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THE
FEDERAL REPORTER.

VOLUME 98.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

PRINCE v. ILLINOIS CENT. R. CO. et al.

(Circuit Court, D. Kentucky. November 21, 1899.)

1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

There can be no joint liability of a railroad company and its employes for an injury alleged to have resulted from the failure of the company and of such employes to perform a duty imposed on the company alone by statute; and in an action to recover for such injury, commenced in a state court against both the company and such employes, the controversy is separable as to the defendants, and the cause may be removed by the railroad company, where it is a citizen of another state, and the other requisites for removal exist.¹

2. SAME—JOINDER OF DEFENDANTS TO PREVENT REMOVAL.

In an action brought in a state court by a citizen of the state against a nonresident railroad company to recover for a personal injury, the joinder as defendants of certain employes of the company, who are citizens of the state, and against whom the facts alleged clearly constitute no cause of action, must be regarded by a federal court to which the cause would otherwise be removable as an attempted fraud upon its jurisdiction, which will not be permitted to defeat such right of removal.

On Motion to Remand to State Court.

Bishop & Hendricks, for plaintiff.

Quigley & Quigley, for defendants.

EVANS, District Judge. The plaintiff, a citizen of Kentucky, was a brakeman or switchman employed by the Illinois Central Railroad Company, and was hurt, while coupling cars for that company, at Paducah, Ky. This action to recover damages therefor was brought in the state court by the plaintiff against the railroad company, W. R. Carroll, and E. P. Smith. The railroad company is a citizen of Illinois. W. R. Carroll and E. P. Smith are citizens of Kentucky. The plaintiff's petition shows his own relation to the railroad company at the time of the injury, which occurred while he was in the discharge of

¹ As to separable controversy as ground of removal, see note to Robbins v. Ellenbogen, 18 C. C. A. 86, and, supplementary thereto, note to Mecke v. Mineral Co., 35 C. C. A. 155.

the duties of his position. While coupling cars, as he alleges, his foot was caught in a frog, and he claims that this was because the frog was open, and not properly blocked or plugged. He claims that this failure to block or plug the frog was the result of the negligence alike of the railroad company and of its two other employés, viz. the defendant Carroll, who was a section boss, and defendant Smith, who was a yard master. He also claims that the individual defendants are jointly liable with the railroad company under these circumstances. The plaintiff bases this claim of joint liability upon the provisions of section 780 of the Kentucky Statutes, which reads as follows: "Before the first day of January, 1894, every company shall adjust, fix or block the frogs on its tracks to prevent the feet of its employés from being caught therein." Section 793 provides that any company failing to comply with, or violating, or permitting any of its employés or agents to violate, the provisions of section 780, shall, in addition to subjecting itself to damages, be guilty of a misdemeanor. The railroad company removed the action to this court, stating in its petition therefor two grounds, viz.: First, that there is a separable controversy, which can be fully determined between it and the plaintiff without the presence of either Carroll or Smith as parties; and, second, that those two defendants were made such in fraud of the jurisdiction of this court, and solely for the purpose of preventing a removal of the action to it. It will be observed that sections 780 and 793 of the Kentucky Statutes refer entirely to the railroad company,—to its duties and liabilities. They seem to be altogether punitive in character, and to create no civil liability which did not already exist. They create no liability whatever, civil or criminal, as against employés. On the motion to remand, made by the plaintiff, the court, pursuant to the practice required by the cases of *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 1003, 33 L. Ed. 473, and *Hukill v. Railroad Co.* (C. C.) 72 Fed. 745, heard evidence upon the second ground of removal stated above. It was shown clearly, distinctly, and without doubt that neither Smith nor Carroll was present at the time of the injury; that both were at their respective offices or headquarters at points quite remote from the place where the injury was inflicted; that neither one of them had any connection with it; that neither of them had any sort of management of the train, the cars of which were being coupled, nor gave any directions respecting it, and that neither of them had any knowledge of the occurrence at the time. The only claim was that they, in different capacities as employés of the railroad company, had had some previous supervision or control over the construction or maintenance of the frogs in the yard where a crew was operating the train, and that in some way they had negligently failed to block or plug up the frogs. Upon this state of facts the court feels bound to conclude that there could be no reason for joining Carroll and Smith, except for the purpose of preventing a removal to this court, and particularly so as the claim to recover from them or either of them is so utterly unfounded in fact as to make that conclusion a demonstration. Nor can the court, in considering the subject, ignore its own knowledge of the surrounding situation, which knowledge is, indeed, matter of public

current history. The court is, therefore, of opinion that the joinder of Carroll and Smith under the circumstances is equivalent to a fraud upon the jurisdiction of this court, which it would be discreditable to wink at or fail to see. The cases of *Warax v. Railway Co.* (C. C.) 72 Fed. 637, and *Hukill v. Railroad Co.* (C. C.) 72 Fed. 745, and the authorities there cited, seem to leave no doubt of the correctness of the conclusion reached upon this ground for removal. They control in this circuit until reversed or overruled, notwithstanding anything conflicting in the opinion of Judge Shiras in *Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co.* (C. C.) 85 Fed. 876. The same cases also seem to make clear the proposition that there was no such privity of contract or of relation or otherwise between the plaintiff and either Carroll or Smith as to make either of them liable in any event to the plaintiff for the injury. They were the employés of the railroad company. They owed no duty to the plaintiff, under the circumstances of this case, whatever may have been their obligations to the railroad company; and while their superior, the common employé of all the parties, may be responsible to the plaintiff, it by no means follows that Carroll or Smith is in any way liable. Evidently it is a case where the master, if any one, must respond for the damage, instead of the servant. But, whatever may be the law as to a several liability, according to the cases cited, there is no joint liability with the railroad company to the plaintiff upon the facts stated in his petition. It therefore follows, under the rulings referred to, that there is a separable controversy between the plaintiff and the railroad company which can be fully determined as between them without the presence of either Carroll or Smith as a party to the cause. This would bring the whole case here to be retained until that separable controversy is fully determined, when, under the ruling in the case of *Torrence v. Shedd*, 144 U. S., at page 533, 12 Sup. Ct. 726, 36 L. Ed. 528, the action should be returned to the state court to be there disposed of as to Carroll and Smith. At present, however, as each of the grounds indicated is sufficient, the motion to remand is overruled.

JOHNSON v. WELLS, FARGO & CO.

(Circuit Court, N. D. California. November 17, 1899.)

No. 12,739.

REMOVAL OF CAUSES—CERTIORARI—RIGHTS CLAIMED UNDER INTERNAL REVENUE LAWS.

Rev. St. § 643, authorizing the removal to a circuit court of the United States, by writ of certiorari, of any civil suit commenced in any state court against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, is intended solely for the protection of the agents of the government in the administration and enforcement of its revenue laws, and its application is limited by its terms to suits against its officers, or those acting by their authority. An express company sued in a state court for refusing to accept goods tendered for transportation, as required by a state statute, cannot remove

such suit into a federal court, by writ of certiorari, under such section, on the ground that its refusal to accept the goods was based on a right claimed by it to require the shipper to furnish or pay for the stamp required to be placed on the receipt by the revenue laws of the United States.

Action at law to recover damages in the sum of \$50 for the alleged neglect of the defendant, as a common carrier, to receive and transport a certain package of merchandise offered and tendered by plaintiff for conveyance and transportation.

McGowan & Squires, for plaintiff.

E. S. Pillsbury, for defendant.

MORROW, Circuit Judge. This is an action to recover damages in the sum of \$50 for the alleged neglect of the defendant, as a common carrier, to receive and transport a certain package of photographs offered and tendered by plaintiff for conveyance and transportation. The case was originally removed to this court under the act of March 3, 1887 (24 Stat. 552), as corrected by the act of August 13, 1888 (25 Stat. 433), and the jurisdiction of this court was invoked by the defendant under section 629 of the Revised Statutes, providing that the circuit courts shall have original jurisdiction of all suits at law or in equity arising under any act providing for revenue. The court held that, although the court might have such original jurisdiction of the case, it could not acquire that jurisdiction under the act of removal, where it did not appear from the plaintiff's statement of his cause of action that it was one arising under the constitution, laws, or statutes of the United States, and that more than \$2,000, exclusive of interest and costs, was involved. The case was accordingly remanded to the state court. *Johnson v. Wells, Fargo & Co.* (C. C.) 91 Fed. 1. The case is now here upon a writ of certiorari, under section 643 of the Revised Statutes. When the writ was granted upon the petition of the defendant, the question of jurisdiction was reserved to be further considered upon a motion to quash the writ. That motion having been made by the plaintiff, and also a motion to remand, the question of jurisdiction is now before the court for determination, and the solution of the question depends upon the construction to be given to section 643 of the Revised Statutes. This section relates to the removal of suits and prosecutions against officers, and persons acting under authority of such officers, on account of acts done under the revenue and registration laws of the United States. It is a long section, providing various details for the removal of such suits. The material part of the section, so far as it relates to this case, may be stated in the following language: When any civil suit is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed, by

a writ of certiorari, from the state court into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant. The office and function of the common-law writ of certiorari issued from the king's bench or out of chancery was to supervise the action of inferior courts and quasi judicial proceedings where an individual was sued in a court having no jurisdiction, and no appeal or writ of error was given by law, or where the jurisdiction had been exceeded, or where it appeared that the prosecution was against the law. The purpose of the writ was in all cases to prevent injustice. *Board v. Magoon*, 109 Ill. 142, 146. It is clear that the writ of certiorari provided for in section 643 of the Revised Statutes is not the common-law writ, but a statutory writ, performing the office and function of an order of removal; and the jurisdiction of the circuit court to issue the writ and entertain the suit after such removal is dependent entirely upon the provisions of the statute as applied to the facts of the case.

It is alleged in the complaint in this case that the defendant was at the times mentioned in the complaint a common carrier of freight, goods, and merchandise, and engaged in the business of carrying freight, goods, and merchandise, as such common carrier, within the state of California, and to and from different parts thereof, and particularly to and from the city and county of San Francisco and the city of Oakland, in said state, and was at all times mentioned offering to carry the class of freight mentioned and described in the complaint; that on or about the 12th day of September, 1898, the plaintiff, being desirous of having the defendant carry a certain package of photographs from said city and county of San Francisco to said city of Oakland, offered and tendered to defendant said package of photographs, to be by said defendant, as such common carrier, conveyed and transported from said city and county of San Francisco to said city of Oakland, for which the charge of said defendant for said package was 25 cents; that the plaintiff offered and tendered to said defendant the said sum of 25 cents as freight on said package; that the defendant refused to accept or receive said package, or to convey or transport the same, or to permit it to be conveyed or transported upon or over any of its lines or conveyances; that by reason of the defendant's refusal to receive, transport, or convey said package of photographs plaintiff was compelled to send the same by other conveyance, was greatly inconvenienced, incurred additional cost and expense, and was damaged in the sum of \$50. The defendant, in its petition for removal, refers to the act of congress of the United States entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, and particularly to the provision that from and after the 1st day of July, 1898, it shall be the duty of every carrier and express company to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment secured for carriage and transportation, whether in

bulk, or in boxes, bales, packages, bundles, or not so inclosed or included; and that there shall be duly attached and canceled, as in said act provided, to each of said bills of lading, manifest, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent; that on the said 12th day of September, 1898, and when the plaintiff tendered said package to the defendant, the defendant, as a condition to the acceptance from the plaintiff of said package by it for transportation, requested the plaintiff to furnish to it, in addition to the regular charge of 25 cents demanded by it and tendered by the plaintiff, a United States revenue stamp of the value of one cent, or one cent for such a stamp, in order that, pursuant to the requirements of said act of congress, such a stamp might be attached (and canceled) to the bill of lading, manifest, or other memorandum, which, under the terms of said act of congress, it was the duty of the defendant to issue to the plaintiff upon the acceptance by it of said package tendered to it for carriage and transportation by the plaintiff; that the plaintiff refused to furnish the stamp, or to pay for the same, and thereupon, and in consequence of such refusal, the defendant declined to accept said package, or to carry or transport the same; that the refusal of the defendant to accept said package or to carry or transport the same was solely by reason and on account of the failure of the plaintiff to furnish said revenue stamp, or to pay for the same, and for no other reason, or otherwise. It is provided in section 2169 of the Civil Code of California: "A common carrier must, if able to do so, accept and carry whatever is offered to him at a reasonable time and place of a kind that he undertakes or is accustomed to carry." Defendant admits that the package was tendered at a reasonable time and place, and that it was of the kind that it was accustomed to carry, but it claims the right and authority, under the war revenue act of June 13, 1898 (30 Stat. 448, 459), to refuse to accept a package for carriage or transportation unless the person tendering the package furnishes a United States internal revenue stamp of the value of one cent, or pays one cent for the value of such a stamp furnished by the defendant, the stamp so furnished to be attached to the bill of lading, manifest, or other evidence of receipt and forwarding required by the law to be issued by the defendant; and because the defendant makes this claim as a defense to this action it contends that the circuit court has jurisdiction of the case. Section 643 of the Revised Statutes provides for the removal of a case from a state to a United States circuit court when suit is commenced in a state court against either of two classes of persons, namely: (1) Against an officer appointed under or acting by authority of any revenue law of the United States on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer under any such law; (2) against any person acting under or by authority of any such officer on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer. The defendant does not claim to have been an officer appointed under

or acting by authority of any revenue law, or a person acting under or by authority of any such officer, but it does claim that it was a person acting under the authority of a revenue law, and that this suit is being prosecuted against it on account of the right and authority claimed by it under such law to require the plaintiff to furnish or pay for a one cent stamp to be attached to the express receipt.

It will be observed that the right of removal here contended for by the defendant does not depend upon the validity of the right or authority of the defendant to require the plaintiff to pay the stamp tax, but merely upon the fact that it makes such a claim. In other words, it claims that there are three classes of persons described in section 643 who are entitled to have suits against them removed from the state to the federal courts. Two classes have been mentioned. The third class comprises persons who are not revenue officers, or persons acting under the authority of revenue officers, but persons who are being prosecuted on account of a right or authority claimed by such person under a revenue law. It is contended that this construction of the statute is supported by the language of section 3 of the act of March 2, 1833 (4 Stat. 633), commonly known as the "Force Act." This section furnished the original text from which section 643 of the Revised Statutes was compiled. It provides:

"That in any case where suit or prosecution shall be commenced in a court of any state against any officer of the United States or other person for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer or other person under any such law of the United States, it shall be lawful," etc.

This section appears to be broad enough to support the jurisdiction contended for by the defendant, but it is no longer in force. Section 3596 of the Revised Statutes provides that:

"All acts of congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed and the section applicable thereto shall be in force in lieu thereof."

Section 643 of the Revised Statutes embraces a portion of the section under consideration, and is, therefore, now the law upon the subject, and resort can only be had to the original act to interpret anything left in doubt by the language of the revisers. *U. S. v. Bowen*, 100 U. S. 508, 513, 25 L. Ed. 631. Is there anything left in doubt in the revised section? It points out distinctly in the first part of the section the two classes of persons who are entitled to have certain suits against them removed from any state court to the United States circuit court, namely: (1) Any officer appointed under or acting by authority of any revenue law of the United States, and (2) any person acting under or by authority of any such officer. The character of the suits is then described, and removal limited to those suits against the officer or person acting under his authority, on account of any act done under color of office or color of law, and on

account of any right, title, or authority claimed by such officer or other person. Clearly, the "other person" last referred to is a person acting under the authority of a revenue officer, since only such a person is mentioned in the first part of the section as being entitled to have suits which may be brought against him removed to the federal court. The fact that the revised section introduces the person acting under authority of a revenue officer, and gives him the right of removal of a suit against him; and omits the "other person" provided in the corresponding part of section 3 of the act of March 2, 1833, appears to be a clear and consistent revision of that section. The purpose of the statute is to protect the revenue officers of the government in the line of their official duties, and those who are employed to act under them in the performance of such duties; but, further than providing this necessary protection to the administration of its revenues, the federal government has no interest in the business affairs of the people incidentally brought within the range of the tariff system. The statute must be interpreted with reference to its manifest spirit and general purpose, and a word or phrase should not be extended beyond its proper relation to give jurisdiction where jurisdiction does not appear to have been intended. Moreover, where the question of jurisdiction is doubtful, the rule now is to resolve that doubt against the jurisdiction of the federal courts. *Kessinger v. Vannatta* (C. C.) 27 Fed. 890; *Fitzgerald v. Railway Co.* (C. C.) 45 Fed. 812, 820; *In re Foley* (C. C.) 76 Fed. 390; *Coal Co. v. Haley*, *Id.* 882.

As it does not clearly appear that this court has jurisdiction of the present case, it follows that jurisdiction should not be entertained. The proper disposition of the case is provided for by section 5 of the act of March 3, 1875 (18 Stat. 472), where it is enacted that if, in any suit removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of the court that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, the court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require. In accordance with this requirement, the suit will be remanded to the justices' court of the city and county of San Francisco.

WILLIS v. TERRY et al.

(Circuit Court, E. D. Pennsylvania. November 21, 1899.)

No. 7.

1. EQUITY PLEADING — DISPOSITION OF EXCEPTIONS TO ANSWER — TIME FOR PLEADING FURTHER.

Where a complainant files exceptions to the report of a master, which sustains one exception to defendant's answer but overrules others, the defendant is not required to answer further until such exceptions have been heard and disposed of by the court, so that he may know what further answer is required by the court's decree.

2. SAME—REFERENCE ON EXCEPTIONS—COSTS.

The costs of a reference to a master of exceptions to an answer may properly be equally divided, where but one of a number of exceptions was sustained, but the answer was plainly insufficient in the matter to which that one related.

John B. Uhle, for complainant.

Henry C. Terry and Dimmer Beeber, for respondents.

DALLAS, Circuit Judge. This is a bill for an account. The defendants filed separate answers. To these answers the complainant filed 13 exceptions, which were referred to a master. He has reported that none of the exceptions is well taken, except the twelfth. The twelfth exception he has sustained, "because the defendants, in denial of the averments that they never had accounted in court or in any way binding upon the plaintiff, set up an amicable settlement of their account as executors with the plaintiff, which would be a defense upon the hearing for a decree for an account, but have not set out the details of and circumstances of that transaction, with all writings relating thereto, with sufficient fullness to enable the court to pass upon its legal effect." Of this part of the master's report no complaint is made, and the defendants admit, as of course they must, that it is their duty, in view of their acquiescence in this ruling of the master, to make further answer in conformity therewith. But the position taken by the complainant, that the defendants should already have filed such further answer, is untenable; for, of course, until hearing had upon the exceptions of the complainant himself to the master's report, there could be no decree thereon, and consequently it could not be known what further answer would be requisite.

It has been strenuously urged by each party that the master erred in reporting that the costs of the reference should be equally divided between them, but I think he was right. My first impression was that, inasmuch as the plaintiff had filed thirteen exceptions and had succeeded in maintaining but one of them, he ought to be required to pay a somewhat greater proportion of these costs; but, on further reflection, I have reached the conclusion that, as the answers were plainly insufficient in one particular, which alone justified objection to them, the respondents may fairly be charged with one-half of the expense of the investigation.

The plaintiff's exceptions to the report, other than those which relate to the question of costs, go to the refusal of the master to sustain any of the exceptions to the answers except the twelfth. I am, however, after full consideration of the arguments of counsel, entirely satisfied with the master's conclusions. The main contention on behalf of the plaintiff seems to be that an error was committed in applying to this case the well-established rule that, until a decree for an account be obtained, no evidence is relevant, nor argument pertinent, which does not tend to establish the defendants' liability to account. But I have not been persuaded of this; and the avowal in the brief of the plaintiff that, upon an answer being filed in conformity with the master's report, the

question of accountability can be litigated at once, without insisting upon the remaining exceptions, involves, I think, the concession that there is no good reason why the case should not now proceed for determination of the question of accountability, without in any manner anticipating the proceedings to ensue if and when accountability shall be decreed. The exceptions to the master's report are dismissed, the report is confirmed, and the decree thereby recommended will be entered as the decree of the court.

WHITEHEAD et al. v. FARMERS' LOAN & TRUST CO.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1899.)

No. 1,075.

1. **TAXATION—SUIT TO ENJOIN ISSUANCE OF TAX DEED—NECESSITY OF TENDER.**

Where a state has provided a system of laws for the levy and collection of taxes, which includes the enforcement of taxes when delinquent by a sale of the property, it is essential to the efficiency of such system that a purchaser at a sale made thereunder should be protected in all the rights given him by the statute as fully as are the officers charged with the enforcement of the laws; hence where property was subject to taxation, was legally assessed, and the taxes thereon were legally levied, and it has been offered for sale and sold by the county for such taxes, the purchaser is not a mere volunteer, and the owner is no more entitled to maintain a suit in equity to enjoin the issuance to him of a deed on the ground of irregularity in the sale, without having tendered the amount of taxes legally due, together with the interest and penalty provided by statute, than he would be to maintain such a suit against the county or its officers to restrain a sale of the property.

2. **SAME—PROPERTY IN POSSESSION OF RECEIVER.**

The fact that real property sold by a county for delinquent taxes is in the possession of the receiver of a court, as a part of the assets of an insolvent corporation, does not afford any ground for enjoining the issuance to the purchaser of a tax deed therefor.

Appeal from the Circuit Court of the United States for the District of Colorado.

The Lakewood & Golden Railroad Company, a corporation of the state of Colorado, being the owner of a line of railroad extending from Denver, through Arapahoe county, to Golden, in the adjoining county of Jefferson, on November 1, 1890, executed a mortgage conveying its entire property to the Farmers' Loan & Trust Company, the appellee, as trustee, to secure the payment of an issue of bonds. In July, 1896, this trustee instituted a suit in the United States circuit court for the district of Colorado to foreclose the mortgage. A receiver was appointed, and took provisional possession of the property. The taxes assessed by the county of Jefferson against the railroad company for the year 1893 were not paid, and on November 26, 1894, the taxes still remaining unpaid and delinquent, the treasurer of the county sold that portion of the railroad track located within the confines of Jefferson county to one M. G. Palmer for \$1,665.59, and issued a certificate of purchase therefor to him, who soon thereafter assigned the same to W. H. Whitehead, one of the appellants. The taxes for the year 1894 not having been paid by the railroad company when due, Whitehead, on August 28, 1895, paid the same, amounting then to \$1,374.37, and an entry showing such payment was made on the certificate of purchase then held by him. In due course of time, Whitehead demanded from the treasurer of Jefferson county a tax deed, based on his alleged right thereto

as holder of the certificate of purchase. Thereupon this suit was instituted by the appellee to enjoin the execution of such a deed. The bill sets out the facts already stated, and further alleges, in substance, that Whitehead is claiming and demanding from the receiver appointed in the main case the sum of \$5,002.47, as the amount due under and by virtue of his ownership of the certificate of purchase and subsequent payment of taxes by him; that the sale by the treasurer of Jefferson county in 1894 was void, because it was an attempt to segregate and sell a part of an entire line of railroad, instead of the whole thereof; that Whitehead was a volunteer in paying the taxes to the county of Jefferson, and well knew the facts above stated; that the execution of the deed, as demanded by Whitehead, would be an interference with the property in the custody of the court through its receiver, and would constitute a cloud upon the title of the railroad property. The prayer of the bill is for an injunction restraining the treasurer of the county from executing and delivering the tax deed to Whitehead, and restraining Whitehead from demanding such deed, as well as for other and general relief. To this bill a demurrer was interposed, for the reason, among others, that the allegations of the bill were insufficient to entitle complainant to any relief. This demurrer was heard by the trial court, and overruled. An interlocutory injunction was awarded restraining the treasurer of the county and Whitehead, as prayed for. From this order an appeal has been duly prosecuted to this court.

Gustave C. Bartels (James H. Blood, on the brief), for appellants.

Charles W. Waterman (Edward O. Wolcott, Joel F. Vaile, Herbert B. Turner, David McClure, and Louis B. Rolston, on the brief), for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The only question presented for our determination is whether the order for an interlocutory injunction was warranted by the averments of the bill. Counsel for appellee, in argument and brief, disclaim any contention that there was any irregularity in the assessment of the property of the railroad company, and admit that the taxes for the year 1893, as well as for the year 1894, were legally assessed, and never paid by the railroad. The bill in no way challenges the regularity of the sale of the railroad property to Palmer, except that there was an attempt to segregate a part of the railroad track from the entire line, as well as from the franchise of the railroad company, and to sell the same substantially as real estate is sold under execution in the state of Colorado. The bill does not aver that the amount demanded by Whitehead as due him by virtue of his ownership of the certificate of purchase and subsequent payment was in excess of the amounts paid by him, with the accumulated statutory interest. There are no averments showing that the appellee, or any one else, prior to the institution of this suit, ever offered to refund to Whitehead the amount due him, or that the appellee was ready to pay the same to Whitehead as a condition to obtaining the relief sued for. The order for the interlocutory injunction appears to have been made without imposing any such condition upon the appellee. The serious contention presented by counsel for the appellee is that the sale of the track of the railroad situated in Jefferson county, segregated from the balance of the line and from the franchise of the com-

pany, was not warranted by law, and this court is asked to declare such a sale void, and, as a result thereof, to affirm the unconditional order awarding an interlocutory injunction in this case. Counsel for appellants take issue with this main contention of the appellee, and further insist that the appellee's bill is without equity, because unattended with any payment or offer to pay the amount of taxes conceded to have been paid by Palmer and the appellant Whitehead for the years 1893 and 1894, with the accumulated interest thereon. In the view we have taken of this case, the last question is the only one which at the present time demands attention.

The appellee, the complainant below, being the trustee in the mortgage referred to, represents the bondholders, who, according to the averments of the bill and exhibits filed therewith, are, to all intents and purposes, the owners of the railroad property. The burden of paying the taxes upon the property, therefore, rests upon them, and the consequences of nonpayment concern them alone. In other words, the appellee, as representative of the bondholders, to all equitable intent and purpose, stands in the shoes of the railroad company. It was therefore the equitable duty of the appellee to attend to the payment of all taxes lawfully assessed against its property as and when due; and, notwithstanding any irregularities in subsequent proceedings looking to the enforcement of the state's lien for such taxes, it remained the duty of the appellee to pay and satisfy all just and lawful taxes, with accrued charges, until such time as the duty should be performed. If this duty be neglected until the state or some of its municipalities are forced to resort to the process of law to enforce its performance, it is not apparent how the equitable obligation is thereby lessened. Accordingly, it is our opinion that the appellee cannot invoke the aid of a court of equity to relieve it from the consequences of some irregularity in proceedings rendered necessary by its default, without first doing equity by paying, or offering to pay, as a condition to the relief sought, the amount which it, or those it represents, justly and fairly owe. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 669; *Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *Chicago, B. & Q. R. Co. v. Board of Com'rs of Norton Co.*, 32 U. S. App. 227, 67 Fed. 413, 14 C. C. A. 458; *Charlton v. Kelly*, 24 Colo. 273, 50 Pac. 1042.

The general doctrine of the foregoing cases we do not understand to be seriously questioned by counsel for appellee. It is practically conceded, as we understand, that, if this was a proceeding against Jefferson county or any of its officers to restrain the collection of the tax, it could not be maintained without a precedent offer to pay the amount of tax justly due; but it is contended that Whitehead, the appellant, stands in a different attitude from that of the officers of the county; that he is a mere volunteer, and purchased the property, not because he had any personal interest to protect, but merely as and for an investment; that the taxes, by reason of the payments by Whitehead, have been fully paid to the county; and that neither the county nor its officers have any longer any interest in the matter, and accordingly that the injunction constitutes no interference with the collection of taxes.

We are unable to appreciate the force of this distinction. The state of Colorado has provided a legislative scheme, not only for assessing taxes, but for securing their prompt payment. As a part of this scheme, purchasers at delinquent tax sales, in the event of redemption by the owner, are allowed to demand, as a condition to the exercise of that right, not only the amount paid by them at the sale, but also the amount of subsequently accruing taxes paid by them, with liberal interest on the money so employed until the right of redemption is exercised, and, in the event of no redemption by the owner, are entitled, after a lapse of time fixed by the statute, to a conveyance by the county treasurer of the lands which were purchased by them at the tax sale. Sections 3900, 3905, Mills' Ann. St. Colo. If the officers of the state, or any municipal subdivision of the state, cannot be interfered with in the performance of their duty by the owner, until he shall do equity by paying the taxes justly due, it is, in our opinion, equally true and important that the purchasers who come to the aid of the state in the performance of its functions should not be interfered with without a like offer to do equity. If the sale to such purchaser is irregular, or if, for any reason other than that the land was not subject to taxation, it is ineffectual to carry title, it is not reasonable that such purchaser should be deprived of equitable protection any more than the officers of the county who take the first step towards collecting the revenue. The efficiency of the whole scheme must be maintained, or it fails to accomplish its purpose. If it were understood that a purchaser at a sale of lands for delinquent taxes is a mere volunteer, and not entitled to the protection of equitable principles in case of the invalidity of the sale because of some mere irregularity attending it, there would probably be few purchasers, and, as a result, the machinery of the state for securing its revenue would be seriously crippled. We see no reason why a rule should be applied to this case different from that applicable to one which might have been brought against the officers of the county in an earlier stage of the process of collecting its revenue. The following authorities sustain this conclusion: *Willson v. Brown*, 82 Ind. 471; *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546, and 15 N. E. 806; *City of Logansport v. Case*, 124 Ind. 254, 24 N. E. 88; *Charlton v. Kelly*, supra.

It is further contended by counsel for appellee that the fact that the property of the railroad company is in the custody of the court, through its receiver, is of itself sufficient to secure an interlocutory injunction; and this, for the reason that the execution of the deed by the county treasurer would constitute an unwarrantable interference with property in custodia legis. Counsel rely in support of this contention upon the cases of *Clark v. McGhee*, 31 C. C. A. 321, 87 Fed. 789, and *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689. In the first of these cases it appears that, after the receiver had taken possession of property, an assessment for taxes unassessed for previous years was made by the state authorities. The validity of this assessment was disputed by the receiver, and the court very properly held that, until its validity could be tried and determined, the hands of the executive officers of the state should be stayed. In the other case it appears that the state officers levied for the satisfaction of

taxes upon 14 cars of the railroad then in actual use for conducting the business by the receiver in charge. The receiver brought his bill for an injunction, alleging the illegality of a part of the assessment, the payment of all taxes admitted to be due, and the injury to the business of the railroad occasioned by the seizure of cars necessary for, and actually used in, carrying on the business of the receiver. The allegations of the bill in that case show a physical invasion of the custody of the receiver,—an actual and forcible seizure of the property in his hands. In addition to this, there was a real controversy with respect to the liability of the property for the payment of the taxes involved. Neither of these facts exists in the case now under consideration. Here there was no seizure of any property, and no interference, or threatened interference, with the receiver's possession or custody, but only an attempt to perfect an incipient title by taking the required statutory steps to that end. If a deed should be executed by the treasurer to Whitehead, and he should attempt to take possession of the property conveyed to him, the court in charge of the receiver will undoubtedly be able to protect his possession, when disturbed or threatened to be disturbed, with due consideration to the rights of all parties interested in the same. In this way the court can assert its lawful right to exclusive custody and control, and the state will not be embarrassed by any unwarranted interference with its own process for collecting its revenue. The interlocutory injunction was, in our opinion, improperly granted, and the order awarding the same is hereby vacated and annulled.

ANIMARIUM CO. v. NEIMAN et al.

(Circuit Court, S. D. Iowa, C. D. December 11, 1899.)

EQUITY PLEADING—MULTIFARIOUSNESS.

The rule as to multifariousness is largely one of convenience, and a bill which joins as defendants certain individuals and a company, alleging that the individual defendants, under the name of the company as a pretended corporation, are engaged in the manufacture and sale of certain articles which infringe different patents owned by complainant, and also that they wrongfully use on such articles an imitation of complainant's trade-mark, is not subject to demurrer for multifariousness, either on the ground of misjoinder of defendants or of causes of action, all the defendants being jointly interested in each cause of action stated, and no reason appearing why such causes cannot be conveniently tried together, and with less expense to the parties than separately.

In Equity. On demurrer to bill.

Thornton & Chancellor and Dudley & Coffin, for complainant.

L. Kinkead and R. G. Dyrenforth, for defendants.

SHIRAS, District Judge. In the bill filed in this case it is averred that John N. Neiman, George W. Johnson, and George C. Hunter are engaged in business at Des Moines, Iowa, under the name and style of the Iowa Electropoise Company, a pretended corporation, but acting without a charter and license; and that these parties are infringing upon the rights secured to the complainant as the

owner of certain letters patent issued to Dr. Hercules Sanche, and by him assigned to the complainant company, and also as the owner of certain trade-marks used in connection with the sale of the patented articles. To this bill a demurrer is interposed on the ground of multifariousness, it being urged in support thereof that the joining of the Electropoise Company with the individual defendants, and charging in the one bill violations of the four separate letters patent, and charging in the one bill the violation of the rights secured by the letters patent and those secured by the trade-marks, are each sufficient grounds to sustain the objection of multifariousness. Counsel for complainant have submitted a very full brief, complemented by an able oral argument, in support of the demurrer, but I do not deem it necessary to discuss the authorities thus submitted. The rule that should govern the court in this case is given in the opinion of the supreme court in *U. S. v. American Bell Tel. Co.*, 128 U. S. 315, 352, 9 Sup. Ct. 90, 32 L. Ed. 450, in which case a bill was filed on behalf of the United States asking the cancellation of two letters patent, one dated March 7, 1876, and the other January 30, 1877, it being charged that the issuance of these several patents was procured by means of fraud, false suggestion, concealment, and wrong practiced on the patent office. In considering the objection of multifariousness urged against the bill, the supreme court ruled that:

"The principle of multifariousness is one very largely of convenience, and is more often applied where two parties are attempted to be brought together by a bill in chancery, who have no common interest in the litigation, whereby one party is compelled to join in the expense and trouble of a suit in which he and his co-defendant have no common interest, or in which one party is joined as complainant with another party, with whom, in like manner, he either has no common interest at all, or no such interest as requires the defendant to litigate it in the same action. *Oliver v. Platt*, 3 How. 333, 11 L. Ed. 622; *Walker v. Powers*, 104 U. S. 245, 26 L. Ed. 729. In the present case there is no such difficulty. The Bell Telephone Company and Mr. Bell himself are the only parties defendant, and their interest in sustaining the patent is the same. So, also, there is no such diversity of the subject-matter embraced in the assault on the two patents that they cannot be conveniently considered together, and, although it may be possible that one patent may be sustained, and the other may not, yet it is competent for the court to make a decree in conformity with such finding. It seems to us in every way appropriate that the question of the validity of the two patents should be considered together."

In the bill of complaint in this case it is averred that the Animarium Company is engaged in the manufacture and sale of apparatus for curing diseases, being the various kinds of apparatus described in the letters patent issued to Dr. Sanche, and by him assigned to complainant; and that in the sale of these articles complainant uses the trade-marks described in the bill. The bill then charges, in effect, that the defendants are engaged in the making and selling of articles which infringe upon the patent rights of complainant, and in doing so they use imitations of the trade-marks belonging to the complainant. Under these circumstances it cannot be held that there is a misjoinder of parties, either plaintiff or defendant. There is but one complainant, and it is averred that all the defendants are jointly engaged in carrying on the alleged in-

fringement; so that, if this averment be true, they are properly joined in the one action.

Can it be said that there is a misjoinder of causes of action? The bill charges that the defendants are united in making and selling articles or apparatus for the curing of diseases which infringe upon the rights secured to complainant by the letters patent described in the bill. While it may be true that the infringement of each patent might have been made the subject of a separate suit, it is not perceived that this would have resulted in any benefit to the parties, and it would unquestionably have largely increased the costs and expenses necessary to a hearing of four cases instead of one only. The patents have a general relation to each other, and, according to the averments of the bill, they all have a relation to the apparatus manufactured by complainant, and which it is claimed the defendants are imitating in the business carried on by them. The same is true of the trade-marks which the bill charges are being imitated and wrongfully used by the defendants in the sale of the articles claimed to infringe upon the patent rights of complainant. If it appears that a person manufactures an article which is an infringement of a patent owned by another, and in order to secure a ready or enlarged sale for the infringing article he places thereon the known trade-mark of the patentee, what good reason exists for holding that the injured party may not in the one suit obtain relief and protection against the infringement of his patent and the misuse of his trade-mark? If, in the progress of the case, it becomes apparent that the two questions cannot be conveniently dealt with in the one suit, the court can require a separation thereof, but there is not such an inherent difficulty in properly disposing of such issues under ordinary circumstances as to require the ruling upon a demurrer that a bill which seeks protection against an infringement of a patent and a misuse of a trade-mark cannot be sustained when it appears that the trade-mark is used as a means to secure the sale of the patented article. The demurrer is overruled, with leave to answer the bill by the January rule day.

ALLEN & LEWIS v. OREGON R. & NAV. CO. et al.

(Circuit Court, D. Oregon. November 20, 1899.)

No. 2,551.

1. CARRIERS—INTERSTATE COMMERCE LAW—UNJUST OR DISCRIMINATIVE RATES.

The proportion in which freight earned by two connecting railroads under a joint tariff schedule is divided between them is a matter for their consideration alone, and cannot be taken cognizance of by a court for the purpose of determining that the share received by one constitutes an unjust or discriminative rate, under the interstate commerce law.

2. SAME.

Complainant's bill alleged that it was a wholesale dealer in merchandise, located at Portland, Or.; that defendants, owners of connecting railroad lines, had established a schedule of joint freight tariffs between Portland and points in Idaho on the second line; that such second road, in connection with a third, had also established a schedule of joint rates on

freight from San Francisco to the same points, under which the charge from San Francisco was the same as from Portland, although the distance was greater; and that, under the divisions made between the respective roads, the second road received a smaller rate, relative to the length of the haul over its line, under the latter than under the former schedule, in which the haul was from the opposite direction. The bill charged that such facts constituted an undue preference in favor of San Francisco and its merchants over Portland and its merchants, in violation of section 3 of the interstate commerce law, and that therefore the rates charged from Portland were unjust and unreasonable, under section 1 of such law. *Held*, that the bill stated no grounds for relief under either section: (1) Because the rates from Portland, not being alleged to be unjust or unreasonable in themselves, could not become so by comparison with other joint rates from an opposite direction, and from a different and competing point on a different line of road; (2) because the shipments under the second schedule being entirely without the district, and the other road, which was a party to such schedule, not being before the court, it had no jurisdiction over that schedule, or power to prevent the discrimination complained of; and (3) for the further reason that it is not the purpose of the third section of the act to prevent competition in rates between different points on different lines of road.

3. SAME.

The fact that a shipper under a joint schedule of rates over two connecting railroads is charged a smaller rate on through shipments over the entire length of the joint line than to intermediate points does not establish a claim that the latter rates are unjust or unreasonable, nor does it entitle him to claim that such rates are discriminative.

This was a suit in equity against two railroad companies, to enjoin the enforcement of a schedule of joint rates established by them, on the ground that such rates were unjust and unreasonable. On demurrer to bill.

L. B. Cox, for complainant.

W. W. Cotton, for defendant Oregon R. & Nav. Co.

Zera Snow, for defendant Oregon Short-Line R. Co.

BELLINGER, District Judge. The complainant is a private corporation engaged in the wholesale grocery business in this city. The defendants are owners, respectively, of two lines of railroad which connect at the town of Huntington, in this state, and thus form a through line for traffic from this city, through the state of Idaho, to Ogden, in the state of Utah; and they have established such a line for a continuous carriage of goods and other property and commodities from Portland to Ogden and intermediate points. The defendant the Oregon Short-Line Railroad and the Southern Pacific Railroad form a connection at Ogden, and these two roads have established a line for a continuous carriage of freight from San Francisco to points on the line of the former road between Ogden and Huntington. The complaint is that the Oregon Railroad & Navigation Company and the Short-Line Company have established a schedule of freight charges on shipments from Portland to Ogden and intermediate points that are the same as those established by arrangement between the latter company and the Southern Pacific Company between San Francisco and the same points, notwithstanding the longer haul over the latter route. The distance from Portland to Caldwell and Shoshone, Idaho, is, respectively, 477 and 623 miles, and

to Ogden 865 miles, while that from San Francisco to Shoshone is 1,025 miles, to Caldwell 1,221 miles, and to Ogden 833 miles. The joint rate established by the Oregon Railroad Company and the Short Line between Portland and these Idaho points is \$2.13 per 100 pounds. The Ogden rate is \$1.72½. The Short-Line Company and the Southern Pacific have established the same rate between San Francisco and these points.

The allegations of the complaint are, in substance, as follows: That on the through haul of Portland freight the Oregon Railroad & Navigation Company receives the amount of its own rate to Huntington, and the Short Line receives the excess; and the Southern Pacific receives the amount of its own rate to Ogden, and the Short Line the excess. That, "in consideration of the premises," the freight charges made by the Oregon Railroad & Navigation Company and the Short-Line Company, "as set forth in their joint freight tariff," are unreasonable and unjust, and in violation of section 1 of the act of congress (24 Stat. 379). That the defendants are charging and receiving more for freight for the shorter haul to intermediate points than to Ogden, the circumstances and conditions being substantially the same. That the Oregon Short-Line Railroad has entered into the joint freight tariff with the Southern Pacific Company, and is charging and receiving lower rates for the carriage of property thereunder than it is charging and receiving for like service in the carriage of property under the joint freight tariff with the Oregon Railroad & Navigation Company, for the purpose of giving, and is thereby giving, San Francisco and its merchants an undue and unreasonable preference over the city of Portland and its merchants, in this: that the said merchants and dealers of San Francisco are given the same freight rates to the various towns and side tracks up to the town of Caldwell, a distance ranging from 1,075 to 1,221 miles (and special commodity rates as far as the town of Weiser), that are required to be paid under the joint freight tariff of the Oregon Railroad & Navigation Company and Short-Line Company; and the Short-Line Company is charging and receiving a much less rate under the "joint freight tariff" with the Southern Pacific Company for its services in the transportation of property than it is charging and receiving under the "joint freight tariff" with the Oregon Railroad & Navigation Company for its services in the transportation of like property a like distance, the circumstances and conditions attending the transportation of such property under both of said tariffs being substantially the same. That this discrimination is made in order to give San Francisco and its merchants an unreasonable preference over the city of Portland and its merchants, "and that said action of said Oregon Short-Line Railroad is having such effect," and that the Oregon Railroad & Navigation Company, by entering into the unjust and unreasonable "joint freight tariff" arrangement with the Short-Line Company, is aiding and abetting in said purpose of an unreasonable preference by the Short-Line Company in its joint tariff agreement with the Southern Pacific Company, "and that, by reason of the matters and things here stated, the defendants conjointly, and the Oregon Short-Line Railroad distinctively, are violating section 3 of said

act of congress." That owing to the unjust and unreasonable rates charged by the defendants from Portland to the several mentioned points in Idaho and Oregon on the merchandise and commodities in which complainant deals, and the undue and unreasonable preference given by the defendants to the city of San Francisco and the merchants and dealers there located in business, and the undue and unreasonable prejudice to which the city of Portland and the merchants and dealers there located in business are subjected in the matter of freight rates, complainant has been unable to compete with the merchants and dealers in like lines of goods and commodities at San Francisco, and has been almost entirely compelled to abandon, and been excluded from, the business which it and its predecessors in business formerly conducted with the merchants, dealers, and other persons living and doing business at the points mentioned in Idaho, and has lost the profit it would have made on such business if said unjust and unreasonable and discriminative rates had not been made,—the same exceeding in amount the sum of \$2,000,—and is prevented from making the profit which it could now make if said freight rates were just and reasonable and fair towards the city of Portland and the complainant, which said profit would exceed the sum of \$2,000. The prayer of the complaint is: That the rates of charges made by the defendants for the transportation of property from Portland, Or., to Shoshone and Ketchum, Idaho, and intermediate points, as set forth and shown in their "joint freight tariff" (Complainant's Exhibit A), be declared unjust and unreasonable, and that the defendants may be enjoined from continuing the same. And that the defendants may be enjoined from charging a greater rate for the carriage of property under any joint or common schedule of charges, or any common control or arrangement whatever, from Portland, Oregon, to Shoshone, Idaho, and intermediate points in Idaho, and likewise the points of Ontario, Arcadia, and Nyssa, in Oregon, than the charges they make for transporting like property from Portland to Ogden, in the state of Utah. And that the defendant Oregon Short-Line Railroad may be enjoined from maintaining or entering into with the Oregon Railroad & Navigation Company any joint or common schedule of charges, or any joint or common agreement or arrangement whatever, for the transportation of property originating at Portland, Oregon, from Huntington, along the line of its road and branch roads, at any greater rate to said Oregon Short-Line Railroad, per ton, or fraction thereof, per mile, than it charges for the carriage of like property, per ton, or fraction thereof, per mile, from Ogden, along the line of its road and branch roads, under a joint or common schedule of charges, or a common control or arrangement, with the Southern Pacific Company; such decree to be applicable to the points in Idaho herein above named, lying along the line of said Oregon Short-Line Railroad from Old's Ferry to Shoshone, and thence up the branch line to Ketchum, including all of said points and intermediate points, and also including Boise, on a branch line, and Ontario, Arcadia, and Nyssa, in Oregon.

Briefly stated, the complaint is that the Short Line and the Southern Pacific have made a joint tariff for freight between San Francisco

and the Idaho points, under which the same rate is charged as that charged by the joint tariff of the Short Line and the Oregon Company from Portland to the same points, and under which the Short Line receives ratably much less for its haul than it receives on Portland freight; that the object of this is to give to San Francisco and its merchants an undue and unreasonable preference over Portland and its merchants, and that the Oregon Railroad & Navigation Company is aiding and abetting this purpose by entering into the joint traffic arrangement in question with the Short-Line Company, and that in this way the former company, conjointly with the latter, and the latter distinctively, are violating section 3 of the interstate commerce act, which makes it unlawful for any common carrier subject to the act to give any undue or unreasonable preference or advantage to any particular person or locality; and that because of these facts the joint tariff of the Oregon Railroad & Navigation Company and the Short-Line Company is unreasonable and unjust, and in violation of section 1 of such act.

The complainant is proceeding upon the theory that the action of the Short-Line Company in entering into a joint tariff arrangement with the Southern Pacific, by which it receives a smaller rate as its proportion of the through haul under that arrangement than it receives for its proportion of the haul under its joint tariff agreement with the Oregon Railroad & Navigation Company, has the effect to make both joint tariffs discriminate against Portland, and therefore unlawful. There is no complaint that the rate of the Oregon Railroad & Navigation Company from Portland to Huntington is excessive or discriminating, and it is alleged that, of the joint rate, this is what that company receives. Nor is there any complaint that the excess above the Oregon Company's rate, charged and received by the Short-Line Company as its share of the joint rate, nor that the joint rate established by the two companies, is unjust or unreasonable, except as these charges are related to the charges made under the joint tariff established by the Southern Pacific and the Oregon Short-Line Companies. The allegation as to the unreasonableness of the joint rate made by the Oregon Railroad & Navigation Company and the Short-Line Company is that, "in consideration of the premises,"—in consideration of the alleged discrimination against Portland merchants in the two joint rates, and of the lower charge for the longer haul to Ogden,—such rate is unjust and unreasonable, and in violation of section 1 of the interstate commerce act. The case is therefore one of alleged unlawful discrimination in the rates described and complained of, and unless there is such discrimination there is no ground for relief. The fact that the Short-Line Company, under its joint tariff arrangement with the Oregon Railroad & Navigation Company, receives ratably more for its haul than it receives under its tariff arrangement with the Southern Pacific Company, is not a matter cognizable by the court. In forming by agreement any joint tariff, the basis of division, and the proportion of moneys each company shall take, is a matter left to their determination. There is no power to compel connecting companies to contract with each other,—much less, to fix the pro-

portion that each company is to receive of any joint or through rate. *Railway Co. v. Osborne*, 3 C. C. A. 347, 52 Fed. 914. The facts are, moreover, that the freight hauled by the Short Line under its joint arrangement with the Southern Pacific is hauled in the opposite direction from that hauled under the joint arrangement with the Oregon Company. It is subjected to a much longer haul before reaching the Short Line than that received from the Oregon Company, and, when the length of haul is considered, the Short Line's charges on its Southern Pacific freight are greater than those on its Oregon Railroad Company's freight; that is to say, in proportion to the through haul the Short Line's share in the charges on freight delivered to it by the former company is greater than the share it receives in the charge under the joint tariff for the carriage of Oregon freight. But the reasonableness of the division between the two companies is immaterial. The joint arrangement between the Southern Pacific and Short-Line Companies formed for the two roads practically a new and independent line from San Francisco to the Idaho points in question. The division between the companies of the freight earned by this line is, as already stated, a matter for their determination. It concerns nobody but themselves, and whether the joint tariff of these roads violates the interstate commerce law is a matter without the jurisdiction of this court. No part of this line is in this district, and, moreover, the Southern Pacific Railroad Company, one of the parties to the tariff complained of, is not a party in the suit.

In the brief filed in its behalf, complainant's grievance is set forth as follows:

"The San Francisco merchant starts out with an advantage over the Portland merchant due to the incidents of geographical situation, but he is further removed from the seat of trade. He is entitled to these advantages, and entitled to any rate he can get from his carriers, so long as it is fair and just, not only to himself, but to his Portland competitor; but he is not entitled to a rate which is unfair and unjust to his Portland competitor. Starting with this advantage, if he is let into the common territory on an equal freight rate he will drive the Portland merchant out of the field."

What is wanted, therefore, is that the court shall decree against an equal freight rate,—against the alleged advantage which the joint rate established by the Southern Pacific and the Short Line gives to the merchants of San Francisco as compared with the rate established by the Oregon Railroad & Navigation Company and the Short Line. How is this to be done? By reducing the latter rate, without reference to the question as to whether it is excessive? What, then, is to prevent the Southern Pacific and Short Line from making a like or even greater reduction, by which the wrong complained of will be continued or aggravated? The case is put upon the ground that independent lines from competing points must make their rates conform upon a mileage basis, and that in this case, the joint tariff line of the Short Line and the Oregon Railroad & Navigation Company being shorter than that of the Short Line and Southern Pacific, its rate must be lower than the joint rate fixed by the latter roads. There is nothing in the act of congress that compels one competing line to charge less or more than its rival. Either

company may fix its rate without reference to those of other companies competing for business from the same or different points of supply. The act is not intended to prevent competition, and competition is what is complained of. The fact that competition results in placing one shipping point at a disadvantage with another does not make a case of discrimination. In the case of Savannah Bureau of Freight & Transportation v. Charleston & S. R. Co., 7 Interst. Commerce Com. R. 458, there was the same rate from Savannah to Valdosta, 158 miles, that was charged by an independent line from Charleston to Valdosta, 413 miles. The commission in that case say:

"If the railroads constituting the line from Charleston to Valdosta see fit to make the same rate from Charleston as is made from Savannah, we have no power to order them not to do so, for it has always been understood that the commission had no authority to fix a minimum rate."

It is obvious that the relation which the rate established by one independent line of railway bears to another is not subject to change or control by the courts or the interstate commerce commission. As said in the case cited, "each line is an independent line, and may fix its own rate wherever it pleases; and we have no power whatever over that rate, when established." If the Southern Pacific and the Short-Line roads see fit to establish a losing rate for a continuous carriage of goods from San Francisco to Idaho points, there is no power to prevent it, or to compel the Oregon Railroad & Navigation Company and the Short Line to make a lower or the same rate from Portland to such points. Competition between rival points and roads cannot and should not be prevented.

The complaint that the lower rate for the longer haul to Ogden is in violation of section 4 of the interstate commerce act concerns only the places discriminated against. It is not unjust to Portland that the more distant point of Ogden has a lower rate than intermediate Idaho points. Portland has the benefit of the low rate to Ogden. Its interests will not be advanced by an increase in that rate. If this low rate discriminates in favor of Ogden, it is against the intermediate points, where the higher rate is collected. The question of discrimination is determined by the relation of the two rates. That rate may be unreasonable in itself, or it may be unjust as related to the rates given to other points. In the latter case the objection is overcome by increasing the lower rates until, making due allowance for length of haul, equality is established between the complaining and the favored points. So that in this case, if the Ogden tariff is increased relatively to the rate given to Caldwell, Shoshone, and other intermediate points, the complaint of discrimination will be satisfied; but how will Portland be affected by this? Possibly to her injury, by being shut out of the Ogden market; at least, not otherwise. The object of the law against discrimination is to maintain equality in rates, all things considered, between points on the same line of railway service, to prevent the building up of one point at the expense of another. But there is no inequality as to Portland in the fact that Ogden has a lower rate than Caldwell

or Shoshone, and there is no cause for complaint on this ground by her merchants.

Inasmuch as the complaint does not state facts sufficient to constitute a cause of suit, the question as to the jurisdiction of the court under the interstate commerce act is not considered. The demurrer is sustained.

GERMANIA IRON CO. v. CRAIG et al.

MIDWAY CO. v. BELDEN.

(Circuit Court, D. Minnesota. Fifth Division. November 21, 1899.)

1 PUBLIC LANDS—VALIDITY OF SCRIP—ATTEMPTED USE FOR PREVIOUS ENTRY.

Where land scrip was used in payment for land entered in a local office, was accepted and forwarded to the department, but through an error the entry was noted on the books of the office and reported as a cash entry, and the scrip was returned to the purchaser, who completed the entry for cash, such facts did not exhaust the scrip, or affect its validity for use in making a subsequent entry.

2. SAME—PURCHASER FROM ENTRYMAN PENDING CONTEST.

Purchasers of land from one who entered it from the government, but whose entry is in contest, who knew, or whose agents through whom the purchase was made knew, of the pendency of the contest, obtain no greater rights, as against the contestant, as bona fide purchasers, than their grantor had.

These were consolidated suits in equity to set aside a patent, and to recover lands alleged to have been patented through an error of law.

Walter Ayers and P. H. Seymour, for complainants.

James K. Redington, Henry J. Grannis, and Davis, Hollister & Hicks, for defendants.

LOCHREN, District Judge (orally). This is an interesting case, and if I had time I should be glad to review the evidence, and the law that has been cited, carefully, before announcing a decision. But, with the work which I have before me, it is clear that I shall not have time to do so, and, if I postpone the matter, it may be long before I can review the evidence, so as to have it as clear in my mind as now. So I think it better for all parties to determine the case at once.

It appears from the evidence that on the 18th day of February, 1889, the land in question was segregated from the public domain, and appropriated to private use, by the location of half-breed scrip upon it, and a contest was then pending before the secretary of the interior upon appeals taken from the local land office to the commissioner of the general land office, and thence to the secretary of the interior, between the person who had located the scrip and an alleged pre-emptor, with respect to this land. That contest was decided by the secretary on that day, by which he held that the location of the scrip was void, also that the pre-emption was fraudulent, and he decided against both parties to the contest. It is shown that, on the next day, Mr. Houghton James attempted to enter the land as a homestead, and his offer to enter was refused by the local land officers, for

the reason, as it was claimed, that the land was not then open for entry on account of this contest. It further appears that afterwards, on the 23d day of the same month, after the decision of the secretary had been certified to the local land office, there was a rush of several parties at the opening of the local land office in the morning, each seeking to enter this land. The decision filed by the secretary on the 21st day of December, 1894, upon the various contests which arose from the efforts that had been made to enter this piece of land, decided, as a matter of fact, that Mr. Hartman's application to enter it was the first on that 23d day of February, 1889; but he held that the prior attempt to enter it by Mr. James, on the 19th of February, was valid, and therefore his decision was against Mr. Hartman, and in favor of Mr. James. The bill of complaint in this case alleges that the secretary was in error in making that decision; that he committed an error in law, and, but for that error, the decision would have been in favor of Mr. Hartman, and he would have been entitled to a patent for the land, and that the subsequent entry of the land by Mr. Craig, under the Porterfield scrip, could not have taken place. It appears from the testimony that, after this decision of the secretary in favor of Mr. James, the latter made an entry upon this 40 acres as a homestead, and that subsequently, on the 23d of September, 1895, by reason of a bargain between himself and Mr. Craig, and for a consideration paid to him by Mr. Craig, he relinquished his homestead right upon the premises, and filed a written relinquishment of that right to the United States, and that upon that filing Mr. Craig immediately entered this land with Porterfield scrip. The title of the defendants arises upon that entry, and through conveyances from Mr. Craig as the owner of the land under this entry.

In order to succeed in this case, it is necessary that the complainants show not only that the secretary committed an error of law in allowing the entry of James, but that Hartman was at that time legally entitled to enter the land, and that he had a good equitable title. It has been decided by the circuit court of appeals in this very case (*Iron Co. v. James*, 32 C. C. A. 348, 89 Fed. 811) that if there was a rule in existence at that time which forbade the register and receiver of the local land office from receiving any applications to enter land while there was a contest in respect to it pending in the general land office, or before the secretary, prior to the time when the decision of the contest was communicated to the local land office, and entered upon its records and plats, then, in that case, the decision of the secretary that this land was open for entry on the 19th day of February, 1889, was error in law. All the evidence in the case, taken together, I think, fully shows that such a rule was in existence at and prior to that time,—a rule known as "Rule No. 53,"—under which, whatever was the effect of the judgment as between the parties to the contest, the land in question was not in condition to be entered as unappropriated land of the public domain until notice of that decision was given to the register and receiver of the local land office.

When the matter was before me on demurrer, it seemed to me

that, being a rule of the secretary, it might perhaps be varied by the secretary himself. At any rate, there were cases submitted from which it appeared that the rule had not always been followed in the land department, particularly the Anderson Case, 7 Land Dec. Dep. Int. 163. But I think the evidence is now satisfactory that there was such a rule in existence, which had not been abrogated, and had been by circulars made known to the local land officers, and was a rule which they were expected to follow. The circuit court of appeals held that, under such circumstances, it was error in law for the secretary himself to disregard a general rule which was in force; and the evidence shows that it was so in force; and therefore it must be held that the secretary's decision that James was entitled to make this entry on the 19th day of February, 1889, was an error in law.

As to the suggestion that the decision of the secretary went to the extent of holding that there was no such rule, I do not think that it does so hold; that is, it does not go to the extent of holding that there never had been such a rule, or that no such rule had been promulgated, or that it had been abrogated. The holding of the secretary, in effect, was that there was no such rule which would bind him, not that there was not such a rule in existence; and the circuit court of appeals, in this case, has adjudged that such holding by the secretary was error in law.

The other question which arises is whether the evidence shows that, if this error had not occurred, Hartman would have been entitled to enter the land. The secretary found, as a matter of fact, that Hartman was the first applicant; but it is objected to his application that the Porterfield scrip which he used in attempting to make that entry was void, as having already been used, and therefore exhausted, in an entry of land made by Mr. Gilman at a prior time. The evidence in relation to that is that Mr. Gilman was desirous of entering land which at the time was not subject to cash entry, but was subject to be entered with Porterfield scrip, and that he made his application and filed this scrip for that purpose; that, by some misapprehension or misconception on the part of the local land officers, the certificate, or receipt, or whatever it was, was given to Mr. Gilman as for a cash entry, and was so entered upon the books of the local land office, and so noted in the returns to Washington, and this Porterfield scrip was sent, instead of cash, to the United States treasury. It seems the treasury officials made inquiry about it, and it was returned to the general land office, as not being cash or anything that the treasury could accept as cash; and as the result of further inquiry, upon being notified of the facts by the local land officers, the scrip was returned to the local land office to be sent back to Gilman as its owner, and the land went to patent, as having been entered for cash. The scrip was returned to Mr. Gilman, and afterwards, upon suit brought by the United States on a deficit in the accounts of the receiver, involving a hundred dollars as the purchase price of this land, Mr. Gilman paid that money over to the receiver, who paid it to the government, and it was accepted, and the matter dismissed out of the suit.

Now, the result of all this is, in my judgment, that although this land was not subject to cash entry, and might have been entered by Porterfield scrip, and although it undoubtedly was the idea and purpose of Mr. Gilman when he attempted to make entry to secure the land by the use of this Porterfield scrip, still, as a result of the whole transaction, the scrip was not accepted by the government for the land, but the cash was accepted, and the scrip returned by the land department to Mr. Gilman as not used. Whether that was regular or irregular does not affect the validity of this scrip. Although it had been offered in purchase of that land, it had not been accepted, but the cash had been accepted instead, and this scrip had been returned to Mr. Gilman as unused and unappropriated. So it seems to me very clear that it was, under these circumstances, unappropriated scrip, and Mr. Gilman or any one else might use it thereafter in the location of land.

No other objection is made to Mr. Hartman's location. He was first in time, and, if no error of law had been committed by the secretary, Mr. Hartman would have been entitled to enter the land with this Porterfield scrip at that time.

The only question that remains is as to the bona fides of Mr. Hillard and Mr. James in the subsequent purchase of this land from Mr. Craig. The doctrine of bona fides is, of course, an equitable doctrine, and cannot be allowed to cause an inequitable effect. If the complainant was in fact entitled to the land, and was without laches, and pursued the only remedy he had, it is difficult to see how anybody could be a bona fide purchaser from Craig, under the circumstances. He would be substantially buying pending litigation. But, however that may be, the evidence in the case does not sustain the claim of bona fides; that is, that the grantees of Craig purchased this land without any knowledge of anything to put them upon inquiry as to the claim of Hartman. There is no question that James had full knowledge of Hartman's claim, as he was a party to this contest when it was before the secretary of the interior. So far as the other parties were concerned, Craig, Hillard, and Belden, the purchases were made, as appears from the evidence, through the agency of either Mr. Draper or Mr. Chandler, both of whom were familiar with this contest from its inception. Even if any of the purchasers from Craig had no personal knowledge of the matter, the knowledge of their agents, through whom these transactions were had, would be sufficient to charge them. It appears, in most instances, that the transactions were had entirely through agents. In many cases the principals knew very little about the details of the transactions, but trusted wholly to Mr. Draper or Mr. Chandler. I do not see why they would not be chargeable with whatever knowledge their agents had in the matter. The result is, without dwelling on the evidence at any greater length, I have come to the conclusion that the plaintiff is entitled to a decree in each case. Ordered accordingly.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

SOUTHERN PAC. R. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 2, 1899.)

Nos. 494, 495.

1. PUBLIC LANDS—GRANTS TO SOUTHERN PACIFIC RAILROAD.

The decisions of the supreme court in the various suits between the United States and the Southern Pacific Railroad Company involving the right of the latter to lands in California within the limits reserved under the grant to the Atlantic & Pacific Railroad Company must be regarded as having settled that the grant to the Atlantic & Pacific Company became effective, as to the lands between the Colorado river and San Buenaventura, on the coast, on the filing and acceptance by the land department in 1872 of the map of its route between such points, by relation as of the date of the grant, July 27, 1866, and that all the lands within both the primary and indemnity limits of such grant were forfeited by the act of July 6, 1886, and restored to the public domain; and hence as having conclusively determined, as between the parties and their privies, that the Southern Pacific Company did not acquire any of such lands under either its main-line or branch-line grants.

2. SAME—RECOVERY OF LANDS ERRONEOUSLY PATENTED—ACT FOR PROTECTION OF BONA FIDE PURCHASERS.

Under Act March 2, 1896, supplementing Act March 3, 1887, directing the bringing of suits for the recovery of lands erroneously certified or patented under railroad grants, by providing that no patent to any lands held by a bona fide purchaser should be annulled, and confirming the title of such purchasers, all purchasers in good faith, and in the belief that they will obtain a good title from a railroad company of lands which have been patented to it, are protected, whether such patents were issued before or after the commencement of suit.

Appeal from the Circuit Court of the United States for the Southern District of California.

This is a suit in equity brought by the United States against the Southern Pacific Railroad Company and the other defendants named in the bill, to quiet the title to certain lands in California embraced within the granted and indemnity limits of the Atlantic & Pacific Railroad Company under the act of congress approved July 27, 1866 (14 Stat. 292). The lands in controversy are situated on both sides of that part of the line of the road as located between the Needles, on the Colorado river, and San Buenaventura, on the Pacific Coast.

The act of July 27, 1866, granted lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast; and, to carry out the purposes of the grant, the act incorporated the Atlantic & Pacific Railroad Company, and authorized that company to lay out, locate, and construct a continuous line of railroad and telegraph from the town of Springfield, in the state of Missouri; thence westerly to the head waters of the Colorado Chiquito; and "thence along the 35th parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific." For the purpose of aiding in the construction of this road and telegraph line to the Pacific Coast, the third section of the act granted to the Atlantic & Pacific Railroad Company every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of said road, whenever it passed through any state, and whenever on the line thereof the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road should be designated by a plat thereof filed in the office of the commissioner of the general land office. It was further provided that

whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections, and not including the reserved numbers. The sixth section of the act provided "that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act." The eighth section of the act provided "that each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic & Pacific Railroad Company upon and subject to the following conditions, namely: that the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred seventy-eight." The eighteenth section of the act provided "that the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad, formed under this act, at such point near the boundary line of the state of California as they shall deem most suitable for a railroad line to San Francisco; and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided; and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad herein provided for." In 1872 the Atlantic & Pacific Railroad Company filed in the office of the commissioner of the general land office certain maps, designating its line of railroad, as located, from a point selected by the company for crossing the Colorado river by the route deemed by the company the most practicable and eligible to the Pacific. The line of road so designated ran from a point on the Colorado river near the thirty-fifth parallel (the Needles) to San Buenaventura, on the Pacific Coast; thence to Santa Barbara, San Miguel Mission, and San Francisco.

The Southern Pacific Railroad Company, referred to in the eighteenth section of the act of July 27, 1866, was incorporated under the laws of the state of California on the 29th day of November, 1865. The charter of the corporation provided for the building of "a railroad from some point on the Bay of San Francisco in the state of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, to the town of San Diego in said state, thence eastward through the said county of San Diego to the eastern line of the state of California, there to connect with a contemplated railroad from said eastern line of the state of California to the Mississippi river." Under this charter the Southern Pacific Company on the 3d day of January, 1867, filed in the interior department at Washington a plat of preliminary survey showing a line of projected railroad from San Francisco to the Colorado river, with the request that the lands indicated be withdrawn from market. Thereafter, on March 19, 1867, the secretary of the interior directed the commissioner of the general land office to issue instructions to the local land offices in California to withhold the odd-numbered sections within the granted limits of 20 miles on each side of the road, as shown on the map, and also withdraw the odd-numbered sections outside of the 20 miles and within 30 miles on each side of the road, from which the indemnity for lands disposed of within the granted limits were to be taken. These instructions were carried out by the commissioner of the general land office under date of March 22, 1867. The right of the Southern Pacific Railroad Company to have this withdrawal made for its benefit was, however, further considered by the secretary of the interior; and on July 14, 1868, he addressed a communication to the commissioner of the general land office in which he revoked the order of withdrawal contained in his letter of

March 19, 1867, having determined that the map filed by the Southern Pacific Railroad Company was upon a route not authorized by the charter of the company, the laws of California, or contemplated by the act of congress. This revocation was afterwards in part suspended, but finally adhered to by the secretary of the interior in a letter addressed to the commissioner of the general land office under date of November 2, 1869. Thereupon the Southern Pacific Company procured the passage of an act of the legislature of California, approved April 4, 1870 (St. Cal. 1869-70, p. 883), authorizing the company to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company should determine to be the most practicable, and to file new and amendatory articles of association. The act further authorized the company to accept such grants as had been, or might thereafter be, made by congress. On June 28, 1870, congress passed a joint resolution (16 Stat. 382) by which the Southern Pacific Company was authorized to construct its road as near as might be on the route indicated by the map filed by said company in the department of the interior on the 3d day of January, 1867. It was further provided that, as each section of the road should be constructed, patents to lands should issue to the extent and amount granted to said company by said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act. Pursuant to this resolution, the order of withdrawal of lands within the granted limits, as made by the secretary of the interior on March 19, 1867 (the revocation of which had been suspended pending action on the part of congress), was renewed and carried into effect by the commissioner of the general land office under date of July 29, 1870. Under the authority of the joint resolution of congress of June 28, 1870, the Southern Pacific Company constructed that part of the railroad from Mojave to the Needles, on the Colorado river, in the year 1885, and at that time filed in the interior department, in sections, its map showing the line of route as so constructed and located by the company; and the land grant to the company was adjusted upon those maps of constructed road. This road from Mojave to the Needles is known as the "Southern Pacific Main-Line Grant." The grant to the Southern Pacific Railroad Company by the joint resolution of June 28, 1870, overlapped the lands withdrawn under the grant to the Atlantic & Pacific made by the act of July 27, 1866, from a point near Mojave to the Colorado river; and those lands are a part of the lands in suit here.

On March 3, 1871, congress passed an act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes" (16 Stat. 573). The twenty-third section of this act provided "that for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company." The Southern Pacific Company filed its map of general route under this act of March 3, 1871, from Mojave via Los Angeles to Yuma, on April 3, 1871, and thereafter as the road was constructed, filed its map of road, so constructed and located, in five sections, during the years from 1874 to 1878, inclusive. This grant to the Southern Pacific Company from Mojave via Los Angeles to Yuma is known as the "Branch-Line Grant," and overlaps the lands withdrawn under the grant to the Atlantic & Pacific; and those lands are a part of the lands in controversy here.

The Atlantic & Pacific Railroad Company failed to complete its road as required by the act of July 27, 1866, and in the year 1886 had failed to construct any railroad on its line west of the Colorado river. Thereupon congress passed the act of July 6, 1886 (24 Stat. 123), forfeiting the lands granted to the Atlantic & Pacific Railroad Company adjacent to and coterminous with

the uncompleted portions of the main line of said road embraced within both the granted and the indemnity limits, as contemplated to be constructed under and by the provisions of said act of July 27, 1866, and acts and joint resolutions subsequent thereto, and relating to the construction of said road and telegraph line; and the lands were declared forfeited and restored to the public domain.

The act of March 3, 1887 (24 Stat. 556), entitled "An act to provide for the adjustment of land grants made by congress, to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," provided for the immediate adjustment of all railroad land grants made by congress; and upon the completion of such adjustment, if it should appear that lands had been, from any cause, erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States to aid in the construction of a railroad, it was made the duty of the secretary of the interior to demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and, if such company should neglect or fail to so reconvey such lands to the United States within 90 days after such demand, it should thereupon be the duty of the attorney general to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certificates, or other evidence of title theretofore issued for such lands, and to restore the title thereof to the United States. The act of congress approved March 2, 1896 (29 Stat. 42), provided for the extension of the time within which suits might be brought to vacate and annul land patents, and provided that no patent to any lands held by a bona fide purchaser should be vacated or annulled, but the right and title of such purchaser was by the act confirmed.

The present action was commenced in the Southern district of California on the 14th day of May, 1894. The bill of complaint alleged, among other things, that the plaintiffs are the absolute owners, by title in fee simple, and are in the possession, of the lands described in an exhibit marked "A," attached to the bill of complaint; that the officers of the interior department have erroneously, and without any authority of law, caused to be issued to the defendant the Southern Pacific Railroad Company patents of the United States, in due form of law, for the tracts of land described in Exhibit A. The prayer of the bill is that the title of the plaintiffs to the lands described in Exhibit A be quieted; that the patents be vacated and decreed to be void, and that the defendants, and each of them, be forever enjoined from asserting or claiming any right or title to said lands adverse to the plaintiffs; and that the defendants be forever enjoined from chopping down or carrying away any wood, trees, or timber upon said lands, and from removing any minerals or other valuable deposits thereon. The bill also includes the unpatented lands within the granted and indemnity limits of the Atlantic & Pacific Railroad Company in California, and alleges that maps of definite location, designating that part of the line, were filed by the company in the general land office in the year 1872; that, as said plats or maps were filed in the interior department, they were each then approved by the secretary of the interior, and upon the filing of such maps or plats the United States withdrew from market and reserved all the odd-numbered sections of land in California within 30 miles of said line of route, and, in pursuance of orders of the secretary of the interior and commissioner of the general land office, the withdrawal and reservation of said lands were then made of record in the general land office and United States district land offices; that the Atlantic & Pacific Railroad Company did not, within the time or manner required by the act of July 27, 1866, or at all, construct or complete any railroad or telegraph line in whole or in part within the state of California, and by the act of congress approved July 6, 1886 (24 Stat. 123), all lands and rights to lands granted to and conferred upon said Atlantic & Pacific Railroad Company, and situated within the state of California, were forfeited and returned to the United States, and said lands were restored to the public domain, including all the odd-numbered sections of land for 30 miles on each side of the line of route of said Atlantic & Pacific Railroad Company between the eastern boundary of California and the Pacific Ocean at San Buenaventura. The bill alleges that the defendant the

Southern Pacific Railroad Company claims that a line of railroad and telegraph from Tehachapi Pass, by way of Los Angeles, to the Colorado river, had been constructed by the defendant within the time and in the manner provided by the act of congress approved March 3, 1871 (16 Stat. 573); that the company accepted said grant, and in the year 1874 designated its line by a plat thereof filed in the office of the commissioner of the general land office, and the defendants claim that the lands described in the act were granted to said company by said act, but it is alleged that none of said lands were granted to the Southern Pacific Railroad Company or to any of the other defendants by said act of congress; that, on the contrary, they were lands reserved and otherwise claimed, and are still owned by the United States. It is further alleged that the defendants, and each of them, claim some interest in said lands under and by virtue of said act of March 3, 1871, and not otherwise. With respect to these lands claimed by the defendants, and for which patents had not been issued, the prayer of the bill is that the court will define and determine the rights of the plaintiffs to the odd-numbered sections of land in California within the 30-mile limits of the line of route of the Atlantic & Pacific Railroad Company, as shown by the maps of said company on file and of record in the general land office, and will decree that the United States are the owners in fee of said lands, as against all rights and claims of the defendants based upon or through said grants made by the United States by said acts of congress approved July 27, 1866, and March 3, 1871, except the lands embraced in pending suits against the defendants. The plaintiffs on May 21, 1894, filed an amendment to their bill, praying that their rights and title to the lands within the granted and indemnity limits of the Atlantic & Pacific Railroad Company be quieted, and the defendants perpetually enjoined from having or claiming any right, title, or interest in or to said lands, from, through, or under the acts of congress approved July 27, 1866 (14 Stat. 292), or March 3, 1871 (16 Stat. 573), or joint resolution of congress approved June 28, 1870 (Id. 382), for which it is alleged patents have been erroneously issued to the Southern Pacific Railroad Company.

The lands described in Exhibit A amount to 29,914.24 acres. The United States attorney on January 7, 1898, dismissed the cause of action as to certain lands described in Exhibit A, amounting to 27,040.40 acres, leaving the action to proceed against 2,873.84 acres described in that exhibit. An examination of the record discloses the fact, however, that with the exception of two tracts, of 160 acres each, these remaining lands described in Exhibit A are not properly involved in this action; that is to say, a number of the tracts described are clearly outside the limits of the Atlantic & Pacific grant, while other tracts are involved in another suit. The remaining lands involved in this action as being within the granted and indemnity limits of the Atlantic & Pacific Railroad Company, and for which no patents have yet been issued, amount to about 3,000,000 acres.

The answer of the defendants denies plaintiffs' ownership and possession of the lands described in Exhibit A; denies that the Atlantic & Pacific Railroad Company filed maps of definite location, designating part of its line in the state of California, in the general land office in the year 1872, or at any time, or at all; denies that, as said plats or maps were so filed in the interior department, they were each then approved by the secretary of the interior; denies that upon the filing of such maps or plats the United States withdrew from market and reserved all or any of the odd-numbered sections of land in California within 30 miles of the line of route, or that, in pursuance of orders of the secretary of the interior and the commissioner of the general land office, the withdrawal or reservation of said lands was made then of record in the general land office and the United States district land offices in California by proper plats, documents, and maps, or in any manner or at all; denies that any lands in suit herein fell within the 30-mile limits of any such line, or were ever withdrawn from market or reserved for, or for the benefit of, said Atlantic & Pacific Railroad Company. The answer further recites the proceedings relating to the location of the route of the Atlantic & Pacific Railroad Company in California, and alleges that the location or designation of the route was upon an unauthorized and impracticable line, and that the maps filed by the company were fraudulent, spurious, and manufactured, and

deceived the officers of the government. The answer also recites the facts relating to defendants' claim to the lands in question, and the execution of certain mortgages to the other defendants in the action, covering such lands, to secure the payment of certain mortgage bonds.

The decree in the court below was in favor of the plaintiffs, adjudging that the United States are the owners, by title in fee-simple absolute, unincumbered, of all the lands described in the decree, and that all patents issued by the United States to the defendant the Southern Pacific Railroad Company to or for any of said lands are null and void; and by the decree such patents are vacated, and the defendants forever enjoined and restrained from having or claiming any right, title, interest, or lien in or to any of said lands, and the title of the United States to said lands is quieted. The lands described are "all the sections and parts of sections of land in the state of California, surveyed and unsurveyed, designated by odd numbers, within thirty miles on each side of the line of route of the Atlantic & Pacific Railroad Company from the Colorado river to the Pacific ocean at or near San Buenaventura, California, and coterminous with said line of route, as designated and established by the maps filed by said Atlantic & Pacific Railroad Company in the general land office and in the department of the interior in the year 1872, copies of which were introduced in evidence in this cause and are now on file herein, to which maps, designating said line of route, reference is hereby made; excepting, however, from the lands so described, and from the operation of this decree, the following specific tracts of land, which are not embraced by this suit." The lands excepted are those mentioned in the bill as being involved in other suits; the lands described in the order of dismissal entered upon the motion of the United States on January 7, 1898; and also certain lands which it was adjudged were, prior to the commencement of the suit, sold by the defendant the Southern Pacific Railroad Company to third persons, who purchased the same in good faith and for value, and as to such lands the court holding that the act of congress approved March 2, 1896 (29 Stat. 42), confirmed the sale of such lands to the purchasers, whether such patents were issued prior to the institution of the suit or subsequent thereto, for lands for which a contract of sale had been entered into in good faith and for value between the railroad company and the purchaser. *U. S. v. Southern Pac. R. Co.* (C. C.) 86 Fed. 962. Both parties have appealed from the decree.

Wm. Singer, Jr. (Wm. F. Herrin, of counsel), for Southern Pac. R. Co. and others.

Joseph H. Call, Special U. S. Atty.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge, after stating the case, delivered the opinion of the court.

The appeal of the Southern Pacific Railroad Company (case No. 494) will first be considered. It will be convenient to designate the parties plaintiffs and defendants, as they were in the court below.

It is contended on the part of the plaintiffs that all the questions involved in the present case with respect to the lands in controversy have been considered in other cases and determined, and, having passed to final judgment, are now *res judicata*. This was the principal question before the supreme court in *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355. It was there contended on behalf of the United States that the lands in dispute in that case were in the same category in every respect with those in controversy in *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, *U. S. v. Colton Marble & Lime Co.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, and *U. S. v. Southern Pac. R.*

Co., Id., and that, so far as the question of title was concerned, the judgment in those cases had conclusively determined, as between the United States and the Southern Pacific Railroad Company and its privies, the essential facts upon which the government rested its claim in the case then before the court. In support of this position it was insisted on the part of the United States that in the former cases the controlling matter in issue was whether certain maps filed by the Atlantic & Pacific Railroad Company in 1872, and which were accepted by the land department as sufficiently designating that company's line of road under the act of congress of July 27, 1866, were valid maps of definite location,—the United States contending in those cases that they were, and the Southern Pacific Company contending that they were not, maps of that character,—and that issue having been determined in favor of the United States, and the lands in dispute in the case then before the court being within the limits of the line of road so designated, it was not open to the Southern Pacific Railroad Company to question the former determination that such maps sufficiently identified the lands granted to the Atlantic & Pacific Railroad Company by the act of 1866, and were therefore valid maps. The defendants, on the other hand, contended in the later case that the decrees in the former cases decided by the supreme court were not conclusive in favor of the United States, either as *res judicata* or as estoppel or as evidence, for the reason that the case then before the court presented new questions of law, arising upon new and different facts. To determine this controversy it became necessary for the supreme court to ascertain what was in issue and what was determined in the former cases. The court accordingly reviewed the previous litigation between the parties, considered the issues presented by the pleadings, the fact that the lands involved in those suits were within the overlapping limits of the two grants, and determined the scope of the former adjudications. The court then proceeds to consider the questions involved in the case under consideration, and, referring to the lands in controversy, classifies them as follows:

"It may be said that the lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic & Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic & Pacific grant; lands within the Southern Pacific indemnity limits and the Atlantic & Pacific granted limits; lands within the common indemnity limits of both grants. Of those in dispute, 219,012.93 acres have not been surveyed by the United States. But all the lands now in dispute are within the limits of the grant to the Atlantic & Pacific Railroad Company, if the maps filed by that company in 1872, and which were approved by the land department, are to be regarded as maps of definite location." 168 U. S. 47, 18 Sup. Ct. 27, 42 L. Ed. 355.

The lands here classified by the court embrace all the different classes of lands within the overlapping limits of the Atlantic & Pacific grant of July 27, 1866, and the Southern Pacific grant of March 3, 1871, but no special consideration appears to have been given to this fact. The controlling fact appears to have been that all the lands in dispute were within the limits of the grant to the

Atlantic & Pacific Railroad Company, and this fact left but one other question to be determined, and that was the validity of the maps of definite location filed by the Atlantic & Pacific Railroad Company. This question is disposed of by the court in the following comprehensive language:

"It was distinctly adjudged in the former cases, as between the government and the Southern Pacific Railroad Company (146 U. S. 570, 596, 13 Sup. Ct. 152, 36 L. Ed. 1091), that the maps filed in 1872 sufficiently identified the lands granted to the Atlantic & Pacific Railroad Company on the contemplated line between the Colorado river and San Buenaventura, on the Pacific Coast, although, for want of authority in that company to construct a railroad to San Francisco, they did not secure to the company any lands north of San Buenaventura; that is, those maps were directly adjudged to be maps adequately fixing or locating the line of the road under the act of 1866. The records of those cases having been introduced in the present suit, there is no room for doubt—if those records are competent evidence—as to what was in issue and what was adjudged in the former cases. The maps which in this case are relied upon by the United States as maps of definite location, and which the Southern Pacific Railroad Company denies to be of that character, are the identical maps which the government relied on in the former cases, and the same which that company referred to and made part of its answer in the former litigation, and which were adjudged by this court, in conformity with the contention of the government, to be valid maps of definite location, the acceptance of which made it impossible for the Southern Pacific Railroad Company to acquire any interest in any lands granted to the Atlantic & Pacific Railroad Company that were forfeited to the United States by the act of 1886."

The court then proceeds to consider the effect of this adjudication upon the matter in issue under the pleadings in the case before the court, and arrives at the conclusion that it must be taken to have been conclusively adjudicated in the former cases, as between the United States and the Southern Pacific Company:

"(1) That the maps filed by the Atlantic & Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866; (2) that, upon the acceptance of those maps by the land department, the rights of that company in the lands so granted attached, by relation, as of the date of the act of 1866; and (3) that in view of the conditions attached to the grant, and of the reservations of power in congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain, without the Southern Pacific Railroad Company having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain. These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; for, as all the lands here in controversy are embraced by the maps of 1872, and therefore appertain to the line located by such maps, it must be, for the reasons stated in the former decision, that the United States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below."

In the present case the pleadings disclose substantially the same issues as were in controversy in the former cases, and they are all supported by practically the same evidence; but the defendants seek to distinguish this case from all the previous cases by the fact that a classification of the lands embraced within the limits of the overlapping grant to the Atlantic & Pacific Railroad Company and the grants to the Southern Pacific Railroad Company will show that the

lands in controversy in this case are not of the particular classes involved in any of the former cases. Upon this fact it is claimed that the rights pertaining to such lands have not been determined. This distinction is based largely upon the fact that the greater portion of the lands involved in this case are claimed by the Southern Pacific Railroad Company under what is called its "Main-Line Grant," for that part of its road from Mojave to the Needles, on the Colorado river, while in the former suits the claim of the Southern Pacific Railroad Company to the lands in dispute was under what is called its "Branch-Line Grant," for that part of its road from Mojave, via Los Angeles, to Yuma, on the Colorado river. The classification of the lands of the overlapping grants under which this claim is made may be stated as follows: (1) Lands within the primary limits of the Atlantic & Pacific grant, and also within the primary limits of the Southern Pacific main-line grant; (2) lands within the primary limits of the Atlantic & Pacific grant, and also within the indemnity limits of the Southern Pacific main-line grant; (3) lands within the indemnity limits of the Atlantic & Pacific grant, and also within the primary limits of the Southern Pacific main-line grant; (4) lands within the indemnity limits of the Atlantic & Pacific grant, and also within the indemnity limits of the Southern Pacific main-line grant; (5) lands within the primary limits of the Atlantic & Pacific grant, and also within the primary limits of the Southern Pacific branch-line grant; (6) lands within the primary limits of the Atlantic & Pacific grant, and also within the indemnity limits of the Southern Pacific branch-line grant; (7) lands within the indemnity limits of the Atlantic & Pacific grant, and also within the primary limits of the Southern Pacific branch-line grant; (8) lands within the indemnity limits of the Atlantic & Pacific grant, and also within the indemnity limits of the Southern Pacific branch-line grant. This method of classification might be further extended by considering the Southern Pacific main-line and branch-line grants as overlapping each other within both primary and indemnity limits, and in such relations conflicting with both the primary and indemnity limits of the Atlantic & Pacific grant.

If now we classify the lands involved in the various cases that have been tried and determined, we have the following result: In *U. S. v. Colton Marble & Lime Co.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104 (No. 88 in the circuit court), the land in controversy was within the indemnity limits of the Atlantic & Pacific grant, and the primary limits of the Southern Pacific branch-line grant. In *U. S. v. Southern Pac. R. Co.*, Id. (Nos. 67, 68, and 69, consolidated as No. 68 in the circuit court), the land was within the indemnity limits of the Atlantic & Pacific grant, and the primary limits of the Southern Pacific branch-line grant. In Id., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091 (No. 178 in the circuit court), the land was within the primary limits of the Atlantic & Pacific grant, and within the primary limits of the Southern Pacific branch-line grant. In Id. (No. 177 in the circuit court), the land was within the primary limits of the Atlantic & Pacific grant, and within the primary limits of the Southern Pacific branch-line grant. In Id., 168 U. S. 1, 18 Sup. Ct.

18, 42 L. Ed. 355 (No. 184 in the circuit court), the lands were within the primary limits of the Atlantic & Pacific grant, and within the primary limits of the Southern Pacific branch-line grant. There were also lands within the primary limits of the Atlantic & Pacific grant and the indemnity limits of the Southern Pacific branch-line grant; and, in addition to these lands, there were lands within the primary limits of the Atlantic & Pacific grant and the indemnity limits of the Southern Pacific main-line grant. It will be observed that the lands involved in these various suits embraced all the four classifications of land in conflict between the Atlantic & Pacific grant and the Southern Pacific branch-line grant, and that in the last case there is a classification of land in conflict between the Atlantic & Pacific grant and the Southern Pacific main-line grant.

The defendants contend that while in the previous cases between these parties lands were in controversy embraced in all the possible classifications of conflict between the grants, except three, nevertheless these three are in the main-line grant of the Southern Pacific, having rights under the statutes which distinguish them from all the other lands heretofore in dispute. The defendants contend further that with respect to the lands in the last case (168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355), found to be in conflict between the Atlantic & Pacific grant and the Southern Pacific main-line grant, this conflict was not observed when the case was tried in the court below, and was not noticed by the supreme court, and that, with respect to lands lying within the indemnity limits of the Southern Pacific branch-line grant, the right of the Southern Pacific to such lands was not considered or discussed in any of the previous cases.

The controversy with respect to the lands in suit in this case may now be stated as follows: The plaintiffs contend that there is no question to be decided by a classification of the lands in dispute; that all the lands involved were granted to the Atlantic & Pacific Railroad Company by the act of July 27, 1866; that the company failed to build a road west of the Colorado river; that by the forfeiture act of July 6, 1886, congress restored the lands within the limits of the grant to the absolute ownership of the United States, without any right or title having attached to any of the lands under either of the grants to the Southern Pacific Company; that in any event these lands were all excepted and reserved from the Southern Pacific's grants, because withdrawn for the benefit of the Atlantic & Pacific Railroad Company prior to the several dates the Southern Pacific definitely located its railroads; and that the plaintiffs' claim in this respect has been determined in the prior cases mentioned, and is *res judicata*. The defendants claim that the lands in conflict within the limits of the Southern Pacific main-line grant were granted the Southern Pacific by section 18 of the act of July 27, 1866 (14 Stat. 292), and the joint resolution of June 28, 1870 (16 Stat. 382); that, in any event, the said act and joint resolution of congress granted the Southern Pacific an equal undivided moiety interest in all conflict lands within the limits of its main-line grant; and that defendants' claim in this respect has not been determined, but is open for adjudication. The defendants admit that, on the prin-

ciple of priority of title with priority of granting act, the Atlantic & Pacific grant defeats the Southern Pacific's right and title to all conflict lands within the primary limits of the Southern Pacific's branch-line grant, and that this question has been so determined in prior litigation. But the defendants claim that the Southern Pacific is entitled to select and receive patents for lands lying within the indemnity limits of either its branch-line or main-line grants, and within the limits of the Atlantic & Pacific grant; such lands having been restored to their original status as public lands, and therefore subject to such selection, by the forfeiture act of July 6, 1886.

It is obvious that the first and most important inquiry is as to the right acquired by the Southern Pacific Company, under the act of July 27, 1866, to the lands west of the Colorado river. The grant was in presenti, and if upon the definite location and construction of the Southern Pacific Railroad in 1885 from Mojave to a point on the Colorado river, where it connected with the Atlantic & Pacific Railroad, the odd-numbered sections of land along that line passed to the Southern Pacific Company, under section 18 of the act of July 27, 1866, as of that date, then the Atlantic & Pacific acquired no interest in that part of the grant, and the act of July 6, 1886, forfeiting the lands granted to that company adjacent to and coterminous with the uncompleted portions of the line of its track, did not affect any lands west of the Colorado river, and gave to the United States no right to assert any claim to such lands under the forfeiture act. This aspect of the case was necessarily involved in any controversy concerning whatever right the Atlantic & Pacific Company may have had in the lands in question. In other words, the claim of the Southern Pacific Company to any lands within the disputed territory of the Atlantic & Pacific grant west of the Colorado river compelled the United States to put in issue the entire title of the latter company to the lands within that territory. In the several cases that have been tried and determined between the parties, the United States have been the plaintiffs, and have had the burden of presenting a clear title in support of the various actions. Hence we find the decisions of the courts upon the issues thus presented dealing with the title of the Atlantic & Pacific Company, and not the title of the Southern Pacific Company. In the case of *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, the supreme court makes this very plain, when, after a review of all the questions involved in previous cases, it holds, as a determination of the controversy, that the maps filed by the Atlantic & Pacific Railroad Company in 1872 were sufficient as maps of definite location to identify the lands granted to that company by the act of July 27, 1866; that upon the acceptance of those maps by the land department the rights of that company in the lands so granted attached by relation as of the date of that act; and that in view of the conditions attached to the grant, and of the reservations of power in congress contained in the act of 1866, such lands became, upon the passage of the act of July 6, 1886, forfeiting the lands granted to the Atlantic & Pacific Railroad Company, the property of the United States, and by force of that act were restored to the public domain, without the Southern Pacific Railroad Company

having acquired any interest therein that affected the ownership of the United States. This declaration of the court as to the character of the title held by the United States as against any claim asserted by the Southern Pacific Company is but a restatement of what was said in *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 598, 13 Sup. Ct. 157, 36 L. Ed. 1091. It was there said:

"Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and therefore that, in the eye of the law, it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific."

It is no answer, therefore, to the claim of title presented by the United States in this case under the Atlantic & Pacific grant and its forfeiture by congress, for the Southern Pacific Company to say that previous adjudications cannot be considered, because it has a better title to the lands involved in this case than it had before in the other cases. The primary question is not what claim of title the Southern Pacific Company has to these lands, but what title the Atlantic & Pacific Company had, to which the United States have succeeded, and upon which they now rest their claim of right. The plaintiffs present this title and the evidence in its support, and say upon this evidence in previous litigation between these parties this title has been declared to be valid, and under it the United States hold all the lands in dispute by title in fee-simple absolute and unincumbered. Is not that sufficient, and the adjudication conclusive upon the questions at issue in the present case? In *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, the court said:

"The maps which in this case are relied upon by the United States as maps of definite location, and which the Southern Pacific Railroad Company denies to be of that character, are the identical maps which the government relied on in the former cases, and the same which that company referred to and made part of its answer in the former litigation, and which were adjudged by this court, in conformity with the contention of the government, to be valid maps of definite location, the acceptance of which made it impossible for the Southern Pacific Railroad Company to acquire any interest in any lands granted to the Atlantic & Pacific Railroad Company that were forfeited to the United States by the act of 1886."

The effect of this adjudication upon the title of the plaintiffs is thus explained by the court:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

Further on the court applies this rule to the claim of the United States for the lands embraced by the maps of 1872. The court says:

"Even if we were prepared, upon a re-examination of the former cases, or upon the showing made by the present record, to hold that the maps of 1872 were not valid maps of definite location, we could not for that reason, in this proceeding, go behind the former adjudication, and deny to the United States the benefit of the rule making that adjudication, so long as it was unmodified, conclusive, as between the parties to it, of all matters actually determined under the issues in the prior suits."

The scope of these decisions of the supreme court cannot be mistaken. They were intended to dispose of all the questions in issue, and make it perfectly clear that all the lands embraced within the primary and indemnity limits of the Atlantic & Pacific grant between the Colorado river and San Buenaventura had been forfeited to the United States, and restored to the public domain, free from any claim whatever on the part of the Southern Pacific Railroad Company; and these decisions have been placed upon grounds that leave no room for the consideration of a claim of title based upon the theory that the Southern Pacific Company had acquired a right to the lands contemporaneously with the Atlantic & Pacific Company under section 18 of the act of July 27, 1866. The Southern Pacific Railroad Company referred to in that section was at that time authorized by its charter to build a railroad from San Francisco, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, to the town of San Diego, and thence eastward, through the county of San Diego, to the eastern line of the state; but that is a very different line of road from the one down the San Joaquin valley, through the Tehachapi Pass, to Mojave, and thence eastward to the Needles, on the Colorado river, the authority for the building of which, under its charter, was not obtained from the legislature of the state until April 4, 1870, and was not authorized by congress until June 28, 1870; and then the resolution of congress granting the authority expressly provided for the saving and reserving of all the rights of actual settlers, together with the other conditions and resolutions provided for in the third section of the act of July 27, 1866. Among the other conditions and restrictions contained in that section was the provision that the lands granted were those to which the United States had full title, and not reserved, sold, granted, or otherwise appropriated. What effect this resolution had upon the original grant to the Atlantic & Pacific Company is not now open for consideration. The question was before the court in the cases that have been determined, together with all the facts relating to the claim of the Southern Pacific Company to the grant of land between Mojave and the Colorado river, and was part of the case against plaintiffs' title under the grant. It follows that the claim now made, that in any event the two companies take the lands within the conflicting lines in equal, undivided moieties, must be considered as having been adjudicated and determined adversely to the claim of the Southern Pacific Company.

Nor is there any room for the consideration of a claim of title based upon any supposed rights arising out of a classification of

lands under the different grants to the Southern Pacific Company. It appears, however, that lands claimed as belonging to the main-line grant to that company were in fact involved in the case of *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; and in a petition to the supreme court for a rehearing of the case that fact was pressed upon the attention of the court as distinguishing that case from the former cases, and calling for a different decree. But the court evidently considered that the fact was sufficiently covered by the decision, and refused a rehearing. That question must therefore be considered as having been determined, and is now *res judicata*. The same disposition must be made of the claim that the right of the Southern Pacific Company to select lands within the indemnity limits is dependent upon the status of the land at the date of selection, and not at the date of the grant, and that, when the forfeiture act restored the lands of the Atlantic & Pacific grant to the public domain, they became subject to selection by the Southern Pacific Company as indemnity for loss of lands within the primary limits. This question was before the court in all the cases that have been determined, and the claim of the Southern Pacific Company to lands within the indemnity limits of the Atlantic & Pacific grant has been considered and denied in all of them; and if, as the supreme court said in *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 598, 13 Sup. Ct. 157, 36 L. Ed. 1091, "in the eye of the law, it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific," it is difficult to see how the Southern Pacific Company has sustained any loss of lands within the primary limits of its main-line grant on account of the grant to the Atlantic & Pacific Company, for which it may claim an indemnity out of the indemnity limits of the latter. If the Southern Pacific Company never had any right or title to lands within the grant to the Atlantic & Pacific Company, then it never had any land in that territory to lose. This was one of the conditions and restrictions contained in section 3 of the act of July 27, 1866, and imposed upon the Southern Pacific Company by the joint resolution of congress of June 28, 1870. It was expressly provided by section 3 that if the route of the Atlantic & Pacific grant be found upon the line of any other railroad route, to aid in the construction of which lands had theretofore been granted by the United States, as far as the routes were upon the same general line, the amount of land theretofore granted should be deducted from the amount granted by that act. The main line of the Southern Pacific having been located upon the same general line as that of the Atlantic & Pacific Company between the Needles and Mojave, it follows that the Southern Pacific Company has lost nothing upon that route. The law does not contemplate an indemnity for a loss which has never been sustained, and we think that the supreme court has so determined, and the controversy has been closed. In *U. S. v. Colton Marble & Lime Co.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104, the supreme court had before it the claim of the Southern Pacific Company's branch line for lands within the indemnity limits of the Atlantic & Pacific grant. In disposing of this claim the court held that the

proviso in the act of March 3, 1871 (16 Stat. 573), granting lands in aid of the construction of the Southern Pacific Railroad, that the grant should "in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company," operated to exempt the indemnity lands of the Atlantic & Pacific Company from the grant to the Southern Pacific Company. This is clearly a final adjudication upon the claim of indemnity for the Southern Pacific branch line, as that was the specific claim involved in the case, and leaves no question to be determined in the present case with respect to any claim of the Southern Pacific Company to lands within the indemnity limits of the Atlantic & Pacific grant. The rights of the defendants other than the Southern Pacific Company, as mortgagees to secure the payment of certain mortgage bonds, have also been considered in the previous cases, and determined adversely to their claim.

The appeal of the United States in case No. 495 raises the question as to the correctness of that part of the decree adjudging that certain lands therein described were, prior to the commencement of the suit, sold by the defendant the Southern Pacific Railroad Company to third persons, who purchased the same in good faith for value, and as to which lands it is adjudged that the United States take nothing by the decree. The court below held that by the act of congress of March 2, 1896 (29 Stat. 42), supplementing the act of March 3, 1887 (24 Stat. 556), such of the lands described in the bill as had been patented by the authority of the United States to, and were sold by, the defendant railroad company, for value and in good faith, were thereby confirmed to such persons, whether such patents were issued prior to the commencement of the suit or subsequent thereto. *U. S. v. Southern Pac. R. Co.* (C. C.) 86 Fed. 962. The act of March 3, 1887, provided for the adjustment of land grants made by congress to aid in the construction of railroads, and for the forfeiture of unearned lands. It required the secretary of the interior to immediately adjust, in accordance with the decisions of the supreme court, each of the railroad land grants made by congress to aid in the construction of railroads, theretofore unadjusted, and if it should appear upon the completion of such adjustments, respectively, or sooner, that the lands had been, from any cause, theretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it was made the duty of the secretary of the interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and, if such company should neglect or fail to so reconvey such lands to the United States within 90 days after making the demand, then the attorney general was required to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certificates, or other evidence of title theretofore issued for such lands, and to restore the title thereof to the United States. The act also provided that as to such of the lands so erroneously cer-

tified or patented which had theretofore been sold by the grantee company to citizens of the United States, or to persons who had declared their intention to become such citizens, the person or persons so purchasing in good faith, and the heirs or assigns of such person or persons, should be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office within such time and under such rules as should be prescribed by the secretary of the interior after the respective grants should have been adjusted, and that patents of the United States should issue therefor, and should relate back to the date of the original certificate or patenting, and directing the secretary of the interior, on behalf of the United States, to demand payment from the company which had so disposed of such lands of an amount equal to the government price for similar lands; and, in case of neglect or refusal of such company to make payment as specified in the act within 90 days after the demand, the attorney general was directed to cause suit or suits to be brought against such company for such amount, provided that nothing in the act should prevent any purchaser of lands erroneously withdrawn, certified, or patented, from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by the act required. The act of March 3, 1891 (26 Stat. 1093), provided that suits by the United States to vacate and annul any patent therefor issued should only be brought within five years from the passage of that act, and suits to vacate and annul patents thereafter issued should only be brought within six years after the date of the issuance of such patents. The act of March 2, 1896 (29 Stat. 42), extended the time for bringing such suits, and provided in section 1 that suits by the United States to vacate and annul any patent to lands therefor erroneously issued under a railroad or wagonroad grant should only be brought within five years from the passage of that act, and suits to vacate and annul patents thereafter issued should only be brought within six years after the date of the issuance of such patents. And it was further provided:

"But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

The question as to who are bona fide purchasers under this act was considered by the supreme court in *U. S. v. Winona & St. P. R. Co.*, 165 U. S. 463, 477, 17 Sup. Ct. 371, 41 L. Ed. 789, and clearly described. The court said:

"Given a bona fide purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the government to disturb it."

The court then proceeded to consider the question whether the holders of title in that case were bona fide purchasers, and said:

"It is earnestly contended by the government that the present holders of the title are not 'bona fide purchasers'; that that term has a fixed and well-defined meaning, as announced in the frequent decisions of this and other courts; that as said in 2 Pom. Eq. Jur. par. 745, 'The essential elements which constitute a bona fide purchaser are, therefore, three: A valuable consideration, the absence of notice, and presence of good faith' (*U. S. v. California*

& O. Land Co., 148 U. S. 31, 42, 13 Sup. Ct. 458, 37 L. Ed. 354); that while two of these essential elements may be found, to wit, a valuable consideration and the presence of good faith, the third, the absence of notice, is lacking; that all men are conclusively presumed to know the law, and that, as the true rule of construction in reference to these grants was laid down by this court, the purchasers were bound to know such true rule; that the records of the land office disclosed the existence of these homestead entries and pre-emption filings, and therefore they who purchased from the railroad company knew, or at least were chargeable with knowledge of, the fact that those lands could not rightfully have been certified to the railroad company, but were excepted from the terms of grant, and in fact remained the property of the government. It is further insisted that as congress, in this statute, used this well-understood expression, it intended only the protection of such parties as came within the scope of this settled meaning. It is said that the only cases to be covered by this provision were those in which the state or the railroad company, by presentation to the land office before the filing of the map of definite location of a forged relinquishment by the pre-emptor, or one having made a homestead entry, or by some other fraudulent representation, secured a certification or patent to the tracts, and thereafter sold and conveyed to one who purchased in ignorance of the fraud. We are unable to agree with this contention of counsel, for several reasons: In the first place, the situation, as it was known to exist, makes against any such narrow construction. While instances of such fraudulent conduct on the part of the state to which the lands were certified, or the company to which the lands were patented, might exist, yet, in the nature of things, they would be few, and hardly worth the special notice of congress, while, on the other hand, the fact that there had been a difference between the land department and the courts, one construction obtaining in the former prior to the decisions by the latter, and the further fact that by this difference of construction many tracts had been erroneously certified or patented, must have been well known to congress, and naturally, therefore, a subject for its legislation; further, there was no need of any legislation to protect a 'bona fide purchaser.' This had been settled by repeated decisions of this court. *U. S. v. Burlington & M. R. R. Co.*, 98 U. S. 334, 342, 25 L. Ed. 198; *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 313, 8 Sup. Ct. 131, 31 L. Ed. 182, reaffirmed in *U. S. v. California & O. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354. For in each of those cases it was decided that although a patent was fraudulently and wrongfully obtained from the government, if the land conveyed was within the jurisdiction of the land department, the title of a bona fide purchaser from the patentee could not be disturbed by the government, so that this provision was absolutely unnecessary if that which is now claimed by counsel for the government is all that was intended by congress. We do not mean to assert that, because legislation to cover such a contingency was unnecessary, therefore the language used by congress necessarily implies something other and different, because, of course, it may have been that congress intended nothing but a simple declaration of the law as it was known to exist. At the same time, the fact that under one construction it was needless raises a presumption that something more was intended, and that congress had in view the protection of other parties than were already protected by general law. But we need not rest on these inferences and presumptions. Other provisions of the acts of 1887 and 1896 make clear the intent of congress. Section 3 of the act of 1887 provides that, if the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant, it may be reinstated, provided he has not located another claim or made an entry in lieu of the one so canceled, and also did not voluntarily abandon such entry. By this section congress provided for a reinstating of the title of one deprived thereof by an erroneous ruling of the land department, but at the same time limited the right of reinstating to cases in which the original entryman had not voluntarily abandoned his entry, or had not since that time made a new entry. In other words, it was limiting the restoration of the title of the original entryman to cases in which he had a continuing and present equitable right to recognition. As to all other cases, congress reserved the determination of the equities between the government, the

railroad company, and purchasers from the latter, and in subsequent sections it made provision for the adjustment of such equities. Section 4 of the same act, expressly referring to all other lands erroneously certified or patented to any railroad company, provides that citizens who had purchased such lands in good faith should be entitled to the lands so purchased, and to patents therefor issuing directly from the United States, and that the only remedy of the government should be an action against the railroad company for the government price of similar land. It will be observed that this protection is not granted to simply bona fide purchasers (using that term in the technical sense), but to those who have one of the elements declared to be essential to a bona fide purchaser, to wit, good faith. It matters not what constructive notice may be chargeable to such a purchaser, if in actual ignorance of any defect in the railroad company's title, and in reliance of the action of the government in the apparent transfer of title by certification or patent, he has made an honest purchase of the land. The plain intent of this section is to secure him the lands, and to reinforce his defective title by a direct patent from the United States, and to leave to the government a simple claim for money against the railroad company. It will be observed that the technical term 'bona fide purchaser' is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale, so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to every one, who in good faith has made an absolute purchase from a railroad company, protection to his title, irrespective of any errors or mistakes in the certification or patent. Section 5 of the same act applies to cases in which no certification or patent has issued, and yet the lands sold by the railroad company are the numbered sections prescribed in its grant, and coterminous with the constructed portions of its road; and it is there provided that, where the lands so sold by the company 'are for any reason excepted from the operation of the grant to said company,' the purchaser may obtain title directly from the government by paying to it the ordinary government price of such lands. It is true the term used here is 'bona fide purchaser,' but it is a bona fide purchaser from the company; and the description given of the lands, as not conveyed, and 'for any reason excepted from the operation of the grant,' indicates that the fact of notice of defect of title was not to be considered fatal to the right. Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent. These being the provisions of the act of 1887, the act of 1896 confirming the right and title of a bona fide purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a 'bona fide purchaser,' has nevertheless purchased in good faith from the railroad company."

Under this decision there is no question but that the purchasers from the railroad company in this case were bona fide purchasers, and are fully protected by the statute.

We are further of the opinion that the bill of complaint did not call for the cancellation of the patents for the lands described. The bill alleged that the officers of the interior department had erroneously, and without any authority of law, caused to be issued to the defendant Southern Pacific Railroad Company patents of the United States, in due form of law, for the tracts of land described in plaintiffs' Exhibit A, attached to the complaint. The prayer of the bill was that plaintiffs' title to the lands described in Exhibit A should be quieted, and that the pretended patents for said lands be vacated and decreed to be void, etc. The lands excepted from the decree as having been sold by the Southern Pacific Company to bona fide purchasers who purchased the same in good faith, and for value are not described in Exhibit A, and were not, therefore, properly involved in the suit for the cancellation of patents. The decree of the circuit court is affirmed.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 9, 1899.)

No. 484.

PUBLIC LANDS — LANDS SOLD BY RAILROADS — ACTS FOR PROTECTION OF PURCHASERS.

The provisions of Act March 3, 1887, and of the supplementary act of March 2, 1896, in behalf of purchasers of lands erroneously certified or patented to a railroad company, were designed to protect all persons who purchased from the railroad company in good faith, and in the belief that they would obtain title; and the fact that such person was chargeable with constructive notice of the invalidity of the company's title does not affect his character as a "purchaser in good faith," under the former act, or as a "bona fide purchaser," under the latter.

Appeal from the Circuit Court of the United States for the Southern District of California.

Joseph H. Call, Special U. S. Atty.

Wm. Singer, Jr. (Wm. F. Herrin, of counsel), for appellees.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge. This suit was brought by the United States against the Southern Pacific Railroad Company, D. O. Mills, and Gerritt L. Lansing, trustees in a mortgage executed by the company, and the City Brick Company, in the circuit court for the Southern district of California, on May 17, 1890, to quiet the title of the United States to certain tracts of land, aggregating about 700,000 acres, within the limits of the forfeited grant to the Atlantic & Pacific Railroad Company. By an amended bill filed September 25, 1891, certain other defendants were made parties to the action. These latter defendants, in their answer to the amended bill, set up the title of the Southern Pacific Railroad Company to the lands claimed by them, and alleged that they were bona fide purchasers of said lands, for value, from the Southern Pacific Railroad Company and its grantees, and as such bona fide purchasers they were entitled to have the bill dismissed as to them. There was evidence introduced in support of this defense upon the trial of the case, establishing the fact that the Southern Pacific Railroad Company had sold, under contracts and deeds to the defendants brought in by the amended bill, about 127,000 acres of the land in suit; and the decree of the circuit court, after adjudging that the United States was the owner, by title in fee-simple absolute, of the lands described in the bill of complaint, provided that the decree should not "in any wise affect any right which the defendants, or any of them, other than the said Southern Pacific Railroad Company, now have or may hereafter acquire in, to, or respecting any of the lands hereinbefore described, in virtue of the act of congress entitled 'An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads, and for the forfeiture of the unearned lands, and for other purposes,' approved March 3, 1887." From this decree the

Southern Pacific Railroad Company and the other defendants appealed to this court, where the decree of the circuit court was affirmed (16 C. C. A. 114, 69 Fed. 47); and thereupon the defendants appealed to the supreme court of the United States, where the decree was also affirmed (168 U. S. 1, 66, 18 Sup. Ct. 18, 42 L. Ed. 355). The mandate of the supreme court was as follows:

"The decree is affirmed in all respects as to the Southern Pacific Railroad Company, as well as to the trustees in the mortgage executed by that company, and also as to the other defendants, subject, however, to the right of the United States to proceed in the circuit court to a final decree as to these defendants."

Upon filing this mandate in the circuit court, the United States dismissed further proceedings as to certain defendants, other than the Southern Pacific Railroad Company and the trustees in the mortgage executed by the company, respecting certain tracts of land, and at the same time moved for a further decree against certain other defendants respecting certain tracts of land claimed by them. The circuit court thereupon rendered a further and final decree as to the rights and interests of such other defendants. With respect to certain defendants claiming lands for which no patents had been issued by the United States, it was adjudged in the decree that they were citizens of the United States, and bona fide purchasers of the land claimed by them from and under the Southern Pacific Railroad Company, within the meaning of section 5 of the act of congress approved March 3, 1887, entitled "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes;" that for these lands the defendants were entitled to make payments to the United States, and secure patents from the United States therefor, upon complying with the provisions of the act of March 3, 1887, in that behalf. With respect to certain defendants claiming lands for which patents had been issued by the United States to the Southern Pacific Railroad Company, it was adjudged in the decree that they were bona fide purchasers from and under the Southern Pacific Railroad Company, within the meaning of section 4 of said act of congress approved March 3, 1887, and within the meaning of the act of congress approved March 2, 1896, entitled "An act to provide for the extension of time within which suits may be brought to vacate and annul land patents, and for other purposes;" that said lands having been erroneously patented by the United States to said Southern Pacific Railroad Company, and said defendants having purchased said lands from the railroad company in good faith, the title of the defendants, and of their heirs, grantees, and assigns, to said lands, was by the decree confirmed. From this decree the United States has appealed to this court, upon the grounds that the circuit court erred in adjudging that the defendants named in the decree were bona fide purchasers of the lands, within the meaning of the acts of congress of March 3, 1887, and March 2, 1896. The decree contains 33 sections, the first 12 of which adjudicate upon the titles of those defendants who claim certain specified tracts of land as bona fide purchasers from the Southern Pacific Railroad Com-

pany, and for which no patent has been issued by the United States. These lands amount to 43,315.67 acres. The remaining 21 sections of the decree adjudicate upon the titles of those defendants who claim certain specified tracts of land as bona fide purchasers from the Southern Pacific Railroad Company, and for which patents have been issued by the United States to the railroad company. These lands amount to 9,284.39 acres, making a total of 52,600.06 acres, the titles to which are involved in this further and final decree. The opinion of the supreme court in this case indicates the precise questions that were to be determined by the circuit court, and the scope and character of its decree. It said:

"One of the objects of this suit was to obtain a decree quieting the title of the United States, not only to the lands claimed by the Southern Pacific Railroad Company, but to those claimed by numerous individual defendants by purchase from or contract with that company. The decree which was passed declares that it is not to 'affect any right which the defendants, or any of them, other than the Southern Pacific Railroad Company, now have or may hereafter acquire in, to, or respecting any of the lands hereinbefore described, in virtue of the act of congress entitled "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887.' Instead of leaving undetermined the matters in dispute between the United States and the defendants other than the Southern Pacific Railroad Company, the circuit court should have determined, by its final decree, what rights those defendants have, by virtue of the above act of March 3, 1887 (24 Stat. 556, c. 376), in the lands, or any of them, now in dispute, and claimed by the United States. The effect of the decree is to leave undetermined the question whether the defendants who claim under the Southern Pacific Railroad Company are protected by that or any other act of congress. The government was entitled to a decree quieting its title to all the lands described in its pleadings, except those, if any, that are protected, in the hands of claimants, by acts of congress. *U. S. v. Winona & St. P. R. Co.*, 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789; *Winona & St. P. R. Co. v. U. S.*, 165 U. S. 483, 17 Sup. Ct. 381, 41 L. Ed. 789. But, as the government has not appealed, the decree cannot be reversed for the error of the circuit court in not finally disposing of the issues between the United States and the individual defendants who claim under the Southern Pacific Railroad Company." *Southern Pac. R. Co. v. U. S.*, 168 U. S. 65, 66, 18 Sup. Ct. 18, 42 L. Ed. 353.

In the case of *U. S. v. Southern Pac. R. Co.* (No. 495; decided at the present term of this court) 98 Fed. 27, one of the questions considered and determined was as to the right of certain purchasers from the Southern Pacific Railroad Company to have a decree confirming their title under the act of March 2, 1896, where patents to the lands had been issued to the railroad company. It was there held, upon the authority of *U. S. v. Winona & St. P. R. Co.*, 165 U. S. 463, 477, 17 Sup. Ct. 368, 41 L. Ed. 789, that the purchasers were bona fide purchasers, and were fully protected by the statute. This decision of the supreme court is also applicable to the facts in the present case. Within the meaning of the statute as thus construed, the defendants referred to in the last 21 sections of the present decree were bona fide purchasers from the railroad company; that is to say, they purchased the land from the company in good faith, believing that they would thereby acquire title to the land. Possessed of this qualification, they were entitled to have their titles confirmed by the decree.

With respect to purchasers of land from the railroad company where no patents have been issued by the United States, the supreme court, in the Winona Case, indicates that the same broad construction is to be given to the statute to protect honest transactions between the purchasers and the railroad company. The policy pursued by all the land-grant railroad companies contemplated the settlement of the country by immigrants as the roads were being constructed; and, to carry out this policy, it was necessary for the railroad companies in many instances to furnish settlers seeking to purchase lands supposed to be railroad lands with some evidence of a right to title in a contract of sale, in advance of the transfer of the title by the United States to the railroad companies by patent. This policy, and its practical operation, has been known to the public, and has been frequently commented upon by the courts and the officers of the land department of the government, in determining the rights of settlers within the limits of the railroad grants. When, therefore, congress passed the act of March 3, 1887, providing for the adjustment of land grants made by congress to aid in the construction of railroads, it had this condition of affairs in view, and dealt with it upon the broad principle that the good faith of the parties in making such contracts should be controlling considerations in determining all questions in controversy. In this view of the act, and applying its provisions to the present case, it is clear that the purchasers mentioned in the first 12 sections of the decree were bona fide purchasers from the railroad company, and as such were entitled to make payments to the United States for the land in dispute, and secure a patent therefor as provided by law. The decree of the circuit court is affirmed.

PETERSON et al. v. MORRIS et al.

(Circuit Court, N. D. Illinois, N. D. November 25, 1899.)

No. 25,001.

1. APPEARANCE—FILING PETITION FOR REMOVAL.

The filing of a petition for removal in a state court, although defendant's appearance is not expressly limited to such purpose, does not constitute a general appearance which precludes the defendant from raising the question of the sufficiency of the service in the federal court; and, where a plea in abatement on that ground had been filed in the state court in accordance with the state practice, it may be permitted to stand as a motion to quash in the federal court.

2. SAME—MOTION TO REQUIRE BOND FOR COSTS.

The filing by the defendant in a federal court, after the removal of a cause, of a motion to require the plaintiff to give security for costs, is not such a general appearance as precludes the defendant from relying on a motion to quash the service.

On motion of defendants for an order that a plea in abatement filed in the state court before removal of the cause stand as a motion to quash the service.

F. T. Murphy, for plaintiffs.

M. Breeden, Jr., for defendants.

KOHLSAAT, District Judge. Under authority of *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431, the filing of a petition in the state court for removal to the federal court, without specially limiting the appearance for such purpose, does not amount to a general appearance. Page 279, 164 U. S., page 128, 17 Sup. Ct., and page 434, 41 L. Ed. The effect is the same with or without limiting by words the nature of the appearance. The motion of defendants for an order that the plea in abatement stand as a motion to quash is granted. *Benton v. McIntosh* (C. C.) 96 Fed. 132, decided by this court on May 27, 1899.

The question then remains as to whether or not the motion made by defendants that plaintiffs file a bond for costs in this court is such a general appearance as will preclude defendants from relying upon improper service of process. Such a motion does not affect the merits of the controversy. It is simply a means for protecting defendants in the recovery of their costs already incurred, and which have not extended beyond those incidental to removal. It would have been better practice to limit the appearance in such a motion, but I hold that, from the nature of the motion, it is not such a one as precludes defendants from relying upon their motion, which was taken by plea in abatement in the state court, and has been ordered, as above, to stand as a motion to quash the service in this court. The motion to quash may be heard upon sustaining affidavits filed within 10 days, and affidavits in opposition to such motion to be filed within 10 days thereafter.

HUNT v. KILE.

(Circuit Court of Appeals, Seventh Circuit. December 1, 1899.)

No. 553.

1. APPEAL—PREPARATION OF RECORD.

The rules of the court prescribing the proper method for preparing the record on appeal, and its prior decisions with reference to the practice in that regard, must be observed by appellants.

2. EVIDENCE—OPINIONS OF EXPERTS—WHEN INADMISSIBLE.

Where plaintiff's intestate, while in the employ of defendant, was killed solely by reason of the breaking of a rope provided by defendant, and used in the work about which he was engaged, the only questions for determination, with reference to defendant's negligence, in an action to recover for the death, are whether the rope was the ordinary and usual instrumentality in use for the purpose to which it was applied, and, if so, whether the defendant exercised reasonable care in its selection, and provided a rope of sufficient strength to sustain the strain to which it would probably be subjected; and such questions are not ones to be determined by the opinions of experts, based on a hypothetical statement of facts as to whether the apparatus used "was an ordinarily safe and proper apparatus for the work for which it was used," but questions to be determined by the jury from the facts in evidence, and the admission of such expert opinions is an invasion of the province of the jury, and erroneous.

3. MASTER AND SERVANT—INJURY OF SERVANT—ASSUMPTION OF RISK.

Plaintiff's intestate, an experienced workman, was assisting in loading piling on a car; the piles being drawn up on skids by means of a tackle held by an anchor rope. Deceased was working behind a pile being so

drawn up, when the rope broke, and the pile, in rolling back, struck and killed him. *Held*, that the failure of the employer to furnish chocks for use by the decedent as a preventive of such accidents, if negligence, was a matter of which decedent had full knowledge, and that he assumed the risk from the danger of working without them.

4. SAME—ACTION—ISSUES.

In an action to recover for the death of such servant, where it appeared that all the parts of the apparatus used except the rope safely performed their functions, their sufficiency or fitness is not a matter in issue, and it is error to submit such questions to the jury.

5. WRONGFUL DEATH—ACTION FOR DAMAGES—INSTRUCTIONS AS TO DAMAGES.

In an action for wrongful death, brought by an administrator, for the benefit of the widow, under the statute of Illinois (2 Starr & C. Ann. St. [2d Ed.] c. 70) which provides that in case of recovery the jury may award such damages as they shall deem "a fair and just compensation with reference to the pecuniary injuries resulting from such death * * * not exceeding the sum of \$5,000," it is the duty of the court to instruct the jury as to the basis upon which the damages are to be computed, and the pecuniary value of the life of the deceased to the widow ascertained; and a charge merely stating that the jury may assess the damages at whatever sum, in their opinion, the plaintiff is entitled to, not exceeding \$5,000, is erroneous.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

This suit was brought by the administrator of Eli M. Davis, deceased, against Robert B. F. Peirce, receiver of the Toledo, St. Louis & Kansas City Railroad Company, to recover damages, under the statute of the state of Illinois, for the death of Eli M. Davis, alleged to have occurred through the negligence of the receiver of the railroad, in failing to furnish proper and adequate machinery and appliances, and in furnishing improper and inadequate appliances, for use by Davis and his co-laborers in their work. The cause was previously before this court upon writ of error to review a judgment in favor of the defendant in error here, and is reported as *Peirce v. Davis' Adm'r*, 53 U. S. App. 291, 26 C. C. A. 201, 80 Fed. 865, to which reference is had for a statement of the facts in respect of the character of the appliances furnished, and the cause of the accident. The judgment was there reversed because breakage of the anchor rope was the only evidence produced and relied upon to establish the negligence of the master. Upon the retrial of the case in the court below the same evidence was offered as that given upon the first trial, the additional evidence being in regard to the insufficiency and alleged dangerous character of the appliances furnished. The character of the additional testimony given is sufficiently stated in the opinion of the court. A verdict was again found for the plaintiff, and the judgment thereon is brought here for review. Pending the writ of error, Peirce resigned as receiver of the railway; and, by order of the court having jurisdiction of the matter, Samuel Hunt was appointed his successor, and by order of this court was substituted as plaintiff in error.

Clarence Brown, for plaintiff in error.

F. W. Dundas, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

It is matter of regret that in this case we cannot extend the word of commendation expressed in *Godkin v. Monahan*, 53 U. S. App. 604, 619, 27 C. C. A. 410, 83 Fed. 116, with reference to the manner in which the record is presented to our consideration. The case was

simple. The accident occurred by reason of the breaking of the anchor rope which let down the pile then being hauled up the skids, and Davis, struck by the falling pile, was instantly killed. The issue involved the insufficiency of the appliances furnished by the master for this work, and whether therein he exercised the care imposed upon him by the law. All of the appliances withstood the strain, with the exception of the anchor rope, and the inquiry was necessarily limited to the sufficiency of that rope for the work then in progress. There was perhaps the further question whether the master was negligent in failing to furnish chocks to protect Davis, who was behind the pile, using the pinch bar, from possible injury resulting from the breaking of any of the appliances, letting the pile down upon him. In asking this court to review the proceedings below, we are presented with a bill of exceptions of 223 printed pages,—a copy of the stenographer's minutes of the trial. We are also presented with 150 assignments of errors asserted to have been made by the court below in a trial not extending over four days. A large part of the bill of exceptions is taken up with questions to and answers by five witnesses produced by the plaintiff below as expert witnesses. The right of each witness to give his opinion with respect to the character of the appliances and the manner of the performance of the work was duly objected to. These questions were long, hypothetical questions, based upon the facts of the case. The assignments of errors consist largely in the repetition of questions and answers of this character, propounded to and given by each witness. It does not seem to have occurred to counsel that one error well assigned is as effective as if often repeated, and that one assignment of such an error is quite as forceful as a hundred assignments of like errors. The proceedings on the trial could have been condensed and properly presented within at least one-tenth of the volume. It is unfair as well to the court as to the parties litigant to offer such a record,—unfair to ask the court to unnecessarily wade through such a mass, unfair to the litigants to incur the unnecessary expense. We trust that these observations will correct a practice that is becoming too common in suits at law. We have upon more than one occasion spoken to this subject (*United States Sugar Refinery v. Providence Steam & Gas Pipe Co.*, 18 U. S. App. 603, 10 C. C. A. 422, 62 Fed. 375; *Association v. Lyman*, 18 U. S. App. 507, 9 C. C. A. 104, 60 Fed. 498), and have also pointed out the correct practice by rule 10 (31 C. C. A. cxlv., 90 Fed. cxlv.), which must not be disregarded.

It is unnecessary to consider seriatim the many questions propounded to, and which the court allowed the witnesses called as experts to answer, with respect to their opinions upon the character and safety of the appliances in question. Any such discussion of them would greatly exceed the proper limits of an opinion. It is sufficient, as we think, to indicate in general terms our views of the questions to be determined, and of the character of the evidence by which they are to be resolved. Every one of the appliances furnished, with the exception of the anchor rope, performed the service for which it was designed. With that one exception, they withstood the strain put upon them, and approved themselves as fit, suitable, and safe

instrumentalities for the purposes for which they were employed. It was therefore wholly immaterial—assuming that the opinions of experts could properly be received—whether, in respect of such appliances as proved sufficient, other and better and safer appliances could have been employed. So, also, it was wholly irrelevant, with respect to the case in hand, whether the men hauling upon the tackle should have been placed upon one side or the other of the flat car; for, in either case, Davis, helping the pile over obstruction with his pinch bar, necessarily stood behind the pile. The simple and only question involved in the inquiry with regard to the character of the instrumentalities used was whether the anchor rope was sufficient, and to that the inquiry should have been limited. The record is replete with questions frequently repeated, and as often objected to, seeking the opinions of the several witnesses upon the character of the different appliances which had proved sufficient, and which were in no sense responsible for the accident. To permit such a course of examination presented to the consideration of the jury a false issue, and necessarily tended to confuse their minds, and might have led them to believe that a verdict could be found upon a general condemnation by the witnesses of all the instrumentalities employed; and this is rendered more probable in view of the very general character of the charge to the jury, and in the absence of any instruction directing their attention to the consideration of the one proximate cause of the injury,—the breaking of the anchor rope. The questions to be determined were whether the anchor rope was a fit instrumentality, and whether the master had failed in the exercise of reasonable care to furnish a reasonably fit and safe instrumentality. The issue was to be resolved by the jury upon proper evidence, and under pertinent instructions by the court. The test of the master's liability in a case like that in hand is whether the appliance furnished was the ordinary and usual instrumentality in use for that purpose. If it be, then it cannot be said that the master has failed to exercise ordinary care with respect to the thing furnished. He is not obliged to supply something that in the opinion of another may be better. We have so ruled in *Logging Co. v. Schneider*, 34 U. S. App. 743, 749, 20 C. C. A. 390, 74 Fed. 195, where the principle is fully stated.

It was, of course, proper for the plaintiff below to prove, if he could, that it was not usual or customary, in such work, to use a manila rope for an anchor rope. It was also competent to show as a fact, if it be a fact, that the rope employed was of insufficient strength to sustain the strain to which, in the execution of the work, it would probably be subjected. He had also the right to show, if he could, that the rope was old, defective, or worn. But these things must be proven as facts, and they are not difficult to be ascertained. The breaking strength and safe working strength of a manila rope is not a question of speculation or of opinion. These things are determined accurately by tables recognized all over the civilized world, the result of practical tests and of long and extended experience. The jury, if the evidence be conflicting, was the proper tribunal to determine the sufficiency of the rope for the purpose for which it was used, and whether in so supplying that rope the master had failed in the duty

which he owed to his servant. The province of the jury in this regard cannot properly be invaded by witnesses expressing their opinions upon the very subject which it was the duty of the jury to determine. The witnesses for the plaintiff below were severally asked their opinions upon a hypothetical description of all the appliances, somewhat in this form: "Whether, in your opinion, that was an ordinarily safe and proper apparatus for the work for which it was used." This question, in our judgment, was clearly improper. It invaded the province of the jury, and called for the conclusion of the witnesses upon ascertained facts. This was not a question of science, but one upon which, the facts being ascertained, the ordinary and uneducated mind could form an opinion. *Railway Co. v. Kellogg*, 94 U. S. 469, 472, 24 L. Ed. 256; *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Seliger v. Bastian*, 66 Wis. 521, 29 N. W. 244; *Bailey, Mast. Liab.* 531 et seq.; 2 Jones, Ev. § 369 et seq.

Much testimony was allowed by the court, under objection and exception, with respect to the failure of the master to supply chocks to prevent the falling of a pile in case of breaking of any of the appliances used in hauling it up the skids and upon the car. Such might well be proper in a proper case. It was allowed here and submitted to the jury without any instruction whatever of the right of the plaintiff below to complain of the alleged omission of duty. It is easy to understand that chocks were desirable, and preventive of injury. If, however, they were not supplied, the omission was apparent to Davis, for he it was who should have used them, if they were furnished, and the danger from the omission was obvious. If, as claimed, Davis was an experienced man, and accustomed to such work, it cannot be asserted that he was ignorant of the danger resulting from the omission to supply or employ them. Under such circumstances, he entered upon the particular work knowing that chocks were not furnished, and with full knowledge of the danger which might result from their absence. He therefore assumed the risk, and the master cannot be held responsible for failure of duty in this respect. *Reed v. Stockmeyer*, 34 U. S. App. 727, 733, 20 C. C. A. 381, 74 Fed. 186; *Peirce v. Clavin*, 53 U. S. App. 492, 27 C. C. A. 227, 82 Fed. 550, and authorities cited; *Wood v. Heiges*, 83 Md. 257, 268, 270, 34 Atl. 872; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Rummell v. Dilworth*, 111 Pa. St. 343, 2 Atl. 355, 363; *Brossman v. Railroad Co.*, 113 Pa. St. 490, 6 Atl. 226; *Dale v. Railroad Co.*, 63 Mo. 455; *Rogers v. Leydon*, 127 Ind. 50, 26 N. E. 210.

The charge to the jury contained an excellent exposition, in general, of the duty of the master to the servant with respect to furnishing fit and suitable appliances. It is subject, however, to just criticism in this: that it is general, and not specific with reference to the facts upon which alone liability could properly be predicated. As before observed, the death was caused by the breaking of the anchor rope, all other appliances fitly and safely performing their respective functions. It was not proper to submit to the jury the question of the sufficiency of those appliances that proved sufficient. The consideration of the jury should have been directed solely to the question of the sufficiency of that rope, its character and condition,—

whether it was such an instrumentality as was usually and customarily employed in such service; whether its strength was reasonably sufficient to sustain the strain to which it would ordinarily be subjected in raising a pile of the weight of that in question; and whether the breaking occurred from its insufficiency, or from an unusual and abnormal strain to which it was subjected by those engaged in the work. The jury should also have been cautioned upon the subject of assumption of risk with respect to the chocks, if it were proper in any event to submit to the jury the question of failure of duty in respect to those instrumentalities; but we search the charge in vain for any direction upon this subject.

The defendant below asked for two instructions, as follows:

"(1) The defendant was not bound to supply Davis and his fellow workmen with appliances which were absolutely safe under any strain they might see fit to subject them to, but only such as were safe when used in a reasonable, careful, and prudent manner, and subject to such strain as they might reasonably be expected to be subjected to in doing the work for which they were supplied in such reasonably careful and prudent manner; and if you find from the evidence that the anchor rope which broke, causing Davis' death, was strong enough to resist such strain which might be put upon it in the work for which it was supplied, when used in a reasonably careful and prudent manner, and that at the time it broke, by reason of the number of men called in to assist in the work by Lyensapp, Davis, or his fellow workmen, all of whom were hauling upon the fall line of the tackle which said anchor rope was supporting, said rope was being subjected to an extraordinary and abnormal strain, and such as it could not have been, in the exercise of ordinary care and prudence, anticipated by the defendant that the said rope would be subjected to, then your verdict must find the defendant not guilty. (2) If you find from the evidence that the anchor rope which broke, causing Davis' death, was of sufficient strength to bear the strain put upon it in the performance of the work of loading bridge piles by the force of men provided by the defendant for doing said work, and that said force of men was sufficient, under ordinary conditions, to do said work, and that during the performance of said work, and just before the said rope broke, such men, finding that by reason of a pile becoming fixed on the skids, or meeting either some obstacle during the process of hauling it up on the skids onto the car they were unable to raise said pile, called in a number of bystanders to assist them in raising said pile, and that, by reason of said additional force of bystanders hauling on the tackle supported by said anchor rope, a great and excessive strain was put on said rope, causing it to give way, and leading to the accident resulting in Davis' death, then you are instructed that the defendant would not be liable for an accident resulting from such men so calling in an additional force of bystanders, and through their assistance placing an excessive and abnormal strain on said rope, and your verdict herein must find the defendant not guilty."

We are of opinion that these instructions should have been given. It was the contention of the defendant below that the anchor rope was sufficient, and that the accident occurred by reason of the manner in which the work was performed; that, meeting with some obstruction, which does not seem to be disclosed by the evidence, a large number of bystanders were called in by some servant of the company, and the increased force of men hauling upon the tackle, and seeking to surmount the obstruction by sheer force, placed a sudden and abnormal strain upon the anchor rope, which it could not withstand. If the evidence was conflicting with respect to the sufficiency of the anchor rope for the purpose for which it was employed, it surely was competent for the defendant below to prove,

and for the jury to determine whether in fact the accident was not caused by reason of the sudden and abnormal strain due to the acts of fellow servants of Davis in the performance of the work. We fail to observe that the charge in any respect covers the ground of these instructions, and in this the court was in error.

Upon the subject of damages the court instructed the jury that, if they found the defendant guilty, they should assess damages "at whatever sum, in your opinion, he is entitled to, not exceeding the sum of five thousand dollars." This is the entire charge of the court to the jury upon that subject. The action is given by the statute of Illinois. The sum recoverable is for the benefit of the widow of the deceased. In such case the jury may award such damages as they shall deem "a fair and just compensation with reference to the pecuniary injuries resulting from such death * * * not exceeding the sum of five thousand dollars." 2 Starr & C. Ann. St. (2d Ed.) p. 2156, c. 70, par. 2. There is here no instruction to the jury touching the basis upon which damages are to be ascertained. Within the limit of amount, the amount is left to the unbridled caprice of the jury. The value of the life should be measured by its pecuniary worth to the widow. The statute allows compensation only, and that is to be ascertained by consideration of the age and probable duration of life of the deceased; his earning capacity, and his probable earning capacity during his expectancy of life, had the accident not occurred; his ability to earn more than would be sufficient for the support of himself and those dependent upon him; his liability to illness and possible want of employment. The probable duration of the life of the widow may also be an element to be considered. The jury should have been instructed with respect to those matters. This charge, however, does not limit recovery to compensation, but places the matter at large, and entirely subject, not to the judgment, but to the caprice, of the jury, controlled only as to the amount of the verdict, and is not limited to the evidence in the case. In *Carrying Co. v. Schulte*, 34 U. S. App. 444, 446, 18 C. C. A. 213, 71 Fed. 489, the instruction with respect to damages was as follows:

"If you find for the plaintiff in this case, the verdict will be, 'We the jury find the defendant guilty, and assess the damages at ———,' whatever you think proper, not exceeding the amount mentioned in the declaration."

We held such a charge to be erroneous; the court, speaking through Judge Woods, observing:

"If the basis for the assessment of damages had been explained in the body of the charge as it ought to have been, the expression quoted would doubtless be deemed to be qualified thereby; but, limited as it is only by the sum named in the declaration, it leaves the jury to that extent an uncontrolled discretion, and is manifestly erroneous."

The charge here cannot be distinguished from the one there under consideration. It is of substance in all these cases of negligence that the jury should be carefully cautioned with respect to the basis upon which its award of damages should be made; and this not only because the parties are entitled to such instruction, but for the further reason that ordinarily, if not always, the appellate court de-

clines to consider the question of inadequate or excessive damages. The judgment is reversed, and the cause remanded to the court below, with instructions to award a new trial.

KERR-MURRAY MFG. CO. v. HESS.

(Circuit Court of Appeals, Eighth Circuit. November 20, 1899.)

No. 1,230.

1. CONTINUANCE—DENIAL OF APPLICATION—DISCRETION OF COURT.

It is not error, even if the ruling were reviewable, to deny an application for continuance on the ground of the illness of a nonresident witness, where there has been ample time for taking his deposition, and the adverse party consents to admit in evidence a statement of the facts to which the witness is expected to testify.

2. MASTER AND SERVANT—INJURY OF SERVANT—FELLOW SERVANTS.

A servant charged by the master with providing lumber for the building of a scaffolding by his fellow servants is in that respect discharging a personal duty of a master, who is liable for his negligence in providing defective and unsafe material.

3. SAME—ACTION BY SERVANT FOR INJURY—INSTRUCTIONS.

In an action by a servant against the master to recover for an injury alleged to have been caused by the breaking of an unsound piece of timber furnished by the master for the use of the servants in building a scaffolding, it is not error to refuse an instruction that the defendant would not be liable if he furnished a sufficient quantity of sound lumber, and the unsound piece was inadvertently selected and used by plaintiff's fellow servants, where the defendant pleaded specially that the plaintiff was injured because of the manner in which he conducted himself at the time he was injured, and where it appears that the issue tendered by the instruction was not actually litigated at the trial; the contention at the trial being that he was hurt by his own fault.

4. APPEAL—REVIEW—INSTRUCTIONS.

The charge of a trial court must be considered as a whole, and cannot be condemned because a single paragraph, taken alone, might be misleading, where its meaning is plain, when read in connection with the other portions of the charge.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action in the trial court by an employé against an employer for personal injuries. In this court the position of the parties is reversed. The Kerr-Murray Manufacturing Company, the defendant below, is the plaintiff in error here, and is seeking to reverse a judgment which was recovered against it at nisi prius. The facts, as disclosed by the record, are substantially as follows: The defendant company is an Indiana corporation, and on November 25, 1897, was engaged in building an iron or steel gas tank in the city of Omaha, Neb. The tank in question was about 90 feet in diameter, and about 26 feet high. For the purpose of constructing the tank, and bolting together the steel plates of which it was composed, it was necessary to erect a scaffolding on the interior of the tank upon which the workmen could stand. The scaffolding was built in the following manner: A box or shaft 4 feet square, consisting of pine plank, was first erected in the center of the tank, extending from the floor to the dome. To this shaft lateral arms, consisting of pine joists or planks 2x10, were nailed, which extended in all directions to the shell of the tank, and were supported at intervals of about 8 or 10 feet by upright posts resting upon the floor of the tank. Walter S. Hess, the plaintiff below and the defendant in error here, was an ordinary laborer

in the employ of the defendant company, and at the date last aforesaid was engaged with some other workmen, under the direction of Henry Loose, the defendant's superintendent or foreman, in constructing the aforesaid scaffolding. In the discharge of his duty he appears to have gone out on one of the joists or arms which radiated from the central shaft for the purpose of splicing another plank or joist to its outer end, and thereby extending the arm towards the shell of the tank. He was sitting astride of the plank some distance from one of the supports, and was nailing the other plank to it, when the plank astride of which he was sitting broke, as he claimed, and precipitated him to the floor some 20 feet below, thereby occasioning the injuries of which he complains. There was testimony offered which tended to show that the plank which broke was neither a sound nor suitable piece of timber, in that it was either sappy and rotten or crossgrained and full of knots.

Ralph W. Breckenridge (Charles J. Greene, on the brief), for plaintiff in error.

V. O. Strickler, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defendant company complains in the first instance that the trial judge was guilty of a gross abuse of his discretionary power in refusing to grant the defendant a continuance, but this complaint is without any adequate foundation. When the case was called for trial, the defendant's attorney presented an affidavit for a continuance which stated, in substance, that the defendant company could not safely go to trial because John Loose, its most important witness, was sick at his home at Ft. Wayne, Ind. The plaintiff's attorney thereupon consented that counsel for the defendant might make a statement of all the facts which they expected to prove by said Loose, and that such statement might be read to the jury as the testimony which the absent witness would give if present. After this offer was made, the court overruled the application for a continuance. Subsequently, at the conclusion of the defendant's testimony, an affidavit was made by one of its counsel containing a succinct and very full statement of the facts which the defendant company expected to prove by the absent witness, and the same was read to the jury as the evidence which he would give if present in person. Moreover, the case appears to have been pending in the federal court on removal from the state court for nearly nine months before the trial took place. Ample time had elapsed, therefore, to obtain the deposition of the absent witness, which should have been taken, as he appears to have been a nonresident. Under these circumstances, the trial court very properly required the trial to proceed. But, in addition to what has been said, it should be observed that the rule is well established in the federal courts that a motion for a continuance is addressed to the discretion of the trial judge, and that his action on such a motion will not be reviewed on appeal or on writ of error. *Davis v. Patrick*, 12 U. S. App. 629, 635, 57 Fed. 909, 6 C. C. A. 632; *Sims v. Hundley*, 6 How. 1, 5, 12 L. Ed. 319; *Insurance Co. v. Hodgson*, 6 Cranch, 206, 207, 3 L. Ed. 200; *Thompson v. Selden*, 20 How. 194, 198, 15 L. Ed. 1001; *Electric Co. v. Dick*, 8 U. S. App. 99, 52 Fed. 379, 3 C. C. A. 149; *Drexel v. True*, 36 U. S. App. 611, 74 Fed. 12,

20 C. C. A. 265. In the present case, however, we should be compelled to hold that the discretion of the trial court was properly exercised, even if the action complained of was subject to review.

Considerable space is devoted in the briefs to the discussion of the question whether the plaintiff below and Henry Loose, the defendant's superintendent or foreman, were fellow servants; but, as we view the case, the consideration of that question is unnecessary. The action was tried below on the theory that they were fellow servants, and that the defendant could not be held liable for the negligent acts of its foreman unless they were committed while he was discharging some personal duty of the master, such as providing suitable material for the construction of the scaffold or proper tools and appliances wherewith the plaintiff was to work. The charge, considered as a whole, advised the jury that there was no ground upon which a recovery could be had by the plaintiff unless it appeared that the joist or plank which broke and precipitated him to the ground was defective in some of the respects pointed out by the various witnesses who testified on that subject, nor unless it appeared that the defendant had failed to exercise ordinary care in providing such defective material. The charge proceeded upon the theory (which was obviously correct) that whoever may have provided the lumber for the scaffolding was in that respect discharging a personal duty of the master, and that the master was responsible for such person's negligence in providing material, without reference to his grade or rank in the employer's service. *Balch v. Haas*, 36 U. S. App. 693, 699, 73 Fed. 974, 20 C. C. A. 151.

Complaint is made because the trial court failed to direct a verdict in favor of the defendant company, but as there was considerable testimony (enough, at least, to warrant a finding) that the joist or board which broke was defective in the respect alleged in the petition, and as this joist was a part of the material for the scaffolding which it was the personal duty of the master to supply, it is not apparent that the trial court could have done otherwise than to submit the issue concerning the defendant's negligence in supplying the material to the decision of the jury. The issue in question was submitted, and the finding was against the defendant, under instructions which advised the jury that, in the matter of providing material for the scaffolding, the defendant was only required to exercise ordinary care; and that the plaintiff on his part, when he went out on the plank, was bound to exercise ordinary watchfulness; and that the defendant could not be held liable if the jury believed that the plaintiff might have discovered the defective condition of the board by ordinary circumspection, before he went out on the same and trusted his weight thereto. These were questions for the jury, in view of the character of the evidence, and they seem to have been submitted under directions from the court that were substantially accurate.

Perhaps the most important question in the case, although it is not argued specially in the briefs, is whether the lower court erred in refusing to give an instruction to the effect that if it appeared that the defendant provided a sufficient quantity of sound and suitable lumber for the erection of the scaffolding, and that the selection of the

defective joist which broke and occasioned the injury was the act of some fellow workman of the plaintiff, then there could be no recovery. This instruction embodied a principle which has been approved in a number of decisions, and has passed into some of the text-books. It is held in some cases, with respect to the building of ordinary scaffoldings and other simple structures of that nature, which laborers and mechanics are in the habit of constructing for themselves, because the construction thereof does not require the exercise of more skill or scientific knowledge than is usually possessed by the ordinary laborer or artisan, that the master is under no obligation to do more than to supply a sufficient quantity of material which is reasonably well adapted for the making of such structures, and that he is not responsible for an injury to one of his servants which is occasioned through the fault of another fellow servant, who erects the structure insecurely, or who selects a defective piece of timber and places it therein, when there is an abundance of sound timber at hand which might be selected and used. An allusion was made to this principle, by this court, in a recent case (*Manufacturing Co. v. Johnson*, 60 U. S. App. 661, 669, 670, 89 Fed. 677, 681, 32 C. C. A. 309), and it has also been recognized by other courts (*Colton v. Richards*, 123 Mass. 484, 487; *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157, 159; *Bowen v. Railway Co.*, 95 Mo. 268, 277, 8 S. W. 230; *Sims v. Barge Co.*, 56 Minn. 68, 73, 57 N. W. 322; *Marsh v. Herman*, 47 Minn. 537, 539, 50 N. W. 611; *Beesley v. F. W. Wheeler & Co.*, 103 Mich. 196, 61 N. W. 658, 27 L. R. A. 266; *McKinney*, *Fell. Serv.* p. 77; *Shear. & R. Neg.* [5th Ed.] § 195, and cases there cited).

The case at bar does not seem to have been tried, however, upon the theory that the joist on which Hess was sitting when he fell was defective, and that some fellow workman inadvertently selected and placed it in the scaffold. No such defense was pleaded in the defendant's answer, which contained simply a general denial of the allegation that it had furnished rotten and defective materials for the construction of the scaffolding, and in addition thereto a special plea that the plaintiff's injuries were occasioned by his own fault, "by the manner in which he conducted himself at the time of the receipt of said injuries," and that, if he had exercised reasonable care, he would not have been hurt. The proof introduced was in accordance with these allegations of the answer. The defendant called but two witnesses, one of them being its own attorney, and the other an alleged eyewitness of the accident. By the latter witness it showed, in substance, that the joist on which Hess was sitting was entirely sound, and did not break, but that it remained in the scaffolding as a constituent part of the structure after the accident, and that in point of fact Hess lost his balance, and fell accidentally, while attempting unnecessarily to catch a small piece that had split off from the end of the joist on which he was sitting, as he was driving a nail. This was the defense upon which the defendant appears to have placed its chief reliance before the jury. A section, as it was claimed, of the very piece of timber on which the plaintiff was sitting when he fell, was produced in court, and identified by one of the defendant's attorneys as being a piece of the alleged defective joist that had been pointed

out to him shortly after the accident, and which he had directed to be sawed off and preserved, so as to establish on the trial that it was sound and suitable for the scaffolding, and that the claim that it was rotten or otherwise defective was a mere pretense. In its charge to the jury the court pointed out the issue of fact aforesaid, which seems to have been the one that had been discussed by counsel, and directed the jury to determine whether the joist broke because of its rotten condition, as the plaintiff claimed, or whether, the joist being sound, the plaintiff fell through sheer accident, while attempting to do an unnecessary act, namely, catch a piece of falling timber, as the defendant had contended. Inasmuch as the issue last stated was the one actually litigated before the jury, and as the defendant neither pleaded that the accident was due to the fault of a fellow servant nor admitted that the joist might have been unsound, and inasmuch as it did not show how much material it had bought for the scaffolding, or what care it had exercised in selecting it, we are of opinion that the judgment below ought not to be disturbed because of the failure to give the aforesaid instruction. In the case in hand, the instruction does not appear to have been pertinent to the defenses outlined in the answer, nor to the proof which was offered in support thereof. The court was justified, we think, in submitting the case to the jury on the issues that had been tried and specifically pleaded.

It is further insisted that an error was committed by the trial court in instructing the jury as follows:

"It has been stated by counsel here frequently that the law is that the defendant was bound to furnish safe materials. Now, that is not the law, that they are bound to furnish absolutely safe materials. The law is that the defendant was bound to use ordinary care to furnish reasonably safe materials. They were not insurers absolutely of the safety of any timber that the plaintiff had to work upon, but they must use such care as an ordinarily careful and prudent man would use under similar circumstances. *If you should find, gentlemen of the jury, from a fair preponderance of all the evidence in this case, that it was the duty of the plaintiff in this case to go out upon this plank, and that it was necessary for him to do that in order for him to properly fasten these two planks together, and that he went out upon that plank in the performance of his duty, and while there, performing his duty, it broke and let him fall to the ground without any fault of his, and through some defect in the plank as described in the testimony, then it would be your duty to find a verdict in behalf of the plaintiff for such damages as you might find from all the evidence the plaintiff was entitled to.*"

That part of the instruction which we have italicized is criticised by the defendant's counsel, upon the ground that it withdrew from the jury the question whether the defendant had been guilty of culpable negligence in furnishing defective material, and simply required them to ascertain whether the plank was rotten, without reference to the degree of care that had been exercised in providing it. When the whole paragraph which is above quoted and other parts of the charge are read, however, it is obvious, we think, that the criticism in question is without merit. The court plainly informed the jury that in the matter of providing materials the defendant was only bound to exercise ordinary care; that it was not an insurer of the safety of any of the materials which it had provided; and, by necessary intendment, that the defendant could only be held liable for a failure to

exercise an ordinary degree of care in that respect. The concluding paragraph of the instruction, when read in connection with what precedes it, manifestly did not leave the jury at liberty to find against the defendant if they were simply satisfied that the joist was defective, but it required that they should be further satisfied that the defendant had not exercised reasonable or ordinary care in providing it. The meaning of an instruction should be determined by considering it as a whole, since many a charge which, as a whole, is unexceptionable, would prove faulty if appellate courts indulged in the practice of wresting a paragraph from its context, and condemning it without reference to what precedes or follows it. *Railway Co. v. James*, 12 U. S. App. 482, 487, 6 C. C. A. 217, 56 Fed. 1001; *Railroad Co. v. Gladmon*, 15 Wall. 401, 409, 21 L. Ed. 114. We cannot act on the presumption that the jury were misled by the instruction in question, when it appears that they were twice advised by the court in unmistakable terms that the defendant company had discharged its full duty to the plaintiff, in the matter of providing materials for the scaffolding, if it simply exercised ordinary care in selecting them. The judgment below should be affirmed, and it is so ordered.

SANBORN, Circuit Judge (dissenting). The opinion of the majority concedes the law to be that if a master furnishes an abundance of sound material for the construction of a scaffold, and some of his employes who are engaged in constructing it select and use a rotten or defective stick or plank, and thereby cause the injury of one of their number, the master is not liable. *Fraser v. Lumber Co.*, 45 Minn. 235, 237, 47 N. W. 785; *Lindvall v. Woods*, 41 Minn. 212, 213, 42 N. W. 1020, 4 L. R. A. 793; *Hoar v. Merritt*, 62 Mich. 386, 29 N. W. 15; *Killea v. Faxon*, 125 Mass. 485. The plaintiff in error requested the court below to give this law to the jury, and it refused. In my opinion, this was a fatal error in the trial of this case, for which the judgment should be reversed, because the bill of exceptions shows that the manufacturing company produced testimony "that the rafters upon which the floor of said scaffolding was laid were first-class, clean pine planks, two inches wide, free from defects, and proper for use in the construction of said scaffolding, and that there was a great sufficiency of such timber, first class and perfect in every way, from which the selections could be and were made, and that said timber was selected by the said John Loose and other workmen who were working with Hess in constructing said scaffold," and prayed for the proper instruction thereon. It is true that one of the defenses which the manufacturing company made was that the plank on which Hess was at work was not defective, and did not break; but it is not less true that another defense was that it furnished a sufficient amount of sound and suitable lumber for the construction of the scaffold, and was guilty of no negligence, even if the plank was defective and did break. The fact that, in the opinion of the jury, it failed in the first defense, in no way deprived it of its right to the benefit of the second; and the testimony quoted above, and the request for a correct statement of the law upon it, show that the

plaintiff in error did not fail to insist upon it. Moreover, the burden of proof to show the negligence of the master was on the plaintiff below. The fact that he or his fellow workmen put a defective plank in the scaffolding, which broke and precipitated him to the floor, was not sufficient to establish that negligence, without proof that the master failed to furnish sound and suitable plank, which the workmen might have used, and on this ground the plaintiff in error was entitled to the instruction it requested.

There is another reason why this judgment ought to be reversed. It is that after telling the jury that the company was not an insurer of the safety of the materials, but was only required to use ordinary care to furnish safe lumber, the court erroneously charged the jury:

"If you should find, gentlemen of the jury, from a fair preponderance of all the evidence in this case, that it was the duty of the plaintiff in this case to go out upon this plank, and that it was necessary for him to do that, in order for him to properly fasten these two planks together, and that he went out on that plank in the performance of his duty, and while there performing his duty it broke, and let him fall to the ground, without any fault of his, and through some defect in the plank as described in the testimony, then it would be your duty to find a verdict in behalf of the plaintiff for such damages as you might find from all the evidence the plaintiff was entitled to."

In my opinion, this charge took from the jury the questions whether or not the manufacturing company was negligent in the discharge of its duty, and whether or not the selection of the defective plank was the negligence of the plaintiff's fellow workmen, and left them nothing to consider but whether or not it was the duty of Hess to go out on the plank, and whether or not it broke without his fault. It was certainly a positive direction to return a verdict for the plaintiff if he went out on the plank in the performance of his duty, and, without his fault, it broke and precipitated him to the ground, and by its very terms it excluded the consideration of any other question. It seems to me that a jury could not have understood it in any other way. I concede that a paragraph of a charge should not be wrested from its context, and condemned, without reference to what precedes or follows it, and that all parts of the charge relative to the subject under discussion should be considered together. But general remarks, which tend to show that the court had correct views of the law, do not extract the vice of an erroneous instruction, which is positive in its terms, and which directs the jury to render a verdict if the conceded facts exist, without considering the vital issues in the case. *Railway Co. v. Needham*, 52 Fed. 371, 378, 3 C. C. A. 129, 147, 10 U. S. App. 339, 350; *Railway Co. v. Farr*, 56 Fed. 994, 1000, 6 C. C. A. 211, 217, 12 U. S. App. 520, 529. This, it seems to me, was the effect of this charge. It was a general statement to the jury that the defendant was required to use ordinary care to furnish reasonably safe material, and a positive instruction to them to return a verdict against it, whether it used any care or not, if the plaintiff went out on the plank, and it broke, and let him fall to the ground, without his fault; and this seems to me to be error.

UNITED STATES v. GREEN.

(Circuit Court, S. D. Iowa. December 1, 1899.)

MARRIAGE—PROOF OF INVALIDITY—SUFFICIENCY OF EVIDENCE.

In an action by the United States to recover pension money paid to defendant as the widow of a deceased soldier and as guardian of their minor children, no fraud was claimed, it being admitted that the pension was applied for and allowed and paid in good faith; but the government claimed that because of a prior marriage of the soldier to a woman still living at the time of his death, and the invalidity of a decree of divorce obtained by him, defendant never became his legal wife, and their children were illegitimate. It was admitted that, but for such facts, defendant's marriage would have been legal, and that it was believed to be so by the parties, who lived together as husband and wife for more than 10 years, and until the soldier's death. It did not appear that any claim to the pension had ever been asserted by the former wife, or that she or any one else had ever questioned the validity of defendant's marriage. *Held* that, under such circumstances, the burden rested upon the plaintiff to prove its invalidity by clear and convincing evidence, and that proof merely of the prior marriage ceremony, without proof that the woman was competent to enter into the marriage, was insufficient, and did not require the court to determine the validity of the divorce; the presumption in favor of the validity of the later marriage and of the competency of the parties being equally as strong as the presumption in favor of the first.

This was an action to recover money paid to defendant, as the widow of Levi B. Davis, under the pension laws of the United States. Tried to the court without a jury.

Lewis Miles, U. S. Dist. Atty.

Steele & Robbins, for defendant.

SHIRAS, District Judge. In this action the United States seeks to recover from the defendant the sum of \$1,146.25, which aggregate amount was paid to the defendant from time to time upon a pension which was allowed to the defendant as the widow of Levi B. Davis, formerly sergeant major of the 50th Indiana volunteer infantry, and also upon a pension allowed to the minor children of said Levi B. Davis. From the agreed statement of facts upon which the case is submitted to the court, it appears that on the 11th day of January, 1878, a marriage ceremony, in due form, was had between the defendant and Levi B. Davis, in Jackson county, Ind., under a license duly issued for that purpose; the marriage ceremony being conducted by R. C. McKinnee, who possessed the lawful authority to perform the ceremony. It is admitted that this marriage was entered into in entire good faith upon the part of both parties thereto, the said defendant being at the time a single woman. It is also admitted that from the date of said marriage the parties thereto lived together as husband and wife, being so known and received by the community in which they lived; that of this marriage there were born six children, four of whom are now living. It is further admitted that in no form was the validity of this marriage questioned by any one during the lifetime of Levi B. Davis; that Davis died April 30, 1889, having always recognized the defendant as his wife, and the children born to them as his lawful and

legitimate children. It is admitted that after the death of Levi B. Davis, in perfect good faith, the defendant made application for a pension for herself and her minor children, as being the widow and children of Levi B. Davis, and the department, in good faith, allowed the pension, and has paid the sum of \$1,146.25 to the defendant in her own right as widow, and also to her as guardian of her minor children. This suit is now brought on behalf of the government to recover back the sum of money thus paid; it being claimed that, owing to a prior marriage between Davis and one Eliza Jane Callahan, the relation of husband and wife was not lawfully created between Davis and the defendant.

From the agreed statement of facts, it appears that on July 6, 1848, a marriage was had between Davis and Eliza Jane Callahan; that on the 19th day of April, 1877, a decree of divorce was granted to Levi B. Davis from Eliza Jane Callahan by the probate court of Malade county, Utah, which Davis, the defendant, and the department in good faith believed to be a valid decree, and acted in the premises in that belief, but it is now claimed on behalf of the government that, by a change of the law, the jurisdiction of the probate court over matters of divorce had been abrogated at the time of the rendition of the divorce decree. Before the court would be justified in holding that the court of Utah territory erred in exercising jurisdiction in the divorce proceedings,—a ruling which, if made, might affect the interests and relations of many others besides the parties to the suit,—the court should be put into possession of all the material matters, both of law and fact, necessary to be considered in reaching a conclusion upon the question. The statement of facts upon which the case is submitted does not present this question with the fullness of detail necessary for its proper consideration, and, for the reasons hereinafter stated, the court will not undertake to determine the question. If, upon a thorough examination of the matter, it should appear that the jurisdiction of the court of Utah territory, granting the divorce, had not been terminated by the subsequent legislation granting jurisdiction in divorce matters to the district courts, then the validity of the divorce granted to Levi B. Davis would be beyond question, and in that event the government would have no ground for recovery in this case. On the other hand, if it should be determined that the decree of divorce granted to Davis was ineffectual because the jurisdiction over proceedings for divorce once existing in the probate courts of Utah territory had been abrogated by subsequent legislation, it would not necessarily follow that the government had proven a right to recover in this action. To entitle the government to recover back the moneys paid to the defendant, the burden is upon it of proving that, at the time of the intermarriage of Davis and defendant, Davis had then a lawful living wife. The claim on behalf of the United States is that, at the date of the marriage of Davis and the defendant, the former was lawfully married to Eliza Jane Callahan. It is certainly true that, before the government should be held entitled to judgment in this case, it must establish this claim of a prior lawful marriage by clear and satisfactory evidence. In

effect, what is sought by the government, in order to enable it to recover the moneys paid to defendant, is a finding and adjudication that the defendant had for years been living in unlawful relations with Davis, and that the children born to them are illegitimate. In the agreed statement of facts, it is expressly admitted that, in applying to the department for a pension for herself and the minor children, the defendant acted in perfect good faith, believing herself to be the lawful widow of the deceased soldier. This is not, therefore, a case wherein the government is seeking to protect itself against a fraudulent claim. It is a case wherein, according to the facts admitted by the government, a pension became lawfully due to the widow of Levi B. Davis, and the defendant in good faith applied for and received the pension as the widow of Davis, but, after allowing and paying the pension, the government now asserts that the defendant is not the lawful widow of the deceased soldier, and therefore the government is entitled to recover back the moneys paid defendant. It is not made to appear that any claim to a pension is asserted on behalf of Eliza Jane Callahan, or that she has ever questioned or denied the claim of defendant to be the lawful widow of Levi B. Davis. Under such circumstances, before the triors of the facts, whether a jury or the court, would be justified in finding in favor of the government, the evidence should be clear, convincing, and satisfactory; and a finding of fact to the effect that the defendant never was the lawful wife of Levi B. Davis, and that the children born to them are illegitimate, ought not to be demanded or expected, unless the evidence is so cogent and conclusive as to fairly preclude any other result.

The point at issue is whether it is proven that at the date of the marriage of Levi B. Davis and the defendant, which took place January 11, 1878, Eliza Jane Callahan was then his lawful wife. In the agreed statement of facts, it is recited that on July 6, 1848, Levi B. Davis and Eliza Jane Callahan were united in marriage. It is not stated that at that time Eliza Jane was a single woman, or that no lawful impediment existed which might render the marriage void. In the subsequent paragraph of the stipulation of facts, wherein is recited the marriage of Davis and the defendant, it is particularly set forth that at that time the defendant was a single woman, and legally competent to enter into the marriage contract. This shows that the parties, when agreeing upon the facts, had in mind the point that, to make a marriage legal, it is not sufficient to go through a ceremony, legal in form, but it must appear that the parties are legally competent to contract with each other. Care was taken to set forth this essential fact with respect to the defendant, it being expressly stated that, when married to Davis, she was a single woman, and legally competent to enter into the marriage relation, but no such statement is found with respect to Eliza Jane Callahan. There is no express statement that, when the marriage ceremony took place between Davis and Eliza Jane, she was a single woman, or that she was competent to lawfully enter into the marriage relation with Davis. It is certainly incumbent upon the government to prove that Davis and Eliza Jane Callahan were lawfully

husband and wife, and, of necessity, this involves the question whether, when they went through the marriage ceremony, they were lawfully competent to contract a marriage with each other. In many cases it might be fairly found, as an inference of fact, that there was competency to contract from evidence showing a proper marriage ceremony, cohabitation, and a failure to question, on part of any one, the validity of the marriage thus entered into. It may be true, as is claimed in argument, that the presumption of competency is ordinarily drawn as a presumption of fact from evidence showing a proper marriage ceremony; but regard must be had to the particular issue at stake, and the special facts of the case. In this case it is proven that the defendant, being a single woman and competent to make a marriage contract, by a marriage ceremony of legal form was married to Levi B. Davis in 1878; that the parties lived together as husband and wife until the death of Davis, in the year 1889, being recognized by the entire community to be husband and wife during that entire time. If presumptions are to be indulged in, is it not clear that these facts would demand the presumption to be that at the date of the death of Davis the defendant was his wife? To overcome the conclusion inevitable from these facts, the government asserts that during all this period Davis had a lawful wife living. It proves the bare fact that a marriage ceremony was had between Davis and Eliza Jane Callahan, and then asks the court, as the trier of the facts, to assume as a fact that the prior marriage was legal, without offering any evidence to show that the parties who entered into this ceremony were legally competent to contract in marriage. It may very well be that this prior marriage was legal and binding. It may be that it was not. The validity of the marriage between Davis and the defendant has never been denied by any one, until the government chose to question it by bringing this suit. Under the peculiar facts of this case, the court, as the trier of the facts, is justified in demanding clear proof of the validity of the alleged prior marriage which is relied on to defeat the claim of the defendant to be the lawful widow of Levi B. Davis, and, in the judgment of the court, the evidence adduced does not prove the validity of the prior marriage, but leaves that question uncertain; and, as the burden of proof is upon the government, it must be held that it has failed to adduce sufficient evidence to justify the finding that the defendant is not the lawful widow of Levi B. Davis, deceased. Judgment for the defendant.

LLOYD v. SUPREME LODGE KNIGHTS OF PYTHIAS.

(Circuit Court of Appeals, Seventh Circuit. December 1, 1899.)

No. 623.

1. EVIDENCE—PROOF OF BY-LAW—PAROL TESTIMONY.

Oral testimony is not admissible to prove the adoption of a by-law by an insurance association, where, under the laws of the state, a certified copy of the record may be used.

2. LIFE INSURANCE—CONSTRUCTION OF POLICY—RESERVATION OF RIGHT TO ADD NEW CONDITIONS.

A provision of a life insurance policy making it subject to the rules and regulations of the association issuing it then in force or that "might thereafter be enacted" gives the association the right to add new conditions to the contract by subsequent regulations, but it has no power to make such regulations retroactive, so as to render the policy forfeitable, or diminish the amount recoverable thereunder, because of acts done by the insured previous to their enactment.

3. SAME—EFFECT OF SUBSEQUENT CHANGE IN CONDITIONS OF POLICY.

Where, after the issuance of a life policy, its conditions were changed, as therein provided might be done, by a by-law enacted by the association reducing the amount recoverable thereon in case the death of the insured should be caused or superinduced by the use of intoxicating liquors, the question whether the amount recoverable on the subsequent death of the insured, admitted to have been superinduced by the use of intoxicating liquors, is affected by such by-law, becomes one of fact, depending on whether the disease causing his death became seated in fatal and incurable form before or after the by-law took effect.

4. SAME—ENACTMENT OF BY-LAWS BY ASSOCIATION—SUPREME LODGE KNIGHTS OF PYTHIAS.

Article 6 of the by-laws of the Supreme Lodge Knights of Pythias, relating to the conditions of insurance of members of the endowment rank, and adopted September 1, 1896, was legally enacted, and is valid.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The plaintiff in error, Jane Wiley Lloyd, was plaintiff below in an action of assumpsit founded on a certificate of membership and policy of life insurance issued by the defendant, Supreme Lodge Knights of Pythias, to her husband, Walter C. Lloyd, who died March 15, 1897. The certificate was issued June 15, 1889, in the form adopted by the order for life insurance, is designated "fourth class," and for the sum of \$3,000. It names the plaintiff as the beneficiary; and liability, in the event of death of the assured, is conditioned, among other requirements, upon the payment of the admission fee and "of all assessments as required," and "full compliance with all the laws governing this rank now in force, or that may hereafter be enacted, and shall be in good standing under said laws." The application of the assured is made a part of the contract, and states that the contract "shall be governed by all the laws, rules, and regulations of the order governing the rank, now in force, or that may hereafter be enacted by the supreme lodge." With the application the assured further states that he uses intoxicating liquors "very moderately," and that he has always been temperate in their use. The testimony is undisputed that the immediate cause of death of the assured was "cirrhosis of liver," and it was conceded on behalf of the plaintiff that "the cause of death was superinduced by alcohol." There is testimony in the record tending to show that this disease was contracted as early as the summer of 1894; that the attending physician then regarded it as chronic, and incurable, and in such view that it would "terminate fatally sooner or later." The habitual use of intoxicating liquor by the assured appears both before and after 1894, but, so far as there is direct proof of immoderate use, it relates to the last year of his life. The following by-law was introduced on behalf of the defendant, as an enactment by the supreme lodge on September 1, 1896, taking effect sixty days thereafter pursuant to the constitution: "Art. 6. Beneficiaries, Conditions of Payment, Contract, etc. If the death of any member of endowment rank heretofore admitted into the first, second, third, or fourth classes, or hereafter admitted, shall result from suicide, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then the amount to be paid upon such member's certificate shall be a sum only in proportion to the whole amount as the matured

life expectancy is to the entire expectancy at date of admission to the endowment rank, the expectation of life based upon the American experience table of mortality in force at the time of such death to govern." The plaintiff objected to this by-law (1) as not adopted in accordance with the constitution; (2) as "void, because retroactive"; (3) as unreasonable; (4) as not adopted by the supreme lodge; (5) as not, in terms and effect, retroactive; and (6) as not properly entitled. Exceptions were preserved to the admission of the by-law and to subsequent refusal to exclude it from consideration by the jury. The plaintiff offered the following provisions of the so-called "Constitution of the Supreme Lodge Knights of Pythias," being in fact a mere regulation adopted by the supreme lodge: Section 12: "All laws enacted by the supreme lodge shall be of general application, shall be formulated as statutes, and shall be styled 'supreme statutes' and when introduced and while under consideration shall be styled 'propositions.'" Section 13: "A proposition shall embrace not more than one subject, which shall be clearly expressed in its title." Section 15: "No proposition shall become a statute until it shall have passed three successive readings, the second and third of which shall be had on the same calendar day." Section 18: "The enacting clause of every proposition shall be as follows: 'Be it enacted by the Supreme Lodge, Knights of Pythias,' and shall precede or be a part of the first section of such proposition." Section 19: "All statutes shall take effect sixty days after final passage, unless otherwise provided." And in reference to the action of the supreme lodge, on which the adoption of the above by-law was asserted, the record of the proceedings was introduced, showing the submission of the by-law, with others, for enactment, on August 29, 1896; that "the report was read a first and second time by title and passed" on August 31, 1896; that "the general laws, rules, and regulations of the endowment rank as proposed by the committee, having been read a third time, were enacted" by vote as recited. The defendant produced as a witness the president of the board of control, who identified a by-law contained in a printed book, and stated that it was introduced by him at a meeting of the supreme lodge, held in August or September, 1894, and was adopted by the supreme lodge; that it continued in force "ever since, and was amended in 1896." This testimony was received under objection as incompetent and immaterial, and the following by-law, so referred to, was then received under objection and exception: "If the death of any member of the endowment rank heretofore admitted into the first, second, third, or fourth classes or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then, in such case, the certificate issued to such member and all claims against said endowment rank on account of such membership shall be forfeited." At the close of the testimony the plaintiff renewed the objections to the by-law of 1896, and, the jury being excused, arguments were heard upon the question of its validity and effect, in the course of which counsel for plaintiff made substantially the following statements: That the proof is uncontroverted that the death of the assured resulted from cirrhosis of the liver, which was caused by the use of alcoholic liquors; that it is a question of law whether the by-law is valid and controlling, and whether it applies to the defense, and, if so held, "that is the end of the case," except the question whether there was an intemperate use of intoxicating liquors; that, even if the by-law is held valid, its application should be limited "to those cases where the insured could, by governing themselves in their conduct, avoid the results of the by-law," and in such view plaintiff is entitled to recover \$3,000; and, finally: "It is a question of law. I do not suppose there will be any necessity much for the jury, except to return such verdict as the court may direct." The subsequent proceedings were as follows: "Whereupon the court admitted in evidence the said by-law of 1896 heretofore offered by the defendant, to which ruling of the court, in admitting said by-law in evidence, counsel for plaintiff then and there duly excepted. And thereupon plaintiff, by her counsel, moved the court to strike from the record and exclude from the consideration of the jury the said by-law, which motion of the plaintiff the court overruled, to which action of the court, in overruling said motion,

the plaintiff, by her counsel, then and there duly excepted. Whereupon the defendant, by its counsel, then and there moved the court to instruct the jury to find the issues for the plaintiff, and assess the plaintiff's damages at six hundred and ten dollars and eight cents (\$610.08), and the court then and there granted said motion, and directed the said jury to find the issues for the plaintiff, and to assess the plaintiff's damages at six hundred and ten dollars and eight cents, and directed that a verdict be entered in that amount, which was done accordingly. Thereupon the plaintiff, by her counsel, then and there duly excepted to the action of the court in granting said motion of the defendant, and in directing the jury to assess the plaintiff's damages in the sum of six hundred and ten dollars and eight cents, and in directing that a verdict be entered in that amount." Verdict was returned and judgment entered accordingly.

Howard E. Leach, for plaintiff in error.

Benson Landon, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

This action is founded on a contract of insurance made by the defendant below, Supreme Lodge Knights of Pythias, June 15, 1889, on the life of Walter C. Lloyd, as a member of the order, for \$3,000, and the controversy hinges upon the validity and effect of a by-law which purports to have been adopted by the defendant on September 1, 1896, to become operative 60 days later. The by-law provides: "If the death of any member * * * heretofore admitted * * * or hereafter admitted * * * shall be caused or superinduced by the use of intoxicating liquors," a portion only of the amount insured should be paid, based on certain computations of life expectancy. The contract was entered into subject to the "laws, rules, and regulations of the order" then in force or thereafter "enacted by the supreme lodge"; but the liability of the defendant for the entire amount is undisputed, except for such operation as this by-law may have under the testimony or conceded facts. Oral testimony appears to have been introduced on behalf of the defendant at the close of the case, purporting to show the adoption of a by-law by the supreme lodge "at a convention in August or September, 1894," which declared a forfeiture of insurance upon the same conditions stated in the by-law of 1896. The objection raised of insufficiency of the proof was valid, as it was secondary in character, when certified copies of the record evidence were available under the provisions of the Illinois statute. Hurd's Rev. St. c. 51, § 15; 2 Starr & C. Ann. St. Ill. (2d Ed.) p. 1846. The record shows that the trial below was conducted throughout, in the introduction of testimony and in the motions and discussion on the part of counsel, upon the theory that the validity of the by-law of 1896 was the sole test of liability for the amount of insurance, under the undisputed fact that the subsequent death of the assured was "caused or superinduced by the use of intoxicating liquors," and that upholding the by-law operated per se to defeat recovery, regardless of the time when the disease so caused was in fact contracted. The testimony which tends to show that cirrhosis of the liver existed in the case

of the assured in its fatal stage before the by-law was adopted was apparently set aside without discussion by counsel, or consideration by the court in the final direction of the verdict for defendant. Such retroactive effect of the by-law is neither demanded by its terms nor admissible under the rules applicable to provisions so adopted, and in the argument at the bar of this court counsel for the defendant in error frankly conceded that a by-law thus adopted would not operate to destroy liability for a pre-existing cause of death which was otherwise within the terms of the insurance. The stipulation that the contract "shall be governed by all the laws, rules, and regulations of the order governing the rank now in force or that may hereafter be enacted," and the condition requiring "full compliance with all the laws governing this rank now in force or that may hereafter be enacted," are provisions which frequently appear in like contracts between mutual benefit associations and their members. The right so reserved in the association is well recognized as authorizing it to subject members to further requirements and conditions of future liability by reasonable enactments within the objects and for the general welfare of the association, and to apply the regulations to prior contracts, but to the extent only that the conditions thus imposed arise after the enactment. No authority rests in the association under this reservation to repudiate obligations as insurer which have become vested under the contract, and the by-law which imposes a new condition, or exempts from liability for a cause of death previously within the insurance, cannot be made retroactive to impair or destroy liability for a pre-existing cause which arose under the contract. *Wist v. Grand Lodge*, 22 Or. 271, 29 Pac. 610; *Supreme Lodge v. Knight*, 117 Ind. 497, 20 N. E. 479, 3 L. R. A. 409; *Hale v. Union*, 168 Pa. St. 377, 382, 31 Atl. 1066; *Nibl. Ben. Soc. & Acc. Ins.* (2d Ed.) p. 65. The by-law in question is not, in terms, opposed to the rule thus stated. Although it relates to members "heretofore admitted," its terms are prospective, only, in reference to the cause of death, namely, "if such death shall be caused or superinduced by the use of intoxicating liquors" (*Wist v. Grand Lodge*, supra); and such provision, in the absence of clear expression otherwise, must be construed as prospective only, "although its words are broad enough in their literal extent to comprehend existing cases" (*Suth. St. Const.* §§ 464, 465; *Sedg. St. & Const. Law* [2d Ed.] 161).

The questions of fact presented on the introduction of the by-law of 1896 were: (1) Whether the disease which produced the death of the assured was caused or superinduced by the use of intoxicating liquors; and, if so caused, (2) whether the disease became seated in fatal and incurable form before or after the time from which the by-law is operative; or (3) whether the use of intoxicating liquors after the by-law became effective caused or superinduced the death. The answer to the first question in the affirmative was conceded by counsel upon both sides on the undisputed testimony, but the other two inquiries were not covered by the admission, and were clearly for the jury to determine so far as there was room for difference of opinion under the testimony. The contention in support of the

judgment that all issues of fact were waived by the remarks made by counsel for plaintiff in error on the motion to direct a verdict are not sustainable to that extent. The discussion related to the erroneous construction of the by-law which was there assumed, and the remarks of counsel in that view—that “the cause of death was superinduced by alcohol,” that “there is no question about it, under the proof,” and that “it is a question of law. I do not suppose there will be any necessity much for the jury except to return such verdict as the court may direct”—cannot be treated, in the face of cogent testimony of contrary effect, as an admission that the fatal disease was contracted after the by-law became effective. On the construction of the by-law adopted in this opinion the issues of fact above indicated remained for the jury to determine, and the direction thereupon in favor of the defendant was erroneous. If death resulted in this case from cirrhosis of the liver, which had reached its fatal stage before the by-law became operative, and was not caused or superinduced by the use of intoxicating liquors subsequent to the adoption, the right of recovery upon the contract was not affected by the by-law. The question suggested in the briefs of counsel of the possible effect of a pre-existing by-law exempting the insurer from liability for the same causes of death specified in the by-law of 1896 cannot be considered on this record, for the reason that no competent evidence is presented of such provision. If the proof upon another trial shows the adoption of a by-law upon the same subject in 1894, and that the cause of death in this instance arose during its existence, it will devolve upon the trial court to determine whether the new enactment operated as a repeal of all the provisions of the earlier by-law, or as a mere modification. See *U. S. v. Tynen*, 11 Wall. 88, 92, 20 L. Ed. 153; *Murdock v. City of Memphis*, 20 Wall. 590, 617, 22 L. Ed. 429; *U. S. v. Bowen*, 100 U. S. 508, 512, 25 L. Ed. 631; *King v. Cornell*, 106 U. S. 395, 396, 1 Sup. Ct. 312, 27 L. Ed. 60; *District of Columbia v. Hutton*, 143 U. S. 18, 26, 12 Sup. Ct. 369, 36 L. Ed. 60. Also, *Tracy v. Tuffly*, 134 U. S. 206, 223, 10 Sup. Ct. 527, 33 L. Ed. 879; *Steamship Co. v. Joliffe*, 2 Wall. 450, 458, 17 L. Ed. 805. The assignments of error founded on objections to the validity of the by-law of 1896 fall within the recent decisions in *Supreme Lodge v. Kutscher*, 179 Ill. 340, 345, 53 N. E. 620, *Same v. Trebbe*, 179 Ill. 348, 352, 53 N. E. 730, and *Dornes v. Supreme Lodge*, 75 Miss. 466, 23 South. 191, and are therefore overruled.

The judgment below is reversed, with direction to grant a new trial.

CREW LEVICK CO. v. BRITISH & FOREIGN MARINE INS. CO. OF LIVERPOOL, Limited.

(Circuit Court, E. D. Pennsylvania. November 20, 1899.)

No. 27.

INSURANCE—GOODS IN TRANSIT—TERMINATION OF RISK.

Under a policy of insurance in form a marine policy, containing the usual provisions for the continuance of the risk from the time the goods insured were loaded on “said vessel” until they were “safely landed,” but having

a rider attached showing that the property insured was "oil contained in tank cars in transit," the risk terminated when the cars reached their destination, and were placed upon the private side track of the insured beside his warehouse.

Heard on motion by plaintiff for judgment on the verdict and motion by defendant for judgment notwithstanding the verdict.

Theo. F. Jenkins, for plaintiff.

H. N. Paul, for defendant.

DALLAS, Circuit Judge. The plaintiff's rule for judgment for want of a sufficient affidavit of defense was discharged for reasons set forth in an opinion of this court, which is reported in (C. C.) 77 Fed. 858. At the present term, the case having come on for trial, a verdict for the plaintiffs was directed, subject to certain points, which, being then presented on behalf of the defendant, were reserved by the court as follows:

"(1) Under the evidence in this case, the oil which was destroyed by fire, and for which the plaintiff claims to recover, was not 'in transit,' and therefore was not within the terms of the defendant's policy in suit. Consequently your verdict must be for the defendant. (2) The policy in suit provides: 'This insurance warranted to be in all cases null and void to the extent of any insurance with any fire insurance company directly or indirectly covering upon the same property, whether prior or subsequent hereto in date.' Under the uncontradicted evidence in this case, the plaintiff was carrying, at the time of the fire, insurance with a number of fire insurance companies to the extent of \$15,500 'on merchandise, consisting chiefly of oils in barrels and tanks, and barrels for same, their own, held in trust, or on consignment, and sold, but not removed, contained in brick warehouse building and in tank cars on sidings adjoining premises.' The oil to recover for which this suit is brought was in tank cars on sidings adjoining the premises of the Crew Levick Company; consequently, if the policy in suit covered the oil after it was placed by the Pennsylvania Railroad Company upon the siding adjoining the premises of the Crew Levick Company, the insurance was null and void, and your verdict must be for the defendant."

These points present the only questions in the case, and my object in reserving them was to enable me to read the stenographer's report of the evidence before passing upon them. Having done this, I am now fully satisfied that, as respects the subject which was considered upon the former rule for judgment, there is no material difference between the facts as set up in the affidavit of defense and as proved upon the trial. Therefore the first point is affirmed.

I am also of opinion that the second point was well taken. The facts it recites were indisputably established, and the legal effect which it ascribes to them is, I think, unquestionable.

The plaintiff's motion for judgment upon the verdict is overruled. The defendant's motion for judgment for the defendant notwithstanding the verdict is granted, and judgment will be entered accordingly.

UNITED STATES v. SIMON et al.

(Circuit Court of Appeals, Second Circuit. November 15, 1899.)

No. 13.

BONDS—GOVERNMENT CONTRACTORS—ACTION.

A plaintiff cannot recover on a bond given by a contractor for government work under Act Aug. 13, 1894 (28 Stat. c. 280), on an allegation that such contractor is indebted to him for work and material supplied in the prosecution of the work, where the only evidence in support of such allegation is that plaintiff hired certain barges to a third person, to whom they were charged, and shows no contract relation with defendant.

In Error to the Circuit Court of the United States for the Southern District of New York.

Howard P. Okie, for the United States.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The act of August 13, 1894 (chapter 280, 28 Stat.), provides that any person or persons entering into a formal contract with the United States for the prosecution of any public work shall be required before commencing such work to execute the usual bond, with sureties, with the additional obligation that "such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials in the prosecution of the work provided for in such contract." It further provides that the person or persons supplying such labor and materials shall have a right of action, and may bring suit on the bond in the name of the United States for his or their use and benefit. The defendant Kaufman Simon on September 8, 1896, entered into a contract with the government for certain dredging in the Patchogue river. The bond required by the act of 1894 was at the same time executed by the three defendants, conditioned for the faithful performance of the contract, and also that the said Kaufman Simon "shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work."

The corporation for whose use and benefit this action was brought alleged in the complaint that:

"On June 22, 1897, the said defendant Kaufman Simon was indebted to the said Sheridan & Shea Company in the sum of \$3,212.99 on an account for goods sold and delivered to defendant, and for labor and materials furnished at the request of said defendant in the prosecution of the work provided for in said contract."

Upon the trial, plaintiff wholly failed to prove these allegations. It appeared by the undisputed evidence of the president of the Sheridan & Shea Company that he chartered three scows to a gentleman representing the firm of E. R. Jackson & Co. This gentleman was their foreman, and, after making oral arrangements with him, the terms of the contract between the two corporations were embodied in a letter which was exchanged between them and which was offered on the trial, and marked 'Exhibit A,' but, for some unaccountable reason, does not appear in the record. The contract having been

made with Jackson & Co., the scows were duly furnished to them. The charges for their use were made against Jackson & Co. on the books of the Sheridan & Shea Company. The bills were sent to Jackson & Co., and efforts made to collect from them. Jackson's foreman stated to Sheridan that "his work was for the government, down at Patchogue"; that it was for that he wanted the scows. Subsequently Sheridan had a conversation with Kaufman Simon in which he told him he had made a contract with Jackson & Co., and asked him about their standing, to which he (Simon) replied that they were perfectly responsible, and also told him (Sheridan) the nature of the work at Patchogue. This certainly falls far short of proof of a supplying to Simon of labor or materials in the prosecution of the work, and counsel for the plaintiff in error wholly fails to indicate upon what theory he contends that defendant is responsible. The only suggestion contained in the brief is that the circuit judge erred in holding that "furnishing scows to move materials to be used on the contract was not supplying labor or furnishing materials, within the meaning of the bond." Careful examination of the record, however, fails to disclose any such holding. Judgment affirmed.

In re WOLF.

(District Court, N. D. Iowa, Cedar Rapids Division. December 11, 1899.)

BANKRUPTCY—LANDLORD'S LIEN—WAIVER.

Under the laws of Iowa, as construed by its courts, a landlord who takes from his tenant a mortgage on the personalty used or kept on the demised premises, covering not only arrears of rent, but also other debts, such as for money loaned, for personal services, and the like, is deemed to have waived his statutory lien on such property for rent due, and he will not be entitled to enforce such a lien against the property in the hands of the tenant's trustee in bankruptcy.

In Bankruptcy. On review of decision of referee in bankruptcy.
Deacon & Good, for trustee in bankruptcy.
Charles W. Kepler, for claimant.

SHIRAS, District Judge. Under the provisions of the Code of Iowa, a landlord is entitled to a lien for rent due upon personal property used or kept on the leased premises. In construing these provisions of the Code, the state supreme court has repeatedly held that if the landlord takes a mortgage on the property as a security for rent and other indebtedness, and so mingles or confuses the several claims that, if payments be made, it would be impossible to determine whether the payments were properly applicable to the rent or not, such action is deemed to be a waiver of the statutory lien. *Smith v. Dayton*, 94 Iowa, 102, 62 N. W. 650; *Ladner v. Balsley*, 103 Iowa, 679, 72 N. W. 787. The finding of the referee shows that in this case a note for \$800 was executed and secured by a mortgage; it being intended by the parties that this note should include all the indebtedness due from the bankrupt to the creditor, including rental, money loaned, services rendered, and the like. The facts

bring the case within the rule laid down by the supreme court of Iowa in the cases above cited, and the ruling of the referee that the claimant is not entitled to a landlord's lien is affirmed.

In re COHN.

(District Court, S. D. New York. December 9, 1899.)

1. **BANKRUPTCY—SUMMARY JURISDICTION—RIGHTS OF ADVERSE CLAIMANT.**

Where a trustee in bankruptcy claims, as assets of the estate, property which is in the actual possession of a third person, who asserts his own title thereto in opposition to the bankrupt and the trustee, the rights of such adverse claimant cannot be adjudicated in a summary manner in the bankruptcy proceeding, but only in a plenary suit brought against him by the trustee.

2. **SAME.**

Where a trustee in bankruptcy claimed that the bankrupt was the real owner of a business which had been carried on for several years in the name of the bankrupt's daughter, but the latter was in the actual possession and management of the business, and claimed it as her own, *held*, that her rights could not be determined summarily in the bankruptcy proceeding; that she could not be treated as a defendant in that proceeding; that the trustee had no authority to collect outstanding accounts of the business, and would be stayed from so doing; and that books of account relating to the business, which were produced by the daughter on her examination as a witness in the bankruptcy proceedings, and impounded by the referee, must be restored to her.

In Bankruptcy. On review of decision of referee in bankruptcy.

Roger M. Sherman, for witness.

Thomas D. Adams and James Murphy, for trustee in bankruptcy.

BROWN, District Judge. Upon the voluminous evidence submitted, I think the proceedings against the witness Lena Williamson, a daughter of the bankrupt, have exceeded the proper limits. She was called as a witness by the creditors, and was examined in their behalf. The evidence leaves no doubt that the business which the creditors claim to have been the business of the bankrupt, was carried on in the daughter's name for two or three years before the bankruptcy proceedings; that the business was claimed by the witness as her own; that the only bank account used in the business was her own genuine bank account, in which receipts of the business were deposited and on which checks in payment of its obligations were drawn. She was, therefore, in the position of a third person not only claiming title, but in possession of the business, as much as its intangible nature was capable of being in possession. If there was any fraud as between her and her mother, so that her title could be avoided in favor of the trustee, that could only be inquired into and adjudged in a plenary suit brought against her by the trustee. Her rights could not be adjudicated in a summary manner by the referee in the bankruptcy proceeding. *Smith v. Mason*, 14 Wall. 419, 20 L. Ed. 748; *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481. For the same reason she could not be treated as a defendant in the proceeding before the referee. The books which have been im-

pounded by the referee were not produced by the bankrupt, but by the witness as her own books, under the threat of imprisonment for omission to produce them. The summary collection or attempt to collect accounts apparently due to the witness, is also unauthorized and beyond the proper limits of the trustee's authority.

The petitioner is entitled to a stay of the proceedings on the part of the trustee complained of, and to the return of the books impounded.

Under the restraining order signed by the referee, the trustee has already had abundant opportunity to commence a plenary suit against the witness for the recovery of assets, if the facts are thought sufficient to justify such a suit. At this season such an injunction is specially injurious, unless the trustee's rights are clear. The referee's restraining order should, therefore, be vacated unless proper suit be commenced by the 15th inst.

In re NELSON.

(District Court, W. D. Wisconsin. January 11, 1899.)

No. 3.

1. **BANKRUPTCY—ACTS OF BANKRUPTCY—PREFERENCE.**

Where a debtor, many years before the enactment of the bankruptcy law, gave a promissory note, with warrant of attorney, based upon a good consideration, on which the creditor entered judgment after the passage of the law, the debtor not procuring such action to be taken, nor being able to prevent it, it cannot be said that he has "suffered or permitted" the creditor to "obtain a preference through legal proceedings," within the meaning of Bankr. Act 1898, § 3a, cl. 3, and therefore the transaction does not constitute an act of bankruptcy on the part of the debtor.

2. **SAME—PETITION—AVERMENTS.**

A petition in involuntary bankruptcy should allege issuable facts with reasonable and sufficient certainty; and an allegation that the debtor has, within four months last past, transferred large amounts of his property to one or more of his creditors, with intent to prefer such creditors over his other creditors, is insufficient as an averment of an act of bankruptcy. The specific fact relied on should be alleged with particulars as to time, place, person, and circumstances.

3. **SAME—VERIFICATION OF PETITION.**

Where the truth of the matters of fact alleged in a petition in involuntary bankruptcy is within the knowledge of the petitioning creditors, the petition should be verified by them in person, and not by an attorney for them.

4. **SAME—AMENDMENT OF PETITION.**

Where a petition in involuntary bankruptcy attempts to set forth acts of bankruptcy by the respondent which would justify an adjudication if properly alleged and proved, but its averments are so vague and general as not to be sufficient in law, and the petition is verified by the attorney of the petitioning creditors, instead of by the creditors themselves, the court of bankruptcy, instead of dismissing the petition, may allow it to be amended and verified anew by the petitioners.

In Bankruptcy. On motion to dismiss petition in involuntary bankruptcy.

D. K. Tenney and Erdahl & Swanson, for petitioning creditors.
Wm. F. Vilas and R. M. Bashford, for respondent.

BUNN, District Judge. I think the petition in this case must be dismissed unless the petitioners be allowed to amend their petition so as to conform to the law and the forms of procedure provided by the supreme court.

1. I am of opinion that the allegation that Nelson, on the 1st day of November, 1898, suffered and permitted, while insolvent, one Mrs. Johnston, a creditor, to obtain a preference through legal proceedings by entry of judgment on a note dated 5th February, 1885, payable in five years after date, in the sum of \$8,960, upon a warrant of attorney, is insufficient. He had a right to give a note, with warrant of attorney, so long before the bankruptcy law was passed, and, having given it upon good consideration, it was not in his power to prevent the entry of a judgment against him. What was not in his power to prevent he can hardly be said to have suffered or procured. To make the entry of judgment an act of bankruptcy, there should be some fault on his part by way of procuring or suffering the act to be done. This case comes squarely within the decisions of the supreme court in *Wilson v. Bank*, 17 Wall. 473, 21 L. Ed. 723, and *Bank v. Warren*, 96 U. S. 539, 24 L. Ed. 640.

2. The allegation that Nelson had, within four months last past, transferred, while insolvent, large amounts and values of his property to one or more of his creditors, with an intent to prefer said creditors over his other creditors, is quite insufficient as an allegation of fact. The specific fact relied upon should be alleged with time, place, person, and circumstances, as in any other allegation of fraud in a pleading either in law or equity. There is no allegation of fact here that the creditor can meet. He is not apprised of what it is intended to prove against him. The allegations should be allegations of fact, made with reasonable and sufficient certainty. The rule is well laid down by Judge Blodgett in *Re Butterfield*, 5 Biss. 120, Fed. Cas. No. 2,247; *Black*, Bankr. 108; *In re Rathbone*, 1 N. B. R. 50, 65, Fed. Cas. No. 11,580; *In re Beardsley*, 1 N. B. R. 52, Fed. Cas. No. 1,183; *In re Marvson*, 1 N. B. R. 115, Fed. Cas. No. 9,318; *Ex parte Potts*, 19 Fed. Cas. 1199 (No. 11,344); *In re Randall*, 20 Fed. Cas. 222 (No. 11,551). There is no analogy between a petition in involuntary bankruptcy and the affidavit to obtain an attachment, where the form of the petition is prescribed. The form of the petition in bankruptcy is not prescribed by the statute, but by the rules of the supreme court, which plainly require the facts to be stated. The statute contemplates that a trial by jury may be had upon the allegations of the petition in case the debtor so chooses, and this shows the necessity of alleging issuable facts, and not mere conclusions.

3. I think, also, the verification should have been by the petitioners, and not by the attorney. I am not prepared to hold that there could not be a case where the verification might be made by the attorney where the facts are within his knowledge, and not within the knowledge of the petitioners, and the attorney is authorized by the petitioners to make it. But it is not necessary to decide that question here. The allegations are those of the petitioners, and not of the attorney. Where the allegations are all in positive form,

as in this case, the presumption is that the truth of the allegations is within the knowledge of the petitioners. The form prescribed by the supreme court contemplates that the verification is to be made by the petitioners, and not by the attorney. It is true that these rules were not in force at the time the petition was filed, but the statute requiring a verification was in force, and it is not too late to comply with the rule.

4. It is urged by attorneys for Mr. Nelson on this hearing that there is not enough in the petition to give this court jurisdiction, and that, therefore, no amendment to the petition or verification can be allowed, and that the petition must be dismissed. I cannot agree with this contention, and shall allow the petitioners to amend their petition, and make a new verification complying with the statute and the rules of the supreme court by the third Monday of January, 1899. If no amendment is made, the petition will be dismissed.

In re STEELE et al.

(District Court, S. D. Iowa, E. D. December 12, 1899.)

1. **BANKRUPTCY—ASSETS—LIFE INSURANCE POLICY.**

A policy of insurance on the life of a bankrupt, having a cash surrender value payable to the bankrupt himself, or to his estate or personal representatives, passes to, and vests in, his trustee as assets of the estate in bankruptcy, subject to the right of the bankrupt to redeem the same by paying to the trustee its surrender value, notwithstanding that a statute of the state (Code Iowa, § 1805) provides that the proceeds of such policies shall be exempt from liability for the debts of the assured, and although section 6 of the bankruptcy act declares that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws"; for the general language of section 6 is limited and restrained in this instance by the specific provision of section 70, cl. 5, that such a policy "shall pass to the trustee as assets," unless the bankrupt pays or secures to him its surrender value.

2. **SAME.**

A policy of insurance on the life of a bankrupt, payable to himself, his executors, administrators, or assigns, no other person having any interest in the policy or its proceeds, will vest in his trustee as assets of his estate, subject to the right of the bankrupt to redeem the same by paying or securing to the trustee its cash surrender value.

3. **SAME.**

Where a wife holds a policy of insurance on the life of her husband, by the terms of which she is bound to pay the premiums and is entitled to receive the proceeds of the policy, such policy will become a part of the assets of her estate in bankruptcy, unless she secures or pays to her trustee its cash surrender value.

4. **SAME.**

Where a policy of life insurance provides that the principal sum shall be paid to the assured himself at the end of a stipulated term of years, if he is then living, or to his wife, if he dies before the expiration of the term, its surrender value is payable to the assured, and the policy will pass to his trustee as assets in bankruptcy, unless redeemed by the bankrupt as provided in the statute.

5. **SAME.**

A policy of insurance on the life of a bankrupt, payable to his wife, is her separate property, and not assets of his estate in bankruptcy.

6. SAME.

Where a policy of life insurance, payable to the executors, administrators, or assigns of the assured, was by him assigned to his wife, by a writing duly executed and attached to the policy, before the enactment of the bankruptcy law, nothing appearing to impugn the good faith of the transaction, the wife is the beneficial owner of the policy, and it will not pass to the husband's trustee in bankruptcy as assets of his estate.

In Bankruptcy. On review of decision of referee in bankruptcy.

W. J. Roberts and Hillhouse Buel, for creditors and trustee in bankruptcy.

W. B. Collins, for bankrupts.

SHIRAS, District Judge. From the record certified to the court in this case it appears that the firm of Steele & Co., and the partners therein, Anna M. Steele, Daniel Steele, William M. Steele, and Daniel H. Steele, have been duly adjudged bankrupts in this district, and, in the proceedings had before the referee, the question arose as to the rights of the creditors represented by the trustee in certain policies of life insurance held by the bankrupts, and from the ruling made by the referee an appeal has been taken to this court. It appears from the evidence that Anna M. Steele is the wife of Daniel Steele; that Daniel, William M., and Daniel H. Steele are and were, when the proceedings in bankruptcy were instituted, heads of families, and were then, and are now, citizens and residents of the state of Iowa. Of the policies in question, three are on the life of Daniel Steele, two on the life of William M. Steele, and one on the life of Daniel H. Steele.

Under the broad provisions of section 1805 of the Code of Iowa, none of these policies could be now subjected to process in favor of creditors, or be rendered available to the creditors by proceedings other than those instituted under the bankrupt act; and, as the policies are exempt from liability to creditors by this provision of the state statute, it is earnestly contended that they must be held exempt in the bankruptcy proceedings by reason of the declaration contained in section 6 of the bankrupt act, to the effect that the act shall not affect the allowance to a bankrupt of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition. In the case of *In re Lange* (D. C.) 91 Fed. 361, I held that the general provisions of section 6 of the act were limited and controlled by the exception contained in section 70, and that, construing the two sections together, it must be held that, where a bankrupt held a policy payable to himself, his heirs or legal representatives, the surrender value thereof would be part of the assets of his estate in bankruptcy.

While I freely admit that the question is not free from doubt, I shall adhere to the view expressed in the *Lange Case* of the meaning of the statute; and therefore the remaining question is, what is the result of the application of this rule to the policies involved in this case?

The policy issued by the Mutual Benefit Life Insurance Company upon the life of Daniel Steele, numbered 109,795, for the sum of \$2,000, is payable to Daniel Steele, his executors, administrators, or as-

signs. The surrender value of this policy is payable to the bankrupt, no other person having any interest in the policy or its proceeds, and the policy will therefore become part of the assets of the bankrupt's estate, unless he avails himself of the right to pay or secure the surrender value to the trustee.

There are two policies issued by the Mutual Life Insurance Company of New York,—one numbered 31,523, for the sum of \$2,000, and one numbered 47,739, for the sum of \$3,000. In form, these policies are contracts between Anna M. Steele and the insurance company, the life insured being that of Daniel Steele, the husband of Anna M. By the terms of the contract, it is Anna M. Steele who is bound to pay the annual premiums, and she is the person to whom the proceeds of the policy are made payable. Under these circumstances, Mrs. Steele would be entitled to the surrender value of the policies, if the same were now terminated, and she alone could contract with the company to terminate the same by receiving the surrender value thereof. These policies are therefore the property of Mrs. Steele. They have a surrender value, payable to her, and, as she is one of the bankrupts, these policies are part of the assets of her estate to which the trustee is entitled, unless the surrender value is paid or secured to him by the bankrupt.

The policy on the life of William M. Steele issued by the New England Mutual Life Insurance Company, numbered 105,575, for the sum of \$5,000, is in the nature of an endowment policy; it being therein provided that, at the end of 48 years, the principal sum shall be paid to William M. Steele, if then living, but, in case of his death before that date, the amount should be paid to his wife. The surrender value of a policy of this form is clearly payable to William M. Steele, the bankrupt, and therefore the policy will pass to the trustee, unless the surrender value is settled with him as provided for in the act.

The remaining policy on the life of William M. Steele is in the Penn Mutual Life Company, numbered 102,082, for \$5,000, and is payable to his wife, Gracie. The wife is the beneficiary of this policy, and, as she is not one of the bankrupts, her interest therein cannot be destroyed by treating the policy as part of the estate of her bankrupt husband. This policy must be deemed to be her property, in which the trustee has no interest.

The remaining policy is one issued by the Northwestern Mutual Life Insurance Company in the sum of \$5,000, numbered 322,790, on the life of Daniel H. Steele; the company contracting to pay the sum named in the policy to the executors, administrators, or assigns of Daniel H. Steele. Under date of May 21, 1895, Daniel H. Steele, by a writing duly executed and attached to the policy, assigned the same to Helen B. Stafford, to whom he was then engaged to be married, and who is now his wife. The effect of this assignment was to make the policy one payable to the wife of the insured. She became the beneficiary thereof, and is entitled to the proceeds of the policy. This assignment was made in 1895, long before the adoption of the bankrupt act, and there is nothing to impugn the good faith of the transaction. I therefore hold that this policy is not part of the assets of the bankrupt Daniel H. Steele, and the trustee has no interest in or

right thereto. Unless, therefore, the bankrupts promptly exercise their right to pay or secure to the trustee the surrender value of the policies in the Mutual Benefit, the Mutual Life, and the New England Companies, the same will become assets of the estate in the hands of the trustee. The referee, upon receiving this opinion, will at once send notice by mail to the bankrupts of the ruling of the court, which affirms the rulings of the referee from which the appeal was taken.

In re FREUND.

(District Court, S. D. New York. December 7, 1899.)

1. **BANKRUPTCY—OPPOSITION TO DISCHARGE — CONCEALMENT OF ASSETS — EVIDENCE.**

On opposition to a bankrupt's application for discharge, on the ground of his having concealed assets from his trustee, it appeared that he had been conducting a certain business under a power of attorney from his wife, acting in all respects as if the business were his own, but that the stock in trade had been transferred to the wife two years before by itemized bills of sale, and that the husband had been insolvent for several years, and could not hold property in his own name. There was no evidence that the bankrupt had contributed any capital to the purchase of the business, but it was shown that the assets of his previous business were conveyed, at his failure, in liquidation of debts exceeding their value. *Held*, that the evidence was not sufficient to prove that the business in question belonged to the bankrupt.

2. **SAME—OMISSION OF PROPERTY FROM SCHEDULE.**

The mere fact that a bankrupt omitted to list in his schedule of assets certain furniture which he had bought for his wife 26 years before, and which was regarded as her property, is not such a knowing and fraudulent concealment of property from his trustee in bankruptcy as will forfeit his right to a discharge.

In Bankruptcy. On bankrupt's application for discharge, and opposition thereto by creditors.

Blumenstiel & Hirsch, for bankrupt.

Rudolf Dulon, opposed.

BROWN, District Judge. The evidence is insufficient to warrant finding that the business conducted since April, 1897, at 339 Grand street is assets of the bankrupt rather than the property of his wife. The bills of sale made out to her of all the goods in the store, item by item, dated April 1, 1897, are prima facie evidence of her title. The bankrupt had failed in September, 1895, owing all the debts named in his present schedules. He could not hold property, or carry on his business without subjecting the goods to immediate sale on execution. There is no reason, therefore, to doubt that the business was intended to be the property of his wife. The bankrupt managed the business under a power of attorney from her; and in their efforts to make a living by this business, he no doubt acted throughout as if the business were his own. But in all this there was nothing inconsistent with the wife's lawful ownership of the business, or with their unity of aim and labor to win support for their family and gradually to

pay the purchase price out of the earnings of the business, upon account of which \$1,400 has in fact been already paid.

There is no evidence that the bankrupt himself contributed any capital towards the purchase of that business, either in 1897 or since. The conveyance of the assets of his previous business upon his failure more than a year and a half before, was made, as the testimony shows, on account of loans of money and indorsements by his brother Moses to the amount of \$12,000, which the property conveyed was not sufficient to meet. As there is no testimony opposed to this, nor circumstances incompatible with its truth, it must be accepted as a fact. The loss of the moneys raised by Mrs. Freund by mortgage on her house to establish a business in Columbus avenue and Third avenue during that year and a half, tends to support the truth of the defendant's testimony. I find, therefore, that the specification alleging the Grand street business to be the property of the defendant is not sustained. And the same as respects the furniture to the amount of about \$1,000 bought for his wife about 26 years ago which presumably was intended as a gift to her at that time. To make this a ground for withholding a discharge, it would be necessary to find that this was knowingly and fraudulently concealed from the trustee, constituting a criminal offense punishable by imprisonment (Bankr. Act, § 14b, subd. 1; *Id.* § 29b, subd. 1); or else that the bankrupt made knowingly and fraudulently a false oath in reference to it. Beyond the mere omission of this property from the schedules, there has been no concealment. After this length of time the furniture must be of comparatively little value; and whatever its value, it was probably and naturally regarded as the wife's, so that whether strictly her property or not, the circumstances do not warrant finding its omission from the schedules to have been a fraudulent concealment constituting a criminal offense.

The discharge should, therefore, be granted.

In re CHALLONER.

(District Court, N. D. Illinois, N. D. October 30, 1899.)

No. 1,653.

1. **BANKRUPTCY—DEBTS RELEASED BY DISCHARGE—ALIMONY.**

In Illinois, under the decisions of the courts of that state as to the nature of the obligation created by a decree awarding alimony to a divorced wife, arrears of such alimony, due from a bankrupt to his wife at the time of his adjudication in bankruptcy, constitute a debt provable against his estate, and such as will be released by his discharge in bankruptcy.

2. **SAME—AFTER-ACCRUING ALIMONY.**

As to alimony accruing under such decree after the adjudication in bankruptcy, the court of bankruptcy will restrain any proceedings by the bankrupt's wife in the state court looking to its collection, until the question of his discharge shall have been determined, in order that he may plead his discharge in the proceedings in the state court.

In Bankruptcy. On motion to dissolve restraining order.

Charles E. George and C. F. Gooding, for bankrupt.
C. W. Foltz, for creditor.

KOHLSAAT, District Judge. This matter comes before me on motion to dissolve the order heretofore entered herein restraining the divorced wife of the bankrupt from attempting to collect alimony under a decree of a state court pending the bankruptcy proceedings in this court, and also a cross motion to punish said divorced wife and her attorneys for disobedience of said order. The matter has been submitted on briefs, and the point for decision is as to whether or not the duty of the bankrupt under the decree for alimony is such a debt as will be released by a discharge in bankruptcy. Under the decisions of the courts of Illinois, I am satisfied that money due under the decree prior to the adjudication as a bankrupt in this court is a debt, under the bankruptcy law. It is not necessary that this court pass upon the status of the money which may become due thereunder after such adjudication; but, in order that the bankrupt may have the full benefit of the bankruptcy law, this court will restrain any proceedings by the divorced wife in the state court under the decree until the question of the discharge of the bankrupt has been determined, and then he may avail himself of such discharge in the proceedings in the state court to as full an extent as he may be entitled to do.

In re O'CONNELL.

(District Court, S. D. New York. December 4, 1899.)

BANKRUPTCY—ATTORNEY'S FEE IN VOLUNTARY CASES.

In a case of voluntary bankruptcy, where no assets were scheduled, and the only money in the trustee's hands was recovered by him through a suit to set aside fraudulent conveyances by the bankrupt; where the case was free from special difficulties, and the discharge not contested; and where the bankrupt's attorney had received from the bankrupt's brother a larger fee than would ordinarily be allowed by the court out of the estate,—*held*, that the court would not authorize the payment of a fee to such attorney out of the funds so recovered and held by the trustee.

In Bankruptcy. On application for allowance of a fee to bankrupt's attorney.

William D. Tyndall, for petitioner.
Edward J. Welch, for trustee.

BROWN, District Judge. The attorney for the bankrupt in a voluntary proceeding applies for an allowance for counsel fee out of the assets under Bankr. Act, § 64b, subd. 3. The schedules showed no assets. The case presented no difficulties except those of the bankrupt's own creating and the specifications in opposition to the discharge were not followed up, and the discharge was finally granted by default. It further appears by the opposing affidavits that the brother of the bankrupt paid to the attorney a sum exceeding what in such a case would ordinarily be allowed by the court in addition to disbursements (*In re Kross* [D. C.] 96 Fed. 816); and that the only

assets now in the trustee's hands are those recovered by the trustee through an action to set aside prior fraudulent conveyances by the bankrupt. The permissive authority given to the court by section 64 to allow a reasonable attorney's fee would be misapplied in granting the application under such circumstances. Assets recovered from fraudulent transfers of the bankrupt ought not to be depleted for his benefit.

The motion is denied.

In re WOLF.

(District Court, N. D. Iowa, Cedar Rapids Division. December 11, 1899.)

1. BANKRUPTCY—PREFERENCE—CHATTEL MORTGAGE.

Where an insolvent debtor gives to one of his creditors a chattel mortgage on his stock in trade, as security for a pre-existing debt then evidenced by a promissory note, and is adjudged bankrupt within four months thereafter, the transaction constitutes a preference, within the meaning of the bankruptcy law, and the creditor cannot enforce his security.

2. SAME—SECURITY FOR ADVANCES.

Where a debtor, endeavoring to save himself from failure in business, procures a loan of money, and at the same time gives a chattel mortgage as security therefor, which is duly recorded, it is not a preference, within the meaning of the bankruptcy law, though the debtor is insolvent, provided no fraud on creditors or on the act is intended.

3. SAME—SECURITY VALID IN PART.

Where a debtor gives a chattel mortgage which shows on its face that it was given in part to secure a pre-existing debt, and in part to secure a new advance of money made at the same time with the mortgage, and there is no actual fraud in the transaction as to other creditors, or upon the bankruptcy act, the mortgagee will be entitled to enforce his security against the estate of the debtor in bankruptcy, to the extent of the money advanced when the mortgage was executed, although it is void as a preference as to the pre-existing debt.

In Bankruptcy. On appeal from ruling of referee on claims of Julius Arkin, a mortgage creditor.

Deacon & Good, for trustee in bankruptcy.

Charles B. Kepler, for creditor.

SHIRAS, District Judge. From the facts certified to the court, it appears that the bankrupt, Wolf, being indebted to Julius Arkin, on the 15th day of May, 1899, executed and delivered to him, as evidence of his indebtedness, a promissory note for \$200, payable in 90 days from date. On the 22d day of July, 1899, the bankrupt borrowed of Arkin the sum of \$100, giving his note therefor, payable in 30 days from date; and to secure this indebtedness, as well as that evidenced by the note dated May 15, 1899, the bankrupt executed and delivered to Arkin a chattel mortgage on his stock of goods in Lisbon, Iowa,—it appearing that Arkin would not advance the loan of \$100 unless the bankrupt would give security to cover, also, the pre-existing indebtedness. Shortly after the execution and recording of this mortgage, Wolf, the mortgagor, was adjudged to be bankrupt, and his

stock in trade was taken possession of and was sold by the trustee; and the mortgagee filed his intervening petition before the referee, praying that he be held to have a valid lien on the stock of goods as security for the indebtedness due him. Upon the hearing before the referee, it was held that the mortgage security was void as to creditors, in that it was a preference, and taken under circumstances rendering it invalid as against the creditors represented by the trustee.

Viewed as a security given to secure the payment of the pre-existing indebtedness evidenced by the note dated May 15th, the holding of the referee that the mortgage was invalid, because thereby a preference was intended to be created in favor of the creditor, is sustained. Viewed, however, as a security for the sum of \$100, money advanced to the bankrupt at the time of the execution of the mortgage, there is nothing shown in the evidence which required the holding that the security given for this loan is not valid. As the security was given for a debt then created, it was a present security, and not a preference which was created by the mortgage; and the case comes within the rule announced by Judge Dillon in *Darby v. Institution*, 1 Dill. 144, Fed. Cas. No. 3,571, wherein it is said that:

"An insolvent person may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money, and give at the time security therefor, provided, always, the transaction be free from fraud in fact, and upon the bankrupt act. And hence it is a settled principle of bankrupt law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or policy of the bankrupt act."

When the mortgage security was taken in this instance, it was shown on the face of the instrument that it was given in part to secure a pre-existing debt, and in part to secure a note of even date. The mortgage was duly recorded, and no other creditor could be misled by the provisions thereof. As between the bankrupt and the creditor, the mortgage was valid, was not tainted with fraud in fact, and the only objection to be urged against the same is that if the trustee should pay the note for \$200, dated May 15th, it would be giving a preference to the mortgagee over the other creditors, as that was a debt created before the giving of the mortgage, whereas the bankrupt had full right to give security for the present loan of \$100. In other words, if the bankrupt had given on the 22d of July a chattel mortgage on his stock to secure the pre-existing debt, evidenced by the note dated May 15th, and on the same day had given a second mortgage to secure the loan of \$100 then advanced as a present consideration, the first mortgage might be nonenforceable against other creditors, under the provisions of the bankrupt act, but the second mortgage would be valid, being given for a present consideration advanced in good faith upon the faith of the security created by the second mortgage. In equity the rights of the parties are not affected by the fact that both the past and present debt are secured by one mortgage instead of two. As already said, there was no effort to mislead creditors by uniting the past debt with the present loan in one note, thus apparently making the past debt a present one, but the actual

situation was made plain on the face of the mortgage. There being no actual fraud in the transaction, no provision of the bankrupt act is violated by holding that Arkin is entitled to the benefit of his security so far as the note for \$100 is involved, and it is so ordered.

In re DOBSON.

(District Court, N. D. Illinois, N. D. December 1, 1899.)

No. 1,613.

BANKRUPTCY—LIENS—VOLUNTARY AND INVOLUNTARY CASES.

Bankr. Act 1898, § 67f, providing that liens obtained through legal proceedings against an insolvent debtor, "at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," is to be construed as applying to voluntary as well as involuntary cases, inasmuch as section 1a, cl. 1, declares that "a person against whom a petition has been filed" shall include a person who has filed a voluntary petition."

In Bankruptcy. On demurrer of trustee in bankruptcy to petition of lien creditor.

William C. Gilbert, for bankrupt.
Gibson Hale, for creditor.

KOHLSAAT, District Judge. The decision of the question at issue herein depends on the construction to be given to paragraph f of section 67 of the bankruptcy act. I hold that this paragraph must be construed by means of the definitions set forth in section 1 of the act. Paragraph a of section 1 states that "a person against whom a petition is filed" shall include a person who has filed a voluntary petition, and I therefore hold that paragraph f of section 67 includes both classes of petitions. The demurrer of the trustee to the amended petition of Howard is accordingly sustained.

In re BUELOW et ux.

(District Court, D. Washington, W. D. November 24, 1899.)

1. BANKRUPTCY—EXEMPTIONS—HOMESTEAD.

Where the state statute (Ballinger's Ann. Codes & St. § 5214) exempts as a homestead "the dwelling house in which the claimant resides and the land on which the same is situated," a bankrupt who resides in a city cannot claim a homestead in a tract of rural land, on which he has not actually lived for several years, although he originally acquired title to it under the United States homestead law, and asserts that he never intended to abandon his residence upon the land.

2. CONSTITUTIONAL LAW—AMENDMENT OF STATUTES.

Under a constitutional provision that "no act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length" (Const. Wash. art. 2, § 37), where an amendatory statute is not complete in itself, but refers to a prior statute, which it changes by adding to its provisions, but does not repeal, so that the full declaration of the legislative will on the subject can be ascertained only by reading both statutes, the later act is void.

3. **BANKRUPTCY—EXEMPTIONS—INVALID EXEMPTION LAW.**

Where the exemption law of the state has been amended by a new statute allowing additional exemptions, but such later act is void for want of conformity to the constitutional requirements as to amending statutes, a bankrupt who has had set apart to him all the exemptions allowed by the original act cannot claim anything further under the amending statute.

4. **SAME—PERSONAL PROPERTY EXEMPT.**

Where a state exemption law sets apart to the householder certain domestic animals, and also provisions and fuel for the maintenance of the family for six months, and provides that a householder who does not possess, or does not choose to retain, such animals, may select and retain other property to the value of \$250, the sum mentioned is to be understood as granted only in lieu of the animals; and a bankrupt who has received such commutation is not to be excluded from claiming a further allowance for provisions and fuel.

5. **SAME—ASSETS IN BANKRUPTCY—INSURANCE POLICY.**

A policy of insurance on the life of a bankrupt, which has no cash surrender value, and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee in bankruptcy, as assets of the estate.

In Bankruptcy. On review of decision of referee in bankruptcy.

H. W. Lueders, for bankrupts.

S. A. Crandall, for creditors.

HANFORD, District Judge. This is a case of voluntary bankruptcy, in which the petitioners have filed exceptions to the decision of the referee disallowing in part their claim to exempt property. It is quite difficult to ascertain from the record the real matter in dispute. I will pass upon the questions discussed orally and in the briefs submitted.

The bankrupts claim as a homestead a tract of land situated in the country, which has not been actually occupied as a home by the family during the several years of their residence in the city of Tacoma, while the husband has been carrying on business as a merchant, and which land was not occupied as a home by the bankrupts at the time of asserting their claim to it as an exempt homestead. The bankrupts also claim the benefit of an act of the legislature of this state relating to exemptions of personal property, approved March 11, 1897, which provides as follows:

"There shall be exempt from execution and attachment to every householder in the state of Washington personal property to the amount and value of one thousand dollars (\$1,000) in addition to the property exempt under section 486 of volume 2 of Hill's Statutes and Codes of the State of Washington: provided, that no property shall be exempt from execution for clerks', laborers', or mechanics' wages, earned within this state, nor shall any property be exempt from execution issued upon a judgment against an attorney on account of any liability incurred by such attorney to his client on account of any moneys, or other property coming into his hands from or belonging to his client." Laws 1897, p. 93; Ballinger's Ann. Codes & St. § 5248a.

The laws of this state define a homestead to be protected against executions and forced sales for debt, as follows:

"The homestead consists of the dwelling house, in which the claimant resides, and the land on which the same is situated. * * *" Ballinger's Ann. Codes & St. § 5214.

The referee denied the right of the bankrupts to claim as a homestead land not occupied as a residence at the time, and in this he appears to have been guided by the plain provisions of the statute. Against his decision the only argument offered is that the bankrupts acquired title to the land under the provisions of the United States homestead law, and that they have never intended to abandon their residence upon the land, but it is conceded that for their own convenience they have actually lived elsewhere for several years. In support of this contention, counsel cites the decision of the supreme court of this state in the case of *Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736. In this case the supreme court upheld the right of a judgment debtor, who was the head of a family, to select and claim as a homestead property which was in fact improved as a residence, and which had been continuously occupied by the family as their homestead for three years prior to the trial of the cause, and which was so occupied at that time. Arguendo, the case supports the referee's decision, and does not in the remotest degree aid the bankrupts in their contention that property not in fact occupied as a family residence at the time of making claim to it can be set apart as an exempt homestead.

The referee allowed to the bankrupts, as exempt, all of the personal property which he considered could be lawfully claimed under the provisions of section 486, Hill's St. & Codes, but denied their right to an additional exemption of \$1,000, as provided in the act of 1897, above quoted, for the reason that said act is unconstitutional and void. The reasons for the referee's decision on this point are set forth by him in an opinion as follows:

"The constitution of the state of Washington (article 2, § 37) says, 'No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.' Section 486, Hill's St. & Codes, specifies, under fourteen subdivisions, the property that shall be exempt from execution, and in each, excepting four, after enumerating the articles, the occupation or profession of the claimant, fixes the value in coin that the exemption shall not exceed. Black upon Interpretation of Laws, at page 361, says: 'Where an amendatory act refers to the act to be amended by its date, title, and subject-matter, a mistake in the two former is immaterial, provided the reference to the latter renders certain the identity of the amended act. * * * But in many of the states the constitution now contains a provision substantially as follows: "No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length." "As we understand this clause of the constitution," says the court of Ohio (*Lehman v. McBride*, 15 Ohio St. 602), "it requires, in case of an amendment of a section or sections of a prior statute, that the new act shall contain, not the section or sections which it proposes to amend, but the section or sections in full as it purports to amend them; that is, it requires, not a recital of the old section, but a full statement, in terms, of the new one. * * * The constitutional provision was intended, mainly, to prevent improvident legislation; and with that view, as well as for the purpose of making all acts, when amended, intelligible without an examination of the statute as it stood prior to the amendment, it requires every section which is intended to supersede a former one to be fully set out. No amendments are to be made by directing special words or clauses to be stricken from, or inserted in, a section of a prior statute which may be referred to, but the new act must contain the section as amended.'" To the same effect is *Bierer v. Blurock*, 9 Wash. 63, 36 Pac. 975; In re *Petrini*, Nat. Bankr. N., No. 11, p. 264. Counsel cites *Zelinsky v. Price*, 8 Wash. 256, 36 Pac.

28, and *Carter v. Davis*, 6 Wash. 327, 33 Pac. 833; but we do not think they have any material bearing upon the matter under consideration. The act of 1897 directs specified words, viz. 'personal property to the amount and value of one thousand dollars (\$1,000),' to be inserted in a section of a prior statute. We are of the opinion that this cannot be done, and that the constitutional provision (article 2, § 37) is mandatory, and therefore that the act of 1897 is unconstitutional."

A statute which is complete in itself is not repugnant to the provision of the state constitution above quoted merely because it changes the existing laws of the state, and by implication repeals prior enactments relating to the same subject. *Warren v. Crosby* (Or.) 34 Pac. 661. But where, as in this case, the new act is not complete, but refers to a prior statute, which is changed, but not repealed, by the new act, so that the full declaration of the legislative will on the subject can only be ascertained by reading both statutes, the very obscurity and the tendency to confusion will be found which constitute the vice prohibited by this section of the constitution.

By his decision, the referee allowed to the petitioners, as part of their exemption, the sum of \$250, in lieu of domestic animals not possessed by them, but refused to allow anything for provisions and fuel. The fourth paragraph of section 5248, Ballinger's Ann. Codes & St., allows to each householder, besides the domestic animals there mentioned, provisions and fuel for the comfortable maintenance of such householder and family for six months; also, feed for the animals for six months; and further provides that if he shall not possess, or shall not desire to retain, the animals above named, he may select and retain other property not to exceed \$250 in value. I hold that the construction given to this statute by the referee is too narrow. The petitioners are entitled to have provisions and fuel in addition to the \$250 allowed in lieu of animals, and, as the property has been sold and converted into money, I will order that an allowance be made to them, from the funds in the hands of the trustee, of \$240 for provisions and fuel.

Certain life insurance policies are also claimed by the petitioners. They have no cash surrender value, and no value for any purpose, except as they may become valuable at the time of the death of the insured, provided the premiums shall be kept paid. Therefore they are not assets of the bankrupt estate, and I direct that the trustee deliver the policies to the petitioners.

IN RE FISHER (two cases).

(District Court, D. Massachusetts. November 6, 1899.)

No. 203.

1. BANKRUPTCY—ASSETS—LIQUOR LICENSE.

Where it appeared that licenses for the sale of liquor, in the city where the bankrupt carried on business under such a license, were transferable, as stated below in the opinion, with the consent of the board of police commissioners, who had authority to grant such licenses in a limited number, and were usually transferred by an indorsement on the license surrendering it for cancellation, and the issuance of a new license

in its place to the assignee, if approved by the board; that the board had made a rule, since the adjudication, that, where a licensee became bankrupt, they would give prior consideration to applicants named by the trustee in bankruptcy; and that licenses had a market value of \$4,000 or \$5,000 for the purposes of such a transfer, conditional upon the purchaser being accepted by the board,—*held*, that the bankrupt would be ordered to make such indorsement upon the license as would enable the trustee to realize its value for the benefit of the creditors.

2. SAME—PARTIES—JURISDICTION.

Where a liquor license was issued jointly to a woman and her husband, but the latter had no personal interest in it, his name being inserted merely to prevent a lapse in case of the wife's death, and they were both adjudged bankrupt on their separate voluntary petitions, and the license was sold and the proceeds paid into the bankruptcy court, pursuant to an agreement between the bankrupts, their trustees, and a creditor to whom the license had been pledged as collateral security, and the husband's trustee and the pledgee petitioned to be made parties to a proceeding already pending in that court on the application of the wife's trustee for orders to enable him to convert the license into cash, *held*, that such petition of intervention should be granted, and that thereupon the court had jurisdiction to order the distribution of the fund in court, and would direct the payment to the pledgee of the amount due to him, and of the balance to the wife's trustee.

In Bankruptcy. In the matter of the voluntary petitions of Ida C. Fisher and Rollin B. Fisher. On review of decision of referee in bankruptcy.

Addison C. Burnham, for trustee in bankruptcy.

Brandeis, Dunbar & Nutter and Edward F. McClennan, for bankrupt.

George A. Blaney, for George F. Chapin.

Joseph W. Lund, trustee in bankruptcy of Rollin B. Fisher.

LOWELL, District Judge. On May 1, 1898, a liquor license for the term of one year was issued by the board of police of the city of Boston to Ida C. Fisher and Rollin B. Fisher. The license fee was paid out of money advanced as a loan to Ida C. Fisher. The license was indorsed as follows:

"This license was paid for by money advanced for same by George F. Chapin, and for which we pledge it for collateral security, and ask commissioners to acknowledge same."

Rollin B. Fisher's name was added in said license, in accordance with a custom prevailing in Boston, to prevent a lapse in case of the death of Ida C. Fisher, but he testified before the referee that he had no personal interest in the license. The referee found that:

"Liquor licenses are issued by the city of Boston to a limited number only, and are much in demand. They are transferable only with the assent of the board of police commissioners, and then only in the following manner: There is a usage and practice by which a license may be surrendered, and a new license issued to another in the place thereof, as follows: The man that desires to go into business files an application describing the locality, and who the persons are that propose to engage in business; and if they are satisfactory, and there is no legal objection to the place where they propose to engage in business, and there will be a vacancy caused in the list of licenses ordinarily granted, the board agrees to one license being surrendered for the purpose of being canceled, and in place of it another is issued to the new firm or persons applying for it. The surrender is ordinarily by a simple form of indorsement,

addressed to the board of police, stating, 'The undersigned hereby surrenders his license for the purpose of having it canceled,' and signed by one or more of the licensees, binding the firm to that agreement. There is a recognized value of from \$4,000 to \$5,000 which attaches to a license for the purpose of such transfer, and such sum can be obtained in the liquor trade for the surrender of a license in favor of another, conditional upon the purchaser proving satisfactory to the board of police commissioners as a licensee." "There was evidence submitted that the commissioners refused to transfer a license, or allow a sale to be made from one person to another, until the one making the transfer had been free of debt,—in other words, 'go out of business honorably' and 'without fraud of his creditors, or anything of that sort.' No evidence was submitted as to what the action of the commissioners would be in case of a surrender under an order of court by a bankrupt of his license, for the benefit of the creditors of the bankrupt, and there was no evidence that such a case had come before the board prior to the filing of the petition in this case."

Since May 1, 1899, the board of police commissioners have taken the following action concerning transfers of liquor licenses and licenses of bankrupts:

"The board of police, in judging of the fitness or unfitness of applicants for a liquor license, will first consider applicants named by a retiring solvent licensee who has provided for his creditors, and who has conducted the business in the spirit as well as the letter of the law. In case such licensee, or one of several licensees, is adjudged a voluntary or involuntary bankrupt, the board, at the termination of such license, will give prior consideration to applicants (if any) named by the trustee in bankruptcy."

Ida C. Fisher and Rollin B. Fisher were both adjudged bankrupt upon their several voluntary petitions, filed October 19, 1898, and September 14, 1898, respectively.

The petition originally filed by Cushman, the bankrupt's trustee in Re Ida C. Fisher, sought (1) to compel the bankrupt so to indorse the liquor license that the trustee might realize its value for the benefit of her creditors; and (2) to compel Rollin B. Fisher, in whose name, jointly with that of the bankrupt, the license was issued, to make a similar indorsement, on the ground that the whole beneficial interest in the license was in the bankrupt. Both the bankrupt and Rollin B. Fisher demurred (the papers filed were styled "demurrers") to the petition for want of jurisdiction, and for other reasons. The referee overruled the demurrers, and made a decree requiring both the bankrupt and Rollin B. Fisher to make the indorsements prayed for in the petition. After a hearing before me on review, I expressed informally the opinion that the referee's decree must be affirmed as to the bankrupt, for the following reasons: Common sense, justice, and the decided cases require that the considerable sum of money which, as it appears, can be obtained as the result of certain acts of the bankrupt in dealing with the license, shall be applied for the benefit of her creditors. It is impossible to improve the statement of Judge Choate in Re Ketchum (D. C.) 1 Fed. 840, concerning a right or privilege in many respects similar to this:

"The seat, however, has an actual pecuniary value, which the rules of the society, as interpreted and applied in practice, permit the holder to realize by a sale and transfer. There is no practical difficulty in effecting a transfer of this right or interest for a pecuniary consideration, subject to the condition that the debts of the present holder to members are first paid; and the right or privilege is, to all intents and purposes, a business right or privilege, useful for business purposes only." "This seat in the board was actually used as part

of the business capital of these bankrupts, as stockbrokers. To suffer the bankrupts still to hold it, virtually withdraws several thousand dollars in value of their business assets from the creditors."

It is not improbable that the license in the case before me came into the bankrupt's hands by virtue of some transfer made to her or to her husband similar to that which she is asked to make in this case, and in return for the payment of money made by her or by her husband to the transferror. It is practically an essential and important part of her business assets, and she has used it as security for the payment of a considerable sum of money which she has borrowed. To permit her to deprive her creditors of the value of this asset would permit the defeat of the primary intent of the bankrupt act. See, also, *In re Gallaher*, Fed. Cas. No. 5,197; s. c. on appeal, 16 Blatchf. 410, Fed. Cas. No. 5,192. It will be noticed that I have not to decide in this case if Ida C. Fisher's legal right to the license in question, under the terms of the bankrupt act, passes to her trustee in bankruptcy, but only if, under the circumstances, she should be compelled to make the indorsement upon the license demanded by the trustee. The board of license commissioners may refuse to recognize the indorsement, if they see fit.

As to Rollin B. Fisher, I intimated that the petition must be dismissed, following the decision in *Re Brodbine* (D. C.) 93 Fed. 643. Thereafter, Rollin B. Fisher having applied for a renewal of the license for his personal benefit, Joseph W. Lund, his trustee in bankruptcy, filed a petition in *Re Rollin B. Fisher* to compel Rollin B. Fisher to execute to Lund an indorsement similar to that demanded from Ida C. Fisher, and Rollin B. Fisher was ordered to make the indorsement. Thereupon an agreement was very properly entered into by the two bankrupts, their several trustees, and George F. Chapin, to the end that the value of the license might be preserved until the final determination of the whole matter by a higher court. The material parts of the agreement are substantially as follows: That the parties will join in making such indorsements on the license and such applications as will enable it to be surrendered and canceled, and a new license issued to any purchaser who may be found therefor, on terms satisfactory to this court; that the license so indorsed shall be placed in the custody of the two trustees, to find a satisfactory purchaser therefor, and to surrender and cancel the same in order to have a new license issue to the purchaser; that the sum realized from the sale and disposition of the license shall be paid into the court of bankruptcy, or be deposited in accordance with the court's order, "to be held in the place of said license, and with all the rights of the parties hereto in said sum which they now have in said license, to await the final determination of the rights of said parties in said license by the highest court of competent jurisdiction to which any of said parties may resort, and subject to all orders and decrees of the court in which, for the time being, proceedings for the determination of said rights are pending, to which said license would be subject." In accordance with this agreement, and with the approval of this court, the license was sold, and the price received has been deposited in this

court. Thereafter a stipulation was filed by the two bankrupts, waiving their objections to Cushman's petition "on the ground that said petition is by a summary, and not by plenary, process," but expressly insisting "upon their objections to the jurisdiction of this court to grant the relief prayed for in said petition." Still later, Lund and Chapin filed petitions asking that they might be admitted as parties to the proceedings begun by Cushman's original petition, for the purpose of establishing their rights in the license, and in the fund realized from the disposition thereof. In these petitions Lund and Chapin each expressly submitted himself to the jurisdiction of this court, for the purpose of having his rights determined in these proceedings. The petitioner Cushman assented to the allowance of these petitions. Counsel for Ida C. Fisher thereupon filed written motions to dismiss the petitions of Lund and Chapin, just mentioned. In this condition of the pleadings and facts, I have to make final disposition of the case, so far as this court is concerned, shaping the record so that all parties may be in the best position to present to the court of appeal the interesting questions they have severally raised.

The petitions of Lund and Chapin to be made parties defendant to the petition of Cushman must be granted. These persons have, or may have, an interest in the disposal of the money now in court as the result of the indorsements ordered by this court, and made by the bankrupts. It is not necessary now to determine if section 23 of the bankrupt act gives this court jurisdiction to bring Lund and Chapin into these proceedings against their will. Lund and Chapin have expressly consented to this jurisdiction, and the section referred to certainly permits any person against whom the trustee wishes to bring suit to submit himself to the jurisdiction of this court. Since Chapin and Lund have come into the case, this court has before it all the persons who have any claim to an equitable interest in the license or in the deposit. Cushman, the trustee of Ida C. Fisher, to whom she has been ordered by this court to indorse the license, and in whom is vested her entire beneficial interest in all her property not exempt by law, is the petitioner. In Lund, trustee for Rollin B. Fisher, is vested the title to all the property of Rollin B. Fisher not exempt by law; and to Lund, Rollin B. Fisher has been directed to indorse all his right in this license. Chapin, whose interest in the license is that of a mortgagee or pledgee, is also before the court. Counsel for Rollin B. Fisher contends that this court is without jurisdiction over him. This need not now be decided, as all his beneficial right in the deposit is now vested in Lund, his trustee. Even though it were true that there still existed in Rollin B. Fisher, as trustee for his wife, some bare legal right unconveyed to his trustee in bankruptcy, yet this bare legal right, this dry trust, the existence of which I gravely doubt, would not prevent the court from dealing with the deposit, which is to be disposed of according to the beneficial interest therein of the several parties. It appears that Chapin has an interest in the same, by way of pledge or mortgage, to the amount of \$1,000. Lund is vested with the beneficial interest of

Rollin B. Fisher, if such interest there was, but he admits that there was none. It follows, therefore, that there must be a decree directing the payment to Chapin of the amount above stated, and directing the payment of the balance to the original petitioner, Cushman. Furthermore, to dispose of the complicated record, there must be a formal decree against Ida C. Fisher. This will follow, in substance, the second paragraph of the decree of the referee of March 2, 1899, so far as the same refers to Ida C. Fisher. This is to be done, although the license has been sold, in order that Ida C. Fisher may present to the court of appeal the question of her right in the license. The first, third, fourth, fifth, sixth, seventh, and eighth paragraphs of the referee's decree have been rendered needless by subsequent proceedings, and, to avoid incumbering the record, they are formally reversed. In the view I take, action by Rollin B. Fisher is not necessary to enable the court to dispose of the fund, and therefore no order or decree will be made against him upon the petition filed by Cushman. Further orders are to be made, admitting Lund and Chapin, upon their several petitions, as parties defendant to the original proceedings. As Lund has submitted to the jurisdiction, it is unnecessary to consider if he could have been made a party defendant to it without his consent. In the matter of Rollin B. Fisher, there must be a decree against him, upon the petition of Lund, similar to that to be made against Ida C. Fisher, above referred to.

HILL et al. v. LEVY.

(District Court, E. D. Virginia. November 24, 1899.)

1. CONTRACTS—VALIDITY—SPECULATIVE OR GAMING CONTRACTS.

A contract for the sale of goods, with future delivery, is valid if the parties really intend that there shall be an actual delivery of the property and payment of the price, though the seller does not then own the goods, and has no other means of procuring them than by a purchase in the market; but if no actual delivery is contemplated, but only that one party shall pay the other the difference between the contract price and the market price at the date set for executing the contract, it is invalid, as a wagering or gaming contract.

2. SAME—TEST OF ILLEGALITY.

It is no defense to an action on such a contract that the purchaser did not expect or intend an actual delivery of the goods, if the seller contemplated such delivery, and would have delivered the property on demand, and failed to do so only because it was not called for; the test of illegality is the intention, not alone of one of the parties, but of both.

3. SAME—BURDEN OF PROOF.

In an action on a contract for the purchase and sale of goods, with future delivery, a party who alleges that the contract is invalid, as a gaming or wagering contract, must assume the burden of proving its illegality; the contract is presumed to be legal.

4. BANKRUPTCY—PROVABLE DEBTS—GAMING CONTRACT.

Where the respondent in a petition in involuntary bankruptcy resists an adjudication on the ground that the debt of the petitioning creditor (evidenced by a promissory note of which he is the indorsee) is invalid under the state statute against gaming, because the note was given to respondent's brokers to cover his losses arising out of certain purchases and sales of wheat negotiated for him by said brokers on the board of trade,

he must assume the burden of proving, by clear and conclusive evidence, that the dealings in question were mere speculations in the rise and fall of prices, and that neither party contemplated any actual sale and delivery of the wheat; failing this, the debt will be provable in bankruptcy, and, if sufficient in amount, will warrant an adjudication.

In Bankruptcy. On petition for adjudication in involuntary bankruptcy.

William P. McRae, for petitioning creditors.

Richard B. Davis, for bankrupt.

WADDILL, District Judge. The questions in this case arise upon a petition filed by Zora Hill against M. Levy, alleging the bankruptcy of the latter, and asking that he be adjudicated a bankrupt in the involuntary proceedings thus inaugurated. The petitioner avers that the creditors of the alleged bankrupt are less than 12 in number, and that, therefore, one creditor whose debt exceeds \$500 has the right to institute proceedings. The alleged ground of bankruptcy is that the said Levy, while totally insolvent, and within four months of the time of filing the said petition, executed a general deed of assignment, conveying all of his property and estate to trustees for the payment of his debts, making preferences among them in contravention of the bankruptcy law, and excluding petitioner, who held his note for the sum of \$2,875.50. To this petition the defendant, Levy, filed his plea and answer, admitting insolvency and the existence of the assignment with preferences, but denied that he owed petitioner anything, and averred that his alleged debt was based upon a gaming consideration, which was void under the Virginia statute, whether in the hands of the original payee or an innocent holder thereof, and was not, therefore, a debt provable under the bankruptcy law. Said Levy further alleged that his creditors were more than 12 in number, and hence that petitioner could not, without other creditors joining with him, inaugurate involuntary proceedings in bankruptcy against him.

Upon this condition of the pleadings, considerable evidence was introduced, petitioner attempting to show that the bona fide creditors of the defendant were less than 12 in number, and that the debts sought to be set up by the defendant were either due to persons within the inhibited degree of relationship specified in the bankruptcy law, or of debts secured in the deed of assignment mentioned in the petition as an act of bankruptcy, and therefore should not be reckoned in the number of creditors in determining petitioner's right to file a petition against the said defendant.

Before the question of the right of the petitioner, a single creditor, to inaugurate the proceedings was determined, or indeed finally submitted to the court for its consideration, two other persons, to wit, J. S. De Shazor and Bartlett Roper, trustee of Edwin P. Goodwin, bankrupt, filed their joint petition, and asked to join in the original petition against the defendant for involuntary bankruptcy. To these petitions Levy answered, denying the existence of any indebtedness due to either De Shazor or Goodwin, and averring that, if any indebtedness existed, said petitioners were so connected with

the original petitioner that their debts were tainted with the gaming consideration aforesaid, and that, therefore, they could not recover. Considerable evidence was taken on the question of the existence of the indebtedness, and whether the same was based upon a gaming consideration; and the case is now finally submitted to the court for its determination upon the issues thus raised, and whether the defendant, Levy, should be adjudicated an involuntary bankrupt.

The first and most material question to be determined is whether, in point of fact, the original and intervening petitioners have provable debts against the bankrupt. If so, and said claims are not void by reason of the gaming consideration alleged to be incident to their inception, then the various other questions presented are unnecessary to be decided, as the creditors are sufficient in number and amount to institute the proceedings. The original petitioner claims to be a holder for value of a note of \$2,875.50, drawn by M. Levy on the 13th of October, 1898, to the order of W. A. Porterfield & Co., and by them indorsed without recourse to the petitioner, said note being a renewal of two other notes, one for \$2,184, dated in June, 1898, and another for \$694, dated September 13, 1898, drawn by said Levy in favor of W. A. Porterfield & Co., and by them indorsed to the petitioner, Zora Hill. The intervening petitioner J. S. De Shazor is the holder of a duebill for \$10 of the defendant Levy, and said Edwin P. Goodwin's trustee sets up an open account of \$40 due him from said Levy.

W. A. Porterfield & Co., it seems, were grain brokers doing business in the city of Washington and various other places throughout the country, including the city of Petersburg, and the indebtedness with said Levy arose by reason of transactions between them in reference to the purchase of wheat by them for him during the year 1898. The defendant, Levy, insists that his transactions with said firm were mere speculations in grain; that he gave orders through an agent of W. A. Porterfield & Co.; that he had no dealings directly with said firm, so far as giving the orders were concerned; that his entire transactions contemplated dealing in futures in wheat, and the payment of the difference, according to the fluctuations of the market, between the contract price of purchase and the price for which the same were sold; and that no actual purchase or delivery of wheat was ever contemplated or intended. Said Porterfield & Co., on the other hand, insist that they do a legitimate brokerage business; that they acted solely as brokers in their dealings with Levy; that they were members of the Chicago Board of Trade, making purchases for said Levy and selling for him whenever requested so to do; that they had no manner of interest in what they did, further than to secure their commissions, and that each and every purchase of wheat they made contemplated an actual delivery, which could have been had whenever said Levy requested it; that the transactions thus had were bona fide, and that upon no other terms could purchases have been made on the Chicago Board of Trade; that the indebtedness in question arose from payments made by them to their agents in Chicago to make good the purchases made on ac-

count of said Levy, which he recognized, fully acquiesced in, gave his negotiable notes for the amount thereof, and subsequently caused them to be renewed; and that the notes, as well as the renewals, were for value transferred to the petitioner Zora Hill.

The law applicable to this case, assuming that the Virginia statute (section 2836, Code 1887) in reference to gaming applies to transactions of the kind in question, seems to be well settled. As stated by Mr. Benjamin, it is that:

"A contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, or any other means of getting them than to go into the market and buy them. But such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer. If, under guise of such contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole contract constitutes nothing more than a wager, and is null and void." 2 Benj. Sales (6th Am. Ed., by Corbin) p. 717, § 828; *Rountree v. Smith*, 108 U. S. 269, 2 Sup. Ct. 630, 27 L. Ed. 722; *Irwin v. Williar*, 110 U. S. 499, 508, 510, 4 Sup. Ct. 160, 28 L. Ed. 225; *Embrey v. Jemison*, 131 U. S. 336, 342, 9 Sup. Ct. 776, 33 L. Ed. 172.

Whether or not the petitioners should be defeated in their recovery because of the alleged wagering character of the transactions out of which, it is claimed, their several debts arose, and whether, as a matter of fact, anything is due to them, or either of them, are questions which can alone be determined from a full consideration of all of the facts of the case and the circumstances surrounding the several transactions.

Upon the whole evidence, my conclusion is that the several petitioners are due the amounts, respectively, claimed by them; and that while it is true as to said debts, and particularly of the debt of the petitioner Zora Hill, a suspicion or presumption might arise from the circumstances surrounding the transactions out of which they arose that said debts were tainted with a gaming or wagering consideration, still I do not feel, in the light of the evidence as adduced, that I should so hold, or would be justified in so doing. To declare the debts of the petitioners invalid, upon the evidence in this case, would be, in effect, to hold that all brokerage transactions involving the purchase and sale of commodities of the character dealt in are void. While such a conclusion from a purely moral standpoint, as well, indeed, as from a business view, would be "a consummation devoutly to be wished," still, taking into consideration its legal bearing, it cannot be reached in this case. The law authorizes speculations in grain and other products, as well as in stocks, bonds, and property of such like character, and places only the inhibition that actual sales and deliveries of articles bought and sold shall be contemplated. When this is done, the transactions are valid, and have to be enforced by the courts. The evidence in this case seems to be clear, however much the circumstances may seem to indicate that no actual sale and delivery of wheat was contemplated, that as to each transaction such was the agreement, and that the wheat purchased would have been actually delivered if desired,

and was not so delivered because not called for. The petitioners, and those through whom the transactions were made, positively so swear, and exhibit the printed terms of the contract under which the purchases were made, viz.:

"W. A. Porterfield & Co., Bankers and Commission Stock Brokers.

"_____, 189-.

"M. _____: We have _____ for your account and risk, subject to the rules and regulations of the New York Stock Exchange, New York Cotton Exchange, or Chicago Board of Trade, respectively.

"Respectfully,

"Per _____.

"All orders for the purchase or sale of any article are received and executed with the distinct understanding that actual delivery is contemplated, and that the party giving the orders so understands and agrees. It is further understood that on all marginal business the right is reserved to close transactions when margins are running out, without further notice, and to settle contracts in accordance with the rules and customs of exchange where the order is executed."

And they, moreover, prove that no transactions, not contemplating an actual delivery of the commodity purchased, could have been had through the board of trade of Chicago, where the purchases in the case were made.

The burden of proof to show the invalidity of these transactions rests upon the defendant. The contracts are presumed to be legal, and the burden to prove illegality rests upon those making the claim. *Irwin v. Williar*, 110 U. S. 507, 4 Sup. Ct. 160, 28 L. Ed. 225. The evidence to show invalidity should be clear and conclusive, and the mere fact that the defendant, one of the parties to the transactions, may not have contemplated an actual delivery of the wheat purchased, will not suffice. The test of illegality is the intention, not alone of one of the parties, but of both or all. *Bangs v. Hornick* (C. C.) 30 Fed. 97; *Ward v. Vosburgh* (C. C.) 31 Fed. 12, 14, 15; *Lehman v. Feld* (C. C.) 37 Fed. 852.

So far as the claim of the original petitioner, Zora Hill, is concerned, which is the only debt of considerable amount involved, it is evidenced by negotiable note of the defendant given on account of money advanced by W. A. Porterfield & Co., the brokers through whom the transactions in controversy were had, to cover purchases of wheat made by them for him and for which he failed to pay. At the maturity of the original notes given for the money thus advanced, at the earnest solicitation of said Levy, a renewal of the note was had, and with the express stipulation and agreement in writing that, in consideration of the extension, payment of the new note would be promptly made when due and without further offset or extension. This renewal note, as indeed were the original notes, is held by the said petitioner, Zora Hill, who claims to have acquired them for value, before maturity, and without notice of the alleged illegal consideration. While the fact of the advancement of the money for the defendant by his agent, and the position claimed by petitioner Hill of an innocent holder for value of the defendant's negotiable note, may not, under the law, disentitle defendant to interpose so serious a defense as that said transactions are based upon

a gaming or wagering consideration, still it but accentuates the fact that, under such circumstances, the defense should be clearly made out by those relying upon it to avoid the payment of their obligations made and placed upon the market for sale. The defendant has not only failed to bear the burden placed upon him of making out his defense, but the preponderance of the evidence seems to be clearly against him. Indeed, his own evidence is all offered to support his view of the case, and an examination of what he says will show that, upon the essential features of the case, in his statement he is vague, uncertain, and unsatisfactory to such an extent that a court would not be justified in adopting his version of the transactions under consideration, where the same is seriously disputed and the evidence of others furnished to the contrary.

With the view taken by the court of the evidence, it will be unnecessary to pass upon any of the various other questions raised in the case and elaborately argued by counsel. The allowance of the three claims presented by the petitioners will entitle them to an adjudication of the defendant, M. Levy, as an involuntary bankrupt, and it will be so ordered.

In re WIELAND et al.

(Circuit Court, N. D. California. November 6, 1899.)

1. CUSTOMS DUTIES—CONSTRUCTION OF TERMS USED IN STATUTE.

Where names of articles have a known commercial meaning, they are to be given such meaning in the construction of tariff statutes, rather than their technical or scientific meaning.

2. SAME—CLASSIFICATION—SARDINES.

Sprats put up in oil in tin boxes of the size and style designated in paragraph 208 of the tariff act of 1894, and labeled "Sardines," are dutiable under such paragraph as sardines, and not under paragraph 211 as fish in cans, not otherwise provided for; the smaller fish of different species, when so packed, being commercially known and commonly sold by the general name of "sardines."

F. J. Castelhun, for petitioners.

Edward J. Banning, Asst. U. S. Atty. (Frank L. Coombs, U. S. Atty., of counsel), for Board of Appraisers.

MORROW, Circuit Judge. This is an appeal from a decision of the board of United States general appraisers at New York. On June 14, 1898, Wieland Bros., of the city and county of San Francisco, filed their petition and application for a review of the questions of law and fact involved in the decision of the board of general appraisers in the matter of the classification of certain importations of fish. This petition alleges that on May 29, 1897, the petitioners imported, per vessel from Bordeaux, France, to New York, and per railroad from New York to the port of San Francisco, certain merchandise, namely, three lots of sprats in oil; that the first lot consisted of 650 cases, each case containing 100 quarter tins, the market value of the lot being \$2,681.49; that the second lot consisted of 100 cases, each case containing 100 quarter tins,

the market value of the lot being \$412.54; that the third lot consisted of 249 cases, each case containing 100 quarter tins, the market value of which lot was \$981.57; that upon the entry of said merchandise the collector of the port of San Francisco classified it as "sardines," under paragraph 208 of the act of congress of August 27, 1894, entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," whereas he should have classified it as "fish in cans, not otherwise enumerated or provided for," under paragraph 211 of the said act of congress; that on August 12, 1897, the entries were liquidated by the collector, upon the classification made by him, at the rate of 2½ cents per quarter tin, the duty amounting to \$1,625 for the first lot, \$250 for the second lot, and \$622.50 for the third, which, together with all charges, was paid to the collector on that day; that on August 14, 1897, petitioners gave notice of their dissatisfaction with this classification, and protested against the classification and liquidation of the entries by the collector, their notice specifying, as the reasons and grounds of their objections, "that the above goods are 'sprats,' and not 'sardines.' The sprats or bristlings are the young of the herring, a family distinct from that to which the sardines belong. They are bought and sold as 'sprats,' and we claim that they are liable to a duty of twenty per cent. ad valorem, as 'fish in cans,' n. o. p., under paragraph 211, Act Aug. 27, 1894." It is further alleged that the board of United States general appraisers at New York duly made its decision on May 26, 1898, which decision was in favor of the classification made by the collector of customs at San Francisco, and overruling petitioners' protest and objections. Petitioners, being dissatisfied with the decision of the collector of customs and the board of United States general appraisers as to the construction of the law and the facts respecting the classification of said merchandise, and the duty imposed under such classification, have appealed to this court, and ask for a judgment for the difference between the amount paid to the collector upon said merchandise and the amount payable under paragraph 211 of said act of August 27, 1894, amounting to the sum of \$1,682.30 and costs.

The three lots of merchandise involved in this petition are invoiced, respectively, No. 6,247, consisting of 65,000 quarter tins, valued at \$2,681.49; No. 6,248, consisting of 10,000 quarter tins, valued at \$412.54; and No. 6,249, consisting of 24,900 quarter tins, valued at \$981.57. The tins included under the invoices Nos. 6,247 and 6,248 bear the brand of "Loqueran & Cie."; those under invoice No. 6,249, that of "Le Keriolec & Cie." The tins bearing the brand of Loqueran & Cie. are labeled at one end "Poissons à l'Huile," and on one side "Fabricants de Sardines à l'Huile." Those bearing the name of Le Keriolec & Cie. are labeled at one end "Poissons Choisis," and on one side "Sardines à l'Huile." It is admitted that the goods are sprats in oil packed in tins.

The act of August 27, 1894, entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," provides as follows (28 Stat. 523):

"Fish.

"208. Anchovies and sardines packed in oil or otherwise, in tin boxes, measuring not more than five inches long, four inches wide, and three and one-half inches deep, ten cents per whole box; in half boxes, measuring not more than five inches long, four inches wide, and one and five-eighths inches deep, five cents each; in quarter-boxes measuring not more than four and three-fourths inches long, three and one-half inches wide, and one and one-fourth inches deep, two and one-half cents each. When imported in any other form, forty per centum ad valorem.

"209. Fish, smoked, dried, salted, pickled, or otherwise prepared for preservation, three-fourths of one cent per pound.

"210. Herrings, pickled, frozen, or salted, and salt-water fish frozen or packed in ice, one-half of one cent per pound.

"211. Fish in cans or packages made of tin or other material, except anchovies and sardines, and fish packed in any other manner, not specially enumerated or provided for in this act, twenty per centum ad valorem."

The act of March 3, 1883 (22 Stat. 503), provides:

"Anchovies and sardines packed in oil or otherwise, in tin boxes measuring not more than five inches long, four inches wide, and three and one-half inches deep, ten cents per whole box; in half boxes measuring not more than five inches long, four inches wide, and one and five-eighths deep, five cents each; in quarter-boxes measuring not more than four inches and three-quarters long, three and one-half inches wide, and one and a quarter deep, two and one-half cents each; when imported in any other form, forty per centum ad valorem. Fish preserved in oil, except anchovies and sardines, thirty per centum ad valorem."

The act of October 1, 1890 (26 Stat. 586), provided:

"Fish.

"291. Anchovies and sardines packed in oil or otherwise, in tin boxes measuring not more than five inches long, four inches wide, and three and one-half inches deep, ten cents per whole box; in half boxes measuring not more than five inches long, four inches wide, and one and five-eighths inches deep, five cents each; in quarter-boxes measuring not more than four and three-fourths inches long, three and one-half inches wide, and one and one-fourth inches deep, two and one-half cents each; when imported in any other form, forty per centum ad valorem."

"295. Fish in cans or packages, made of tin or other material, except anchovies and sardines, and fish packed in any other manner not specially enumerated or provided for in this act, thirty per centum ad valorem."

In the foregoing statutes, including that of August 27, 1894, anchovies and sardines packed in tins are subjected to a specific duty per tin, half tin, and quarter tin, while "fish in cans or packages made of tin or other material, except anchovies and sardines," are subjected to an ad valorem duty. Sprats and sardines belong to the same family of the clupeidæ. The smaller fish of this family are prepared and canned in oil, and are placed upon the market under the general name of "sardines." The sardine is a more expensive fish than the sprat, and sprats sold as sardines are sold as sardines of inferior quality, but "sardines" appears to be the general term covering clupeidæ, both sardines proper and the commoner varieties, when put up in oil in tins. The sprats in oil, in this case, are labeled in two different ways. The label under the brand of Keriolec & Cie., invoice No. 6,249, is "Sardines in Oil"; that under the brand of Loqueran & Cie., invoices Nos. 6,247 and 6,248, is not so expressed, but on one side of the tin is written

"Manufacturers of Sardines in Oil," "Sardines à l'Huile" being printed in conspicuous type. The fish in the consignments in question went under the general name of "sardines." The weight of the evidence leads to the conclusion that persons buying any of the tins of fish involved would buy them as sardines, and that, in response to a demand for cheap sardines, any of these tins would be handed to a customer. The witness Ring, a retail grocer of 13 years' experience, testified that he is familiar with the brands represented by invoices 6,247 and 6,248, and has sold them as sardines; that they are known to the retail trade as sardines; and that he buys them as sardines. There is much testimony to the same effect. There appears to be no doubt that the goods are generally known as sardines, and are retailed to the public as such.

The United States general appraisers, in their opinion, cite the case of *Meyer v. U. S.* (C. C.) 86 Fed. 120. This case comprised two varieties of fish packed in oil, and labeled, respectively, "Kieler Sprotten in Oil," and "Sardelles de Scandinavie." It was held that the sardelles were not commercially known or dealt in either as anchovies or sardines, but with respect to the "Kieler sprats" the court said:

"The other fish are Kieler sprats. They are probably neither genuine sardines nor anchovies. This point, however, is not material. The evidence shows that, when pickled and packed in half barrels, they are commercially known as 'Norwegian Anchovies.' If put up in tins and labeled 'Sardines,' they are commercially known as 'smoked sardines'; and if labeled 'Sprats,' they are commercially known as 'sprats.' The evidence before the board sufficiently supports the finding that these fish are commercially known as 'smoked sardines in oil.' The whole evidence tends to show that little fish of this general character, when thus put up in oil in tin boxes, are commercially recognized as belonging to the general class 'sardines,' although the particular species, when labeled 'Sprats,' are known as 'Kieler sprats.' The facts bring the case within the rule as enunciated in *Re Herrman* (C. C.) 52 Fed. 941."

The rule here referred to is that laid down by Judge Lacombe in his opinion in that case. The learned judge says:

"And it further appears quite plainly from his opinion [the opinion of the board of general appraisers] that to their conclusions they were influenced by a mistaken belief or understanding as to the rules of law, as laid down by the supreme court; that is, they seem to consider that these terms in tariff acts may be interpreted according to the technical understanding of them by manufacturers. Now, I know of no such rule. Some words are to be taken in their popular and ordinary signification, as they would be understood by all the world. Failing that, there is the well-known rule, reiterated over and over again, that, if words have a special meaning in trade and commerce, they are to be given that special meaning when we find them in tariff statutes. I know of no third rule that, because congress frames its statutes after advising with manufacturing experts, words should in some instances be given the technical meaning which the manufacturers give to them."

In interpreting a name or expression applied to articles upon which duties of importation are laid, it is well settled that congress uses such terms in their ordinary commercial sense, rather than in their distinctive or technical sense. As was said in *And. Rev. Law* p. 181:

"It may be asserted, as a general principle, that tariff laws are to be construed according to the commercial meaning of the terms used in them. They

are written in the language of commerce, rather than the language of science; and, if resort was not had to the terms and usages of commerce for their interpretation, they would operate with injustice to the importer, and involve the revenue officers in constant controversy."

In *Twine Co. v. Worthington*, 141 U. S. 468, 471, 12 Sup. Ct. 56, this principle was thus briefly and succinctly summed up:

"It is a cardinal rule of this court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law is passed will control their classification, without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied."

This rule can properly be applied in this case. There has been no evidence to show that a tin labeled "Sardines" is commercially known otherwise than as "sardines," and the word "sardines" must be taken in its ordinary signification; for nothing in this case has shown that any special meaning is attached to the expression, in trade and commerce, which would compel the court to construe it to mean something other than the term itself conveys to people in general. Petitioners' application and petition will therefore be denied.

ANIMARIUM CO. v. FILLOON.

(Circuit Court, S. D. Iowa, C. D. December 18, 1899.)

PATENTS—VALIDITY—THE OXYDONOR.

The Sanche patent, No. 587,237, for a device known as the "Oxydonor," an appliance for use in treatment for disease, considered in a suit for its infringement, and the evidence adduced in its support *held* insufficient to conclusively establish its validity, or to show that the device is in fact valuable or useful, in such sense as to entitle it to the protection of a court of equity.

This was a suit in equity for infringement of a patent and trademarks. On final hearing.

Thornton & Chancellor, E. J. Hill, and Dudley & Coffin, for complainant.

Evans & Adams, L. H. Gilmore, and Frank P. Blair, for defendant.

SHIRAS, District Judge. From the evidence submitted in this case, it appears that the complainant, the Animarium Company, is a corporation created under the laws of the state of New York, and is engaged in the business of manufacturing and selling a device known as the "Oxydonor," which it is claimed is the invention of Dr. Hercules Sanche, and is covered by letters patent issued by the patent office of the United States, which patents, by assignment, have become the property of the complainant corporation. It also appears that, in connection with the sale of the Oxydonor, certain trademarks, duly registered in the patent office by Dr. Sanche, and by him assigned to the complainant company, were used, and have acquired great value in advertising the device to which they apply. It is further shown that the defendant, at Des Moines, Iowa, engaged in the sale of the Oxydonor, and, describing himself as the agent for the

sale of that device, he advertised it in the newspapers, and issued circulars in which he made use of the trade-marks owned by the complainant. After a time a rival device, called by the name of the "Oxygenor," or "Oxygenor King," made its appearance; and the defendant undertook its sale, advertising it for a time in connection with the Oxydonor; and, practically, he made use of the literature, so called, that he had issued in connection with the sale of the Oxydonor, to aid in selling the Oxygenor, and he endeavored to supplant the former device by the latter in his sales to his agents and customers. Thereupon the present suit in equity was brought; it being claimed on behalf of complainant that the Oxygenor was an infringement upon the letters patent which covered the device known as the "Oxydonor," and that the defendant, in selling the Oxygenor, pirated the trade-marks associated with the Oxydonor, thereby misleading the public and injuring the complainant.

So far as the evidence in this case bears upon the point, it justifies the finding that the Oxygenor is an infringement upon the Oxydonor, and that the defendant, in endeavoring to supplant the latter with the former instrument in supplying his customers, has made a misuse of the trade-marks owned by the complainant. In argument, counsel for the defendant have largely concentrated their efforts in support of the propositions that patent No. 587,237, dated July 27, 1897, is void on its face, and that the device known as the "Oxydonor" is in fact a fraud of such a character that a court of equity will not give it recognition. This is a line of defense which certainly does not place the defendant in a very enviable position, as it appears that he has sold several thousand of the Oxydonors, and is now seeking to supplant the same with the Oxygenor, which he claims is an improvement upon the other device; yet in cases of this kind it is well settled that the complainant cannot obtain relief, no matter what the shortcomings of the defendant may be, if it appears that the device for which he seeks protection is not one of value, or if by means thereof he is working a fraud upon the public. I have, with some care, read and re-read letters patent No. 587,237, in connection with the testimony of Dr. Sanche, and the statements contained in the pamphlets which are delivered with the Oxydonors when sold; and I must confess my inability to understand what it is that the so-called inventor relies upon as the meritorious part of his patented device. In the specifications of the patent, he apparently places reliance on producing "an electric tension in the body contrary to that which superinduced the disease"; but, in naming and describing the Oxydonor, he seems to rely on the curative properties of oxygen, claiming that the device enables the body to which it is attached to absorb oxygen from the air. Yet further in his evidence he says:

"The therapeutic effect of the Oxydonor is too long for explanation here. It is about half answered in a twelve hundred page book, which I will make you a present of when published. I cannot give you any fact relating to its therapeutic effect, because that cannot be chewed down into a single answer. It cures everything. Its effect depends upon the user, and not upon me."

He further states that he does not consider the Oxydonor as a therapeutic agent; that it administers nothing to the human body

when in use; that it carries out the principle of diaduction; that "diaduction" "means a connection in life, or between living bodies and inanimate things, congenerous to the connection between electrified bodies." As Dr. Sanche testifies that the principle of diaduction, of which he claims to be the discoverer, is not yet recognized in science, and as he refers for a description thereof to his book of 1,200 pages, which has not yet been published, the court would seem to be justified in refusing to give judicial recognition to this possible new principle until its existence and attributes are more fully recognized and established in the medical and scientific worlds. On the other hand, the claim is made, and finds support in the testimony of the defendant, that many thousands of the Oxydonors have been sold in Iowa and adjacent states, and have produced beneficial results, although the testimony of persons purchasing the device and putting it to use is wanting. It appears that there are other cases brought by the present complainant in this and other jurisdictions to protect its rights under the patent and trade-marks declared upon in the present bill, and it may be that in these cases more evidence upon the vital points involved will be adduced. Under these circumstances, in the present case the court will not attempt to reach a final conclusion upon the points involved, but will confine its conclusion to the holding that the complainant has failed to conclusively establish the validity of letters patent No. 587,237, or to show that the device known as the "Oxydonor" is in fact valuable or useful, in such sense as to justify a court of equity in granting protection thereto; it being open to complainant, if the validity of the patent and the usefulness of the device be properly established in other cases, to file a petition for rehearing in this case. From this holding it follows that the injunction and accounting prayed for must be refused, and each party is adjudged to pay his own costs.

THOMSON-HOUSTON ELECTRIC CO. v. NASSAU ELECTRIC R. CO.

(Circuit Court, E. D. New York. November 10, 1899.)

PATENTS—INVENTION—ELECTRIC SWITCHES.

The Thomson patent, No. 283,167, for improvements in electric switches or commutators, as to claims 1 and 4, the essential feature of which is the use of a magnet to dissipate, or prevent the formation of, an arc between the separated parts of the conductor when an electric circuit is broken by means of a switch, for the purpose of preventing the burning of such parts, is void for lack of patentable invention; the influence of a magnet on the arc formed in a disconnected circuit being previously well known, and its use to prevent the burning of the parts of a switch, as contemplated by the claims of the patent, involving, at most, merely an acceleration of its effect by the use of a magnetic force strong enough to extinguish the arc at once.

This was a suit for infringement of a patent. On final hearing.

Betts, Betts, Sheffield & Betts, for complainant.

William H. Kenyon and George J. Harding, for defendant.

THOMAS, District Judge. The question is whether the defendant infringes the first and fourth claims of letters patent issued to Elihu Thomson in 1883. The patent is for a combination, which carries the concession that each part is old (The Corn-Planter Patent, 23 Wall. 181, 224, 23 L. Ed. 161); and such is the fact. The parts are a switch, a magnet, an electric circuit, and the specifically avowed purpose of the patent is to prevent damage when the circuit is broken. The occasion for such preservation arises from the fact that when an electric circuit is broken, and the conductors are left proximate to each other, an arc forms, and passes from one conductor to the other; and, if the electrical current be sufficient, the ends of the conductors will be burned, and thereby deteriorated. Hence economy requires the earliest elimination of the arc; and in fact it may be dispersed so quickly by a magnet as to seem to have been nonexistent, the constant and obvious condition being that the magnet shall be of suitable power, and placed in proximity to the conductors. Since 1889 the magnet has been used to a large extent to disperse or to prevent the injurious arcs that otherwise form in breaking the circuits in the operation of trolley cars. In no other industry does the magnet appear to be used for the destruction or the prevention of the arc. Hence its present chief industrial use arose some six years after the issue of the letters, and, what is not important, its existing value in connection with trolley cars was not conceived by the inventor. While the patented combination did not go into any substantial use until some six years after the letters were issued, its use in connection with trolleys is, and since 1889 has become, extensive and valuable. The inventor, Prof. Thomson, applied the combination to a structure of his own, which structure was in other respects valuable, and the subject of patents. The structure has obtained a wide sale and use, as have other structures involving the art in question. Undoubtedly the use of the magnet in the manner and for the purpose stated has been an important factor in producing such sales, but it is considered that the development of the structures admitting of its use has made its value available. The defendant does not use the complainant's structure in the controllers connected with its cars, but does use the magnet to avoid the destructive influences of the arc. A precise survey of the complainant's claims and contentions, and an adequate examination of the state of the art previous to Thomson's alleged invention, are necessary. Claims 1 and 4 are as follows:

"(1) The combination, with an electric switch or commutator, of a magnet placed in proximity to the switch-contacts, or to surfaces between which a spark or flash is liable to occur, substantially as and for the purpose set forth."

"(4) The combination, with the contact points or surfaces in an electric switch or commutator, of suitable means for producing a magnetic field in proximity thereto, which field shall act by its attractive or repulsive influence to diffuse or displace any electric arc or current that may pass or tend to pass at the instant of break or commutation."

The complainant's interpretation of these claims deserves attention. The learned counsel for the complainant states that the invention—

"Is the combination of means for producing a magnetic field with the contact-points of an electric switch for the purpose of accomplishing new results,

namely, 'of (1) preserving the switch structure, and particularly the contact-points, from being burnt or injured'; (2) making a switch for use with considerable potentials a more compact structure; (3) making a switch capable of safely operating with higher potentials than had been previously possible."

Again it is stated that the invention—

"Consists of the combination, in an electric circuit of considerable potential, of a magnet, with and in proximity to the contact-surfaces of a switch, 'substantially as and for the purpose set forth,' to wit, to protect such contact-surfaces, to keep them clean, to prolong their life, and to enable them to be used with a higher potential current than would otherwise be possible."

Again it is said:

"What he [Thomson] discovered, and what previous to his discovery no one had known, was that an electric current of sufficient potential to generate a dangerous and damaging arc between the contact-points of a switch could, by the combination with and action of a magnetic field at those contacts, be deprived of its damaging properties, and could be 'moved on' so quickly that injurious results would not follow. His new structure was a switch combined with a magnetic field, in and by which this conception and discovery was utilized, with the result that such combined switch and magnet was not only more durable, and capable of use with currents of higher potential than any previously known switch, but was more compact, and required less separation of the contact-surfaces than any switch previously invented."

The accuracy of these contentions may be tested by turning to the letters patent, and gathering the expressed conception of the inventor. The specification states that the patentee has—

"Invented certain new and useful improvements in electric commutators or switches," and that the "invention relates to switch or commutator devices for breaking, changing, or shifting electric circuits, and more particularly to switches or commutators designed for use in connection with electric-lighting systems, although it is not confined to devices used in such connection, but is intended to include electric switches or commutators generally when used in combination with circuits designed to carry currents of considerable electro-motive force, or of sufficient electro-motive force to cause a tendency to the formation of electric arcs across the switch-contacts on breaking circuit, or when used in connection with any other apparatus such that there is a tendency to the formation of arcs or sparks at the switch or commutator surfaces. The object of my invention is to increase the durability of electric switches or commutators, and to prevent damage thereto from the causes mentioned. More specifically, my invention is designed to prevent damage to the commutator brushes and segments by the formation of arcs or sparks at the commutators of dynamo-electric machines, and likewise to lessen the tendency to short-circuiting of the armature-coils by the residuary spark of rupture. To these ends, my invention consists in combining with the contact surfaces or points for an electric switch or commutator suitable means for producing a magnetic field in proximity to the contact-surfaces,—such, for instance, as a magnet whose poles are placed near to the said contact surfaces or points, so as to break, displace, or disperse any electric spark or arc that may form or tend to form at such contacts; said magnet acting for this purpose by virtue of the tendency of an arc or heated conductor to move out of or into a magnetic field, according to its direction. My invention consists, also, in the combination, with the commutator for a dynamo-electric machine, of a magnet or magnets, or their equivalent, a conductor conveying an electric current, placed in suitable proximity to said commutator at points immediately following those at which a commutator-segment leaves a commutator-brush, so as to prevent, by the diffusing or displacing action of the magnetic field thus brought to bear, any electric arc or flash or spark at the instant of rupture of circuit between the brush and segment. * * * The magnet may be either a permanent or electro magnet. In the latter case it may be charged from any source. If used in connection with a dynamo-machine, it might be charged by the current, or a

portion of the current, generated by the machine. Any desired form or construction of electro-magnet may be employed, and said magnet may be applied in any desired way, provided it be suitably arranged to bring the attractive or repulsive action of a magnetic field to bear upon any spark, arc, or electric current that may pass or tend to pass at the time of breaking or commutation, so as to diffuse or displace the same. I have herein shown a magnet for producing or bringing a magnetic field to bear; but other means for producing or bringing to bear the desired magnetic influence may be employed,—such, for instance, as a conductor forming the path of an electric current. * * * It is plain that my invention is not limited to any particular form or construction of commutator or switch.”

It will be observed that the inventor’s object was to increase the durability of the conductors by preventing injury thereto. The other advantages suggested by complainant’s counsel, to wit, compactness of structure, the safe employment of higher potentials, and other benefits, arise from the fact that immunity from such injury is secured, although not detailed in the letters.

The combination of claims 1 and 4 consists of a magnet or magnetic field, placed in such proximity to the contact points of an electric switch as to diffuse or displace any electric arc, spark, or flash which may pass or tend to pass at the instant of disconnecting the circuit. The vital conception is the adjustment of the magnet to the electric switch, so as to produce the desired result. Does the combination involve invention, in view of the prior state of the art? Much argument has been devoted to the meaning of the words “electric switch or commutator.” Complainant’s counsel states that “a switch is a structure having two or more stationary terminals, and a bridging connection, which is opened and closed at will by an operator.” At one place complainant’s expert Bentley states:

“A switch, in general, is an apparatus for controlling an electric circuit by separating or bringing into contact two electric conductors connected, respectively, to the source of electricity, whenever it is desired to manipulate the circuit, to open or to close it, or to direct it into new channels.”

At a later period in the trial the same witness stated:

“In my opening deposition, I described the switch known to the art as comprising two stationary terminals connected to the opposite branches of a circuit, and a removable bridging piece inserted between said terminals to complete the continuity of the circuit, or withdrawn therefrom to interrupt the circuit.”

It is evident that this definition is much more limited than the first. Mr. Bentley seems to contend that all known organized apparatus used for switching is within this definition. From this he appears to claim that the bridging piece is a component part of all known electrical switches. Defendant’s expert, Dr. Kennelly, defines a switch to be “any means for effecting the opening and closure of an electric circuit at will.” Prof. Wright, complainant’s expert, states that a switch “is a device for opening and closing a single circuit in some regular and systematic manner.” From the definitions of Kennelly and Wright, it would appear that the bridging piece is not necessarily a part of the switch. The letters state that the “invention is not limited to any particular form or construction of commutator or switch,” but claims 1 and 4 seem to involve the use of some portion

of the switch for the purpose of conducting the current. For the time adopting the view that a segment of the circuit is a part of the switch, and is used as a bridging piece, the complainant's claim is that no person using such switch to break an electric circuit may employ a magnetic field to dispel the arc formed by the disunion at the terminals of the conductors. It seems to follow that the invention does not lie in the electric switch, but in the use of magnetism to dissipate the arc formed by a circuit interrupted by a switch. If the circuit be disconnected otherwise than by a switch, the case is not within the claim. Indeed, it is certain that the influence of a magnet upon such arc was well known long before the complainant's patent, although it may be doubted whether the magnet was ever applied to a circuit interrupted by a mechanical device called a "switch." Assuming for the moment that the dissipation of an arc caused by an electric circuit broken by some means other than a switch was known before complainant's patent, does the disconnection of the circuit by a switch add something to the art of dissipating electric arcs by the application of magnetism? If it was known in the art that the arc could be dispelled when the circuit was opened by hand, nothing was added to the art of dispelling arcs by adding that the switch be opened by a lever. If it was known that the arc formed in a circuit disconnected by any means could be dispelled by a magnet, nothing was added to such art by providing that the circuit should be broken by specified means. The opening of the circuit is a mere incident to operation. To what art, then, has the patentee made contribution? To the art of breaking electric circuits? This claim would be too broad, and could not survive. Is the addition, then, to the art of breaking with greater economy electric circuits by means of a switch? It seems to be this, if anything. But if the switch is a part of the conductors, and is capable of being moved in and out of contact with them, the things preserved are, in effect, the terminals of the conductors or electrodes; and such electrodes, and only such electrodes, were the things preserved under the former art, now presumed to have existed. The switch is endangered because it forms part of the circuit. It burns, if at all, because it is a part of the disconnected circuit. It is preserved because it has been performing the functions of a conductor, and its extremities are rescued because they are terminations of the conductors. The ends of the switch have become electrodes. Upon disconnection they are exposed to the perils of electrodes, and are saved accordingly. What was endangered before the incoming of the patent? The ends of the conductors. Hence, if the means of magnetic extinction were then known, nothing is done now, or endangered now, or saved now, otherwise than at the former period. The fact that the switch is made a severable division of the conductors, and is called a "switch," and it is stated that its ends may be saved from combustion, adds nothing to previous knowledge, and achieves no new result. Apparently, such new invention consists in attaching a handle to the segment of an electric conductor for the purpose of moving it in and out of continuity with the circuit to which it belongs, and extinguishing the arc formed at the points of discontinuity by means of a magnet. It is a means of interrupting the cir-

cuit in two places, with the usual result to the electrodes. If an electric switch be deemed a stated means of opening or closing an electric circuit, the handle, the pivot on which the segment turns, and the segment itself may be regarded as its essential parts; but no part of the switch is imperiled or preserved, save the segment, and that is not imperiled because it is a switch, or part of a switch, but because it is a section of the conductor, and the section where the disconnection is made. The complainant's definition of a switch seeks to individualize the segment, and separate it from the conductors, as if it were not a part thereof, for the simple reason that it moves in and out of connection. The arc passes from one electrode to another; that is, from the end of one conductor to the end of the other severed from it. That is done in the case of the so-called "switch," and is all that, in the nature of the case, can be done.

The conclusion is therefore reached that, if the extinction of such arcs by means of magnetism was known before the patent in suit, nothing has been added to any art by applying the knowledge to a circuit broken by a switch; the precise reason being that the switch is not exposed to or rescued from danger by reason of its being a part of a switch, but because it is a segment of an electric conductor. Therefore no economical advantage results to the switch as such, but to the conductors as such; and this was the exact event in the prior art. But the argument has proceeded upon the assumption that the prior art involved full knowledge that the magnet would extinguish an arc of the kind under consideration, where the current was of considerable potential. It may be considered what the complainant concedes to the prior art. Its counsel states that none of the scientists "had discovered that the burning effects upon the switch surfaces in a circuit of considerable potential could be prevented by the action of a magnet upon the arc. No one had pointed out that a destructive arc would be moved on so quickly as not to be destructive." The complainant's counsel further states that "some of the prior publications describe an always ruptured circuit, over which, when current flows, it flows only by maintaining an arc, and in connection with which it was shown that either by magnetizing a part of the circuit itself (experiments of De La Rive and of Rijke), or by bringing the magnet to the point of interruption, an arc could be deflected or extinguished. The arc was maintained, and was then deflected. * * * The most that can be said of the prior art was that it taught that an arc could, by means of a magnet, be deflected or ultimately extinguished, and the extinguishment somewhat accelerated, as compared with conditions where no magnet was used." The complainant would seem to differentiate the prior art from the patent in this: that the patentee showed that a magnet would not only extinguish the arc formed by a current of considerable power, but would do it so quickly as to render it harmless. If the prior art showed that a magnet would extinguish an arc, it would seem to follow that it was known that its extinguishment would stop its burning. The nature of the arc is to burn. The necessary result of the application of the magnet is to stop the burning. This nature and result existed as much before the patent as thereafter. If it were

conceivably otherwise, the inventor has but stated a new advantage, which was unobserved before. This is not patentable. Nothing was done then that is not done now, save, perhaps, that a stronger magnetic force is applied to a stronger electric current; the one being strong enough to extinguish at once the other. Hence the arc is blown out at once. What was done slowly before is done swiftly now, by virtue of an increased magnetic power, aided, undoubtedly, by modern mechanisms. In other words, the extinction of the arc is now accelerated. But such acceleration is not stated in the letters patent, save as the conception of preventing damage involves it. In claims 1 and 4, the patentee was content "to diffuse or displace an electric arc." Whether this diffusion or displacement should be done gradually, or with greatest speed, is only suggested by the object in view. The desideratum was something that should blow out the arc. That was the problem. Now, it was well known that a magnet would extinguish an arc. For such purpose the patentee used it in his combination. If the invention suggests anything new, it is that the magnet will do its work before injury occurs. This is but a statement that the magnet has the power of acting more quickly than before, although there is no evidence of any limitation upon the celerity of its action at the earlier period. There is no change in the manner of applying the magnet, no new mode of operation, no new result, save in degree. The proximate mechanical results are the same in their nature. In *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327, the court said:

"A mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means, with better results, is not such invention as will sustain the patent."

The fact is that the patentee does not necessarily describe, but in practice he uses, a magnet stronger, and capable of instant extinction of the arc. This indicates increased capacity for usefulness, but nothing of invention. *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327; *Light Co. v. Westinghouse (C. C.)* 55 Fed. 490; *Id.*, 11 C. C. A. 342, 63 Fed. 588; *Machine Co. v. Keith*, 101 U. S. 479, 25 L. Ed. 939; *Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267.

Under the concession of the complainant, illustrated by the quotations from the brief above given, it is unnecessary to review the prior art. The influence of the magnet, to the extent stated, was, and for many years had been, a part of scientific knowledge. The patentee applied it to what he called an electric switch or commutator, which for the purposes of this decision has been regarded as a stated means of opening or closing an electric circuit with a segment of the conductor incorporated in the switch. Long afterwards the operation of trolley cars required the quick extinguishment of electric arcs, on a scale not before contemplated. Thereafter Prof. Thomson devised a structure which involved the use of a magnet to extinguish electric arcs. He had formerly embodied this old art in a patent, and in consequence at the later period sought to monopolize it, without any

legal justification, as it appears to the court. Since the letters in truth reveal no use, function, mode of operation, or manner of application new in the art, the complaint should be dismissed.

ROSE v. FRETZ.

(Circuit Court, E. D. Pennsylvania. December 2, 1899.)

No. 52.

1. PATENTS—VALIDITY—EFFECT OF PRIOR DECISIONS.

The owner of a patent cannot be required to uphold it against every successive contestant who may desire to attack its validity upon facts which have previously been decided insufficient to overthrow it.

2. SAME—METAL UMBRELLA STICKS.

The Rose patent, No. 504,944, for improvements in umbrella sticks, was not anticipated, and discloses patentable invention.

This was a suit in equity for the infringement of a patent. On final hearing.

Henry E. Everding, for complainant.

M. W. Collett, for respondent.

DALLAS, Circuit Judge. This suit is for infringement of the first and second claims of letters patent No. 504,944, granted to John Rose, which are:

"(1) A tubular metal stick for umbrellas or parasols, said stick being drawn down near one end, so that the tubular end portion of the stick is reduced in diameter and increased in thickness, as compared with the body of the stick, substantially as specified. (2) The combination of the tubular metal stick drawn down near one end, so that the tubular end portion of the stick is of less diameter than the body, with the notch applied to said reduced tubular portion of the stick, and the ribs hung to the notch, and fitted snugly against the enlarged body of the stick, substantially as specified."

In *Rose v. Hirsh*, 23 O. C. A. 248, 77 Fed. 469, the court of appeals for this circuit sustained this patent, although a vigorous attack was then made upon these claims. It was there said, and is here conceded, that "the second claim covers nothing new; the first embraces the entire invention;" and it was held that "what Rose did was to invent and construct a metal umbrella stick, having a new and useful feature,—a tapering end so drawn down as to diminish the diameter of the tip and part to which the notch is attached, without diminution of the metal, thus allowing the ribs and canvas to be folded closer than formerly, and materially increasing the strength of the stick where the strain upon it is greatest." That the article thus described has been appropriated by the defendant is fully established; but, again, the patent is assailed, notwithstanding the fact that the disputable presumption of its validity, which resulted from its issuance in 1893, has, by the judgment in *Rose v. Hirsh*, now been made indisputable, except by the introduction of additional proofs, which, if adduced in that case, would probably have led the court to a different conclusion. Even upon final hearing, the owner of a patent is not, and should not be, required to up-

hold it against every successive contestant who may venture to question its validity upon facts already decided to be insufficient to justify its overthrow. *Adams v. Patent Co.*, 39 U. S. App. 662, 26 C. C. A. 326, 81 Fed. 178.

I find nothing in this case upon which the positions taken in defense can, in view of the principle I have referred to, be supported. It is contended that the defendant, and not the plaintiff, was the actual inventor of the umbrella stick in question; but the court of appeals, in *Rose v. Hirsh*, decided that Rose was the inventor, and this notwithstanding the fact that a witness had testified in that case that Mr. Rose had told him "something either about the umbrella people or Samuel S. Fretz wanting tube with the end portion smaller"; and the testimony now presented respecting Fretz's supposed invention, apart from its denial by other testimony, shows nothing more than that he suggested the want, whereas "the invention resides in the conception and its embodiment." *Rose v. Hirsh*, *supra*. The evidence offered to show anticipation is not convincing. It may still be said, as was said in the former case, that, "granting * * * that such tubes were previously made, the fact does not seem important. They did not constitute umbrella sticks, nor suggest adaptability to this use." Decree for complainant.

BRICKILL et al. v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court, S. D. New York. December 5, 1899.)

PATENTS — CONSTRUCTION OF CLAIMS — FEED-WATER HEATERS FOR FIRE-ENGINES.

In view of prior adjudications, the combination claimed in the Brickill patent, No. 81,132, for an improvement in feed-water heaters for steam fire-engines, must be held as not including, as one of its elements, the tank shown, which is used for preserving the heating-apparatus from injury when the engine is absent and disconnected; and the patent may be infringed by an apparatus in which a different device is substituted to perform the function of such tank.

On Exceptions to Master's Report.

The patent in controversy, No. 81,132, was granted to William A. Brickill August 18, 1868, for an "improvement in feed-water heaters for steam fire-engines." The object of the invention was to provide a steam fire-engine at all times with hot water heated to very nearly the boiling point so that steam may be rapidly generated when the engine is called into action.

The cause was tried at the October term, 1879, by Judge Wheeler, and the decision was filed July 2, 1880. 18 Blatchf. 273, 7 Fed. 479. The opinion says: "The claim is for 'the combination, with a steam fire-engine, of a heating-apparatus, constructed substantially as described, for the purposes fully set forth.' There were, before Brickill's invention, contrivances for heating water in coils of pipe, connected by tubes with the boiler of a steam fire-engine, so the water would circulate through the boiler and aid in preparing the engine for immediate use, sometimes detachable when the engine was wanted, and sometimes going with the engine; but none of them were very effective. Those not detachable could not be effectively heated at all, and if those which were detachable were heated sufficiently to keep the water in the boiler hot when the engine was there, the heat, not having the water to counteract it, would injure the apparatus when the engine was gone. * * * The

claim is for the combination of a heating-apparatus constructed substantially as described, and the construction described is of what was new with Brickill." The judge found that the patentee's discovery involved the inventive faculty to a considerable degree and was of great utility. He also found that infringement to some extent was clearly proved, if not admitted by the answer, and he did not attempt to construe the claim with reference to the alleged infringing devices now before the court.

The patent was also considered by Judge Shipman on demurrer to the complaint in an action at law. *Brickill v. City of Hartford* (C. C.) 49 Fed. 372. The portions of the opinion applicable to the present controversy are as follows: "The heater is connected with the boiler of the engine by two detachable tubes, one of which receives the cold water and conveys it to the coil of the heater, and the other receives and conducts the water, when heated, from the heater to the boiler; 'thus establishing and maintaining a free circulation between the heater and the boiler.' * * * There are not three members of the combination—the heater, the tank and the engine. There are only two members,—the heating-apparatus, of which the tank is a part, and the engine. The tank is particularly described as a part of the heating-apparatus, and is to be used in the absence of the fire-engine, and is not to be used when and so long as the engine is again in the house. It is included in, and is pointed out with sufficient distinctness as a part of, that apparatus. Whether the omission of the tank and the use of the rest of the apparatus would constitute infringement is a question which does not arise on this demurrer. * * * The fourth ground of demurrer is that the patent is void, because it appears on its face to claim only an unpatentable aggregation of a steam fire-engine and of a heating-apparatus. If the claim should be construed to consist of a combination of three distinct elements, heater, tank and engine, the defect upon the face of the patent, which is pointed out in the demurrer, would exist, because there is no joint and co-operative action between such three separate elements. The service of the tank was only called into requisition during the absence of the engine, and ceases upon its return. The joint action of the heater and tank did not and could not affect the action of the boiler. The situation would be similar to that which, in view of the supreme court, existed in *Beecher Mfg. Co. v. Atwater Mfg. Co.*, 114 U. S. 523, 5 Sup. Ct. 1007, 22 L. Ed. 232. But construing the claim to be a combination of the heating-apparatus, of which the tank is merely a part, and steam engine, the device does not in my opinion exist because there is a joint and co-operative action between the heating-apparatus and boiler, and the action of each influences and affects the action of the other."

The case subsequently came before Judge Townsend upon demurrer to pleas (57 Fed. 216) but no question bearing directly upon the construction of the claim was involved. The opinion, however, expresses full concurrence with the reasoning of Judge Shipman in overruling the demurrer, *supra*.

The patent was also considered on demurrer by Judge Morris in *Brickill v. City of Baltimore* (C. C.) 50 Fed. 274. The opinion says, "The only question then, is whether the claim is uncertain as to the elements of the combination. In his specification the patentee states that he is 'well aware that the form of the heater used as well as of supplying water after the engine has been detached therefrom may be varied without changing the nature of my invention, which, as already set forth, consists in connecting to or combining with a steam fire-engine a heating-apparatus, so that water heated to nearly the boiling point may be supplied to the boiler of the engine, that the steam may be more rapidly generated, and consequently I do not wish to be understood as intending to claim any particular arrangement of heating-apparatus herein shown.' Reading the claim in connection with this explicit statement in the specification, I can perceive no uncertainty in the claim. It expresses to my mind that there are but two elements in the combination,—one a steam fire-engine and the other a heating-apparatus, constructed substantially as described."

The case came on for trial before Judge Morris and a jury and a copy of what purports to be his charge was read on the argument in this case and has been submitted to the court with the briefs. A portion of the charge is as follows: "As I construe his patent, Brickill does not claim as part of his

invention the tank which was to prevent the overheating of the water receptacle in the heater during the absence of the engine. That was a mere supplementary device for a particular purpose for which any other device, accomplishing the same result of preventing the overheating of the water receptacle in the heater, might be substituted without touching the invention which he claimed as new."

The following instructions were given by the court at the request of the defendants: "The court instructs the jury that the Brickill patent, as construed by the court, is broadly for a circulating heater connected with detachable connections with a boiler of a steam engine." "The tank, D, cocks, G and G2, wrenches, H, and that portion of the pipes, C and C, leading from the pipes, E, to the tank, D, which appears in the drawings and descriptive part of the Brickill patent sued on in this action, form no part of the invention set out in the claim of said patent, and should not be considered by the jury in deciding on the question of novelty or patentable invention of said patent, but merely as exhibiting what the patentee suggests as a convenient and practicable mode of putting his combination into successful use."

The jury found a verdict for nominal damages and the judgment entered thereon was reviewed and affirmed by the circuit court of appeals for the Fourth circuit. 8 C. C. A. 500, 60 Fed. 98.

The master reached the conclusion that Brickill's was a pioneer invention and, therefore, that the patent was entitled to a broad and liberal construction. He says in his opinion: "I therefore find the primary object of the invention was to keep the water in the boiler of the steam fire-engine very nearly at the boiling point, or above. The question as to how the heating-apparatus was to be preserved in the absence of the engine was secondary, and in no sense the primary object of the invention. It is quite material in my opinion whether the patented device was kept serviceable by the additional tank, the substitution of running cold water or the attachment of pipes running to the roof for the purpose of permitting the excess of steam and hot water to escape. The patent is for 'the combination with a steam fire-engine of a heating-apparatus constructed substantially as described for the purposes fully set forth.' The tank is not an element of the patented combination. It performs no function with reference to the heating of the water in the steam fire-engine boiler. It is but a device to maintain the heating-apparatus intact when the fire-engine is detached and until the heating-apparatus is again desired for use, and therefore could be dispensed with as a tank at will, provided any other means known at the date of the patent to be capable of performing such an office should be substituted. Any device embodying the self-preserved feature which, in combination with the steam fire-engine, accomplishes the heating of the water in the boiler of a steam fire-engine by means of the circulation of hot water or steam, would, under the decision of Judge Shipman, be an infringement of this patent. As I have already stated, I do not consider the tank any portion of the combination of heater and the fire-engine boiler. It follows that stationary boilers fitted so as to heat a steam fire-engine boiler by means of circulating hot water and steam were and are infringements of the complainant's patent."

The master filed his report, dated May 17, 1899, and this cause came on to be heard at the October term, 1899, on exceptions filed by the defendants. For the convenience of counsel it was agreed that a preliminary question, presented by exceptions Nos. 21 to 28 inclusive, involving a construction of the claim should first be heard, leaving the remaining exceptions to be considered hereafter. The question presented is of paramount importance and it was thought that it should be determined before the other exceptions were considered.

James A. Hudson and Raphael J. Moses, for complainants.
John R. Bennett, for defendants.

COXE, District Judge (after stating the facts as above). The question to be decided may be briefly stated as follows: Is the water tank, D, shown in the drawing and described in the specifica-

tion, an essential feature of the claim? If so, the apparatus used in connection with engines Nos. 8, 11, 24, 30 and 32 did not infringe, for no tank was employed. It is necessary to consider at the outset how far the court is permitted to go in construing the claim. To what extent is the question an open one? If it has been decided by this court in the present action it is, of course, *res judicata*; if decided by another court of co-ordinate jurisdiction, comity, as well as a decent and orderly administration of equity jurisprudence, requires that the decision should be followed, unless it can be shown that it was made upon an entirely different state of facts. It must be admitted, on all hands, that the question was not decided in the original case. The record is not before the court, but it is manifest that the subject of infringement received but scant attention from court and counsel. If not practically admitted, infringement was proved sufficiently to warrant an interlocutory decree. There was, therefore, no occasion for a careful construction of the claim. The defendants sought to escape by proving either that the patent was anticipated, or void for want of patentability, and the controversy was conducted along these lines. That the relation of tank, D, to the combination was not directly determined is obvious from an inspection of the opinion, and, it is thought that the proposition that it was determined indirectly or inferentially cannot be maintained in view of the fact that the language of which it is sought to predicate such a conclusion was used with no thought of the present controversy. If the opinion had interpreted the claim to include the tank as an essential element this court would be controlled thereby. The opinion does not do this, and if the record be appealed to nothing is there found to justify the inference that the judge intended so to construe the claim. Indeed, as often happens in patent litigation, the position of the parties seems to be completely reversed since the trial. Then the defendants were contending for a broad construction in order to prove lack of novelty; now they are asking for a narrow construction in order to escape infringement. The complainants, on the other hand, were seeking to limit their claim to the structure described in order to escape anticipation and now they seek to broaden it so as to include devices not originally before the court. This legal necromancy may not be entirely consistent, but it so often occurs in the course of patent litigation that the court, if it cannot decorate the practice with the seal of commendation, must, at least, recognize it as familiar and venerable. In any view it is entirely plain that the decision does not deal with the question now under consideration. The Hartford Case makes a distinct contribution toward the proper interpretation of the claim. It is authority for the proposition that there are only two members of the combination—the heater and the engine—and that the tank is not a member. The vital question whether the use of the apparatus, minus the tank, would constitute infringement is, however, left undecided. The Baltimore Case, when the same was considered on demurrer, decides nothing more than the Hartford Case, namely, “that there are but two elements in the combination—one a steam fire-engine and the other a

heating-apparatus." When, however, the cause came on for trial it was necessary to construe the claim and the exact question now in dispute was decided. It would be difficult to conceive of language more explicit and distinct than that used by the court. There can be no doubt that the subject was presented in several different aspects and as often decided in favor of the broad construction. Thus the court said, the patent "is broadly for a circulating heater connected with detachable connections with a boiler of a steam engine." "The tank, D, * * * forms no part of the invention set out in the claim." And again, "Brickill does not claim as part of his invention the tank which was to prevent the overheating of the water receptacle in the heater during the absence of the engine. That was a mere supplementary device for a particular purpose for which any other device accomplishing the same result * * * might be substituted without touching the invention which he claimed as new."

It is argued for the defendants that the question now presented was not involved in the Baltimore Case, and that the charge of the court is, therefore, not authority here. This proposition is based upon the fact that one of the rulings that the tank is no part of the invention was made in response to the defendants' request to charge. On the other hand, it is asserted in the complainants' brief that one of the devices in the Baltimore Case was the exact counterpart of the apparatus which the master here finds to be an infringement and which dispenses with the tank and substitutes therefor a connection with the city water. It is not possible from the meager record of the Baltimore Case which is before the court to reach a perfectly accurate conclusion regarding all the issues involved and the manner of their presentation to the court and jury. It is, however, not necessary that this should be done. It is beyond all doubt that in a bona fide suit upon the patent the court in the body of its charge found it necessary to construe the claim and did construe it to cover a combination of which the tank is no part. This is enough, and the rule thus laid down is a guide which neither the master nor this court should ignore. Were the question an open one much might be said on both sides, but such a discussion at the present time would only tend still further to complicate the situation. The entire case, including the original decree, can be reviewed on appeal unhampered by considerations which constrain this court, and, in any aspect, it would seem unwise to send the case back to the master with the consequent delay and expense when the rights of all parties, so far as this question is concerned, can be fully protected upon the record in its present form. The exceptions in controversy are overruled.

ADRIANCE, PLATT & CO. v. NATIONAL HARROW CO.

(Circuit Court, S. D. New York. December 5, 1899.)

INJUNCTION—GROUNDS—THREATENING SUITS FOR INFRINGEMENT OF PATENT.

While a court of equity will not, in general, interfere by injunction to restrain the owner of a patent from publishing letters and circulars asserting the validity of his patent, that it is infringed by an article manufactured by another, and threatening suits for infringement against purchasers, yet the contents of such publications may be such as to entitle the party against whom they are directed to relief, under recognized principles of equity jurisdiction; and a bill alleging the issuance of such circulars by defendant, and that all the material statements therein made are false, fraudulent, and malicious, and made with intent to destroy complainant's business, cannot be dismissed on demurrer.

On Demurrer to Bill.

S. D. Bentley, for complainant.

E. H. Risley, for defendant.

COXE, District Judge. The issues involved were so thoroughly discussed at the argument that but little need be added. It was thought then, and it is thought now, that upon the last analysis the complainant's right to recover will depend upon the answer to the following question: Has this court jurisdiction to restrain a defendant, who is the owner of a large number of patents relating to harrows, from publishing letters and circulars, alleged by the complainant to be false, asserting that harrows made by the complainant infringe defendant's patents and threatening persons purchasing such harrows with suits for infringement? It was thought that before the parties incurred the large expense of taking testimony it was for the advantage of both that this question of law should be settled. The suggestion was made by the court that the bill be amended by striking out the general allegations which describe and characterize the contents of the circulars and by substituting therefor the circulars themselves, in order that the court might be informed of the precise scope and nature of the accusation. This disposition of the matter seemed at the argument to commend itself to the complainant, but the amendment has not been made and the court is thus compelled to consider the question upon the bill in its present form.

The argument in favor of jurisdiction will be found in *Emack v. Kane* (C. C.) 34 Fed. 46, and the argument against it in *Kidd v. Horry* (C. C.) 28 Fed. 773, and *Kelley v. Manufacturing Co.* (C. C.) 44 Fed. 19.

In every case where the circulars simply assert the validity of the writer's patent, the infringement thereof and threaten suits against infringers, this court has uniformly refused to interfere, following the rule of the latter decisions. The doctrine upon which the bill relies is an exotic of recent origin which has received but scant favor in the courts of this country. The moment it becomes a recognized branch of our jurisprudence courts of equity will be urged persistently to intrude into the affairs of trade and dictate the language in which merchants shall advertise their wares. It will foster a system of vexatious judicial parentalism which will create more evils than it will

cure. Commerce needs no such factitious aid. On the other hand, cases of such rank injustice may arise that the interference of a court of equity may be necessary. For instance, should A., an admittedly irresponsible party, holding no patent of any kind, assert that he owns a valid patent covering a device manufactured by B. and threaten to sue the latter's customers, falsely stating that B. is insolvent and unable to protect them; it may be that in such circumstances a court of law can furnish no adequate protection. The court is not prepared to say that a case may not be so saturated with fraud, falsehood and malice as to require the summary interference of a court of equity. Although it is reasonably certain that the case at bar is not such a case, it is also clear that such a case may be proved under the sweeping allegations of the bill, which charges, in brief, that all the material statements of the circulars are false, fraudulent and malicious and made with intent to destroy the complainant's business. Under such allegations it is possible to prove a more flagrant case than the one appearing in *Emack v. Kane*, *supra*. A bill under which such a wide range of proof is permissible should not be dismissed on demurrer. The demurrer is overruled.

FAUBER et al. v. SPRINGFIELD DROP-FORGING CO. et al.

(Circuit Court, D. Massachusetts. November 22, 1899.)

No. 1,145.

PATENTS—INFRINGEMENT BY CORPORATION—LIABILITY OF OFFICERS.

It is no defense to a suit for infringement of a patent against a defendant individually that any acts of infringement committed by him were committed in his capacity as an officer of a corporation, which, if any one, was the infringer.

This is a suit in equity for infringement of a patent. Heard on pleas of defendants Goddard and Moore.

Poole & Browne and William Maynadier, for complainants.

Edward S. Beach, for defendants.

LOWELL, District Judge. This was a bill in equity, brought against the Springfield Drop-Forging Company, one Goddard "individually and as president of said corporation," and one Moore "individually and as treasurer of said corporation." No objection was made to this phraseology of the bill. The substantial part of the plea of Goddard is as follows:

"That this defendant was, prior to the grant of the letters patent No. 492,959, mentioned in the bill of complaint, to said complainants, on March 7, 1893, treasurer of the Springfield Drop-Forging Company, one of the above-named defendants, and since has been and now is treasurer of said Springfield Drop-Forging Company; that this defendant has not personally at any time made, used, or sold, or caused, directed, or consented to be made, used, or sold, in the said district of Massachusetts, or elsewhere in the United States, any velocipedes or pieces or parts thereof constructed according to or containing the alleged invention patented by said letters patent No. 492,959; that this defendant personally is not now doing so; that this defendant personally has not offered, prepared, or threatened at any time to do so; that each and every of the

acts of infringement alleged in said bill of complaint, if committed at all, were committed by the said Springfield Drop-Forging Company; that all the acts of this defendant in relation to said velocipedes and pieces and parts thereof, if done at all, were done solely in his official capacity as treasurer of the said Springfield Drop-Forging Company; and that this defendant has not personally at any time derived, and is not now personally deriving, as alleged in said bill of complaint, any gain, profit, or benefit whatsoever from making, selling, or using, or from causing, directing, or consenting to be made, sold, or used, velocipedes, or pieces or parts thereof, constructed, as alleged, according to or containing the alleged invention patented by said letters patent No. 492,959."

The plea of Moore is similar. The first part of the plea is a denial of infringement by Goddard "personally"; the second part, an assertion that the infringement, if committed, was committed by the corporation; the third part, an assertion that the acts of Goddard, in relation to the infringement, were done in his official capacity. The plea is somewhat inconsistent, but I take it that its first allegation is meant to be controlled by its third, and that the plea sets forth substantially that the acts of infringement committed by the defendant Goddard, if any there were, were committed by him in his official capacity. If this be the meaning of the plea, the plea is insufficient. *Cash-Register Co. v. Leland* (C. C. A.) 94 Fed. 502. Plea overruled.

ROEHR v. BLISS et al.

(Circuit Court, D. Connecticut. November 17, 1899.)

No. 931.

PATENTS—INVENTION—DOOR FRAMES.

The Boda patent, No. 385,233, for finishing of house interiors, as to claims 1, 2, and 3, which cover, as an article of manufacture, a completed door frame, consisting of the facings and jamb divided longitudinally in two parts, so that the parts may be applied to the opposite sides of the wall opening, and locked together to form the finished frame, is void for lack of patentable invention.

This was a suit in equity by Charles Roehr against Watson H. Bliss & Sons and others for infringement of a patent.

Chas L. Burdett, for complainant.

Hungerford, Hyde, Joslyn & Gilman, for defendants.

TOWNSEND, District Judge. Final hearing on bill and answer raising the question of validity of the first three claims of complainant's patent No. 385,233, granted June 26, 1886, to William J. Boda, for finishing of house interiors. This patent has already been considered by Judge Shipman in an opinion denying a motion for a preliminary injunction herein. 82 Fed. 445. Said claims are as follows:

"(1) As a new article of manufacture, a completed door frame, consisting of the facings and the jamb divided longitudinally in two parts, the sections being secured to opposite facings, and adapted to be applied to the wall opening from opposite sides, substantially as described. (2) As a new article of manufacture, a completed door frame, consisting of the facings and an interlocking jamb divided longitudinally in two parts, the sections being secured to the opposite facings, and adapted to be applied to the wall opening from

opposite sides, and locked together, substantially as described. (3) As a new article of manufacture, a completed door frame, consisting of the facings and the jamb divided longitudinally in two parts, having their abutting faces tongued and grooved, respectively, the sections being secured to the opposite facings, and adapted to interlock with each other when the two parts of the frame are applied to the wall opening from opposite sides, substantially as described."

A saving of time and money is accomplished by cutting the jambs of a completed door frame longitudinally in two, and putting the parts together at the factory, instead of at the house. Inasmuch as such results are not patentable, it is not clear what patentable subject-matter is attempted to be covered by the foregoing claims. Completed door frames, solid jambs, and divided jambs were old. It was old to assemble the parts of a completed door frame at the building. The patentee practically admits that the sole difference between the prior art and his patent consists in having the completed door frame made at the factory instead of at the building. He says:

"Q. 14. Did you find any difficulty in getting your invention of said patent in suit adopted by builders and carpenters? A. Yes, I did, on account of the radical change from the old way of taking the work from the mill to the house in pieces and parts, there fitting these different parts into place, and nailing to the door jambs and the wall. Carpenters, being accustomed to this old way, condemned my patent, because of the work being taken out of their hands, and being placed in the hands of the manufacturer at the factory."

If a carpenter has the separate pieces of a door frame delivered to him at the building, or cuts them out himself, and inserts them in the door opening separately, he does not practice Boda's alleged invention; but if the man gets them out, or has them delivered to him, at the factory, and there fastens some of them together, so that he can carry them to the building in two sections, each section consisting of a half jamb and the casing on one side of the door, and so that they can be applied to the door opening from opposite sides, then he does practice Boda's alleged invention. The same man accomplishes the same result in each case by the use of the same instrumentalities upon the same material consisting originally of the same number of separate pieces. It is unnecessary to consider the defenses of prior use and noninfringement. Let the bill be dismissed.

BOSTON & R. ELECTRIC ST. RY. CO. v. BEMIS CAR-BOX CO.

(Circuit Court of Appeals, First Circuit. November 10, 1899.)

No. 292.

1. PATENTS—SUIT FOR INFRINGEMENT—BILL OF REVIEW.

There is no absolute rule which prevents a party who has relied wholly on certain issues in the original cause from filing a bill of review on a new issue not raised in the suit, or not litigated; but where a defendant engaged in the manufacture of an article covered by complainant's patent, with knowledge of the patent, in reliance on the protection of a patent of its own, on which it also relied in a suit for infringement, it is not entitled to file a bill of review, based on newly-discovered evidence, attacking the validity of complainant's patent on a new ground, which had not influenced its actions, unless it presents considerations which appeal with especial force to the chancellor's conscience.

2. BILL OF REVIEW—APPLICATION TO APPELLATE COURT FOR LEAVE TO FILE.

Where a petition is filed in the circuit court of appeals for permission to file a bill in the circuit court to review a decree which has been affirmed on appeal, and the issues raised are such as, if sustained, necessarily require a reversal of such decree, but are of such a character that they cannot properly be determined on affidavits, permission will be given to file the bill in the lower court, provided the petitioner shows himself free from laches, and entitled to raise the issue. In *re Gamewell Fire-Alarm Tel. Co.*, 20 C. C. A. 111, 73 Fed. 908, followed.

3. SAME—PETITION FOR LEAVE TO FILE—QUESTIONS CONSIDERED BY APPELLATE COURT.

While, on a petition to an appellate court for leave to file a bill of review, the question of materiality is ordinarily for that court to determine, and the question of laches for the court below, which has the entire record before it, yet where the petition sets out all the facts necessary to dispose of the question of laches, and shows the petitioner's want of due diligence, while the question of materiality cannot be properly determined on the showing made, the petition will be denied on the ground of laches.

4. PATENTS—SUITS FOR INFRINGEMENT—BILL OF REVIEW—LACHES.

A defendant in a suit for infringement of a patent, who, during a protracted litigation, based his defense entirely on the grounds of anticipation by prior patents and noninfringement, is debarred by laches from the right to file a bill of review based on newly-discovered evidence claimed to show that complainant's patent is void on the ground of prior public use by the patentee, where the petition fails to show that any investigation of the question of prior use was made until nearly 10 years after the litigation commenced, although formal issue was joined thereon in the suit, and that the evidence set out was at once discovered when such investigation was instituted. Especially should the filing of such bill be denied where the petition therefor shows affirmatively that by reason of the lapse of nearly 20 years since the alleged prior use, and the death of persons having knowledge of the facts, it will be difficult to satisfactorily determine the question.

Francis Rawle and Edward Wetmore, for petitioner.

Arthur v. Briesen and Antonio Knauth, for defendant.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This petition arose out of a bill brought in the circuit court for the district of Massachusetts on July 2, 1890, by the Bemis Car-Box Company, the present respondent, against the Boston & Revere Electric Street-Railway Company, the present petitioner, for the infringement of a patent for an invention issued to Sumner A. Bemis on the 5th day of April, 1881. Such proceedings were had on the bill that on August 10, 1896, an interlocutory decree was entered in favor of the complainant for a master and an injunction, from which an appeal was taken to this court, where on April 21, 1897, the decree of the circuit court was affirmed on its merits (25 C. C. A. 420, 80 Fed. 287); and such further proceedings ensued that a final decree against the respondent in that case was entered in the circuit court on May, 1, 1899. The petition was filed in the interest of the J. G. Brill Company, which corporation manufactured the infringing device, and was concerned in the defense of the suit in the principal cause, if it did not entirely assume it. The petition avers that in October, 1898, the J. G. Brill Company received from an unexpected source information which proved to

be the clew to a very large amount of evidence of prior public use, shown by the petition; being mainly, if not entirely, that of prior public use by the inventor for more than two years before his patent was applied for. The prayer of the petition is that the petitioner may have permission to apply to the circuit court for leave to file a bill of review to bring forward the newly-discovered evidence referred to, and to have the principal cause reheard.

Leave was duly granted by this court to file the petition and the proofs accompanying the same, and a summons to show cause was issued to the Bemis Car-Box Company, and it answered and filed its affidavits in reply. Also, in accordance with leave granted, briefs for both the petitioner and the respondent were filed; and, afterwards, by special order, the cause was orally argued at this term. The practice in matters of this character was quite fully explained by this court in *Re Gamewell Fire-Alarm Tel. Co.*, 20 C. C. A. 111, 73 Fed. 908, by an opinion passed down on April 23, 1896. In *Post v. Electrical Co.*, 32 C. C. A. 151, 89 Fed. 1, 5, in an opinion passed down on June 14, 1898, we gave a summary of all the cases where questions of this character have been raised before us.

It is clear that, after the petitioner received the clew to the new evidence to which the petition relates, it proceeded with great diligence in perfecting its case and bringing it before this court.

The bill in the original cause contained the usual allegation that the alleged invention had not been in public use or on sale for more than two years prior to the application for the patent, and the answer contained a formal denial of that allegation. No proofs, however, were taken in the original cause with reference to that allegation; so that, so far as it was concerned, the case stood on the presumption raised by the granting of the patent, and no practical issue was made with reference thereto. There is no indication whatever in the record in the principal cause that the petitioner justified the use of the patented device on the issue of alleged prior public use. The question has been made whether, ordinarily, equity requires that a bill of review should be permitted to be filed on a new issue which might have been presented in the principal cause, but was not. On general principles, it would seem that there would be no equity in this behalf, unless in very exceptional cases.

In *Young v. Keighly*, 16 Ves. 348, 354, decided in 1809, Lord Chancellor Eldon remarked that the decisions allowing bills of review are not applicable where the original cause did not admit the introduction of the evidence, as not having been put in issue. Mr. Justice Story, in *Dexter v. Arnold*, 5 Mason, 303, 313, Fed. Cas. No. 3,856, apparently regarded this as the general rule. Nevertheless the later authorities do not permit a formulated rule of this character; and, as no fixed formula can ever be laid down, limiting equity as to relief against error, fraud, or misfortune, all that can be said in this behalf is that, under some circumstances, the fact that a petitioner for review was originally contented to rest his case on certain issues ought to bar him from calling on equity to aid him to present new issues after he has been defeated as the

result of protracted litigation in the principal cause. The petition in this case does not deny that when the J. G. Brill Company, in whose interest it is presented, commenced to manufacture the infringing device, it had been informed of the existence of the complainant's patent. On the contrary, it had a patent of its own, relating to the same subject-matter, issued on December 31, 1889, under which it claimed the right to manufacture the infringing device; and, both on this account and on account of its extensive interest in the industry, it presumably had full knowledge of the condition of the art, including the patent in suit. It thus appears that the J. G. Brill Company was content to proceed to manufacture the infringing device, relying solely on the defenses stated; and, in equity, it ought to stand there until it presents considerations which appeal with especial force to the chancellor's conscience.

Aside from the question of diligence, which we will consider later, there arises the question of the materiality of the new proofs offered by the petitioner. The rule as stated in Story, Eq. Pl. (10th Ed.) § 413, is to the effect that the new matter should be such as, if known, "might probably have produced a different determination"; and it is also laid down in practically the same language in Daniell, Ch. Prac. (6th Am. Ed.) *1577. The rule on this point is stated quite as favorably for the petitioner in *Re Gamewell Fire-Alarm Tel. Co.*, 20 C. C. A. 111, 73 Fed. 908, as anywhere. It is said there, at page 913, that the circumstances in that case were such that there would be "a reasonable probability that the proofs, if they sustained the allegations of the petition, would require reconsideration from us if the case should come here again." In the present case the new issues, if sustained, would clearly require a reversal of the judgment in the principal suit. In the case last cited, although it was said that the question of materiality is usually for the appellate court, yet the proofs were of such a complicated character that they required investigation according to the ordinary methods of judicial proceeding, which could not be had in this court on affidavits. In that particular the case at bar corresponds fully. The issue which the new proofs raise, if determined in favor of the petitioner, would, as already said, necessarily lead to a reversal of the judgment already entered; but the proofs now brought to our attention are so contradictory, cover so large a field, and relate to matters so long gone by, that it would be impossible for us to sift out the case properly on mere affidavits. It is therefore plain that if the petitioner can be permitted to raise this new issue, and has not been guilty of laches, the new proofs now offered should have an investigation in the court below.

With reference to the nature and degree of diligence which must be shown in a petition of this character, Lord Bacon's rule, as given by the supreme court in *Purcell v. Miner*, 4 Wall. 519, 521, requires that the new proof "could not possibly have been used at the time when the decree was passed." Story, Eq. Pl. (10th Ed.) § 414, says that it must be such as the party, by the use of rea-

sonable diligence, could not have known. The necessity of enforcing this rule strictly, with reference to anticipatory matter, was stated in *Re Gamewell Fire-Alarm Tel. Co.*, already cited; and the new defense now sought to be raised is of the same family.

In *Young v. Keighly*, 16 Ves. 348, 354, Lord Eldon suggests an illustration in the way of an omission to look into a box for instruments which no human prudence would have suggested, and he says that such an omission will not prevent a bill of review. This, of course, is an extreme hypothesis. The petitioner claims to bring itself within that illustration, because it alleges no diligence whatever with reference to searching for the class of facts covered by its petition, and maintains that it came upon them accidentally, and that they could not have become known in any way except by accident. There seems to us, however, no analogy between this case and Lord Eldon's illustration, which would excuse all omission to look for proofs in the early stages of the litigation. It is true that the petition alleges, generally, diligent efforts on the part of the respondent in the principal cause with reference to ascertaining the facts proper for defense. This must, however, be qualified by the fact already referred to, that the petition states what is true, as we have said, that the defenses in the principal suit were limited to alleged anticipation by earlier patents and to noninfringement; and, in the absence of details showing otherwise, these general allegations in respect of diligence must be assumed to be limited to searches with reference to those particular issues. Therefore, on the question of diligence, it is impossible to sustain the petition, except on the theory of the illustration given by Lord Eldon.

This, of course, lays outside of the case numerous instances in which bills of review have been allowed on the strength of facts which have accidentally come to light within the field of prior investigation; for example, cases such as this would be if the J. G. Brill Company had made diligent efforts to find proofs to show prior use by either the patentee or any other person, and had failed to find the thread which was found accidentally after the judgment in the principal case, as alleged by the petitioner. The only question, therefore, is whether the proposition can be maintained that the want of any efforts whatever to investigate the question of prior use can be excused on the theory that, if the efforts had been made, the probability is that no result would have come from them. The categorical answer is that, while the efforts might not have been fruitful in results, on the other hand there is no improbability that they would have been, and the facts of the case itself show that the omission to search was not an omission to look into a field "which no human prudence would have suggested."

It is to be borne in mind, first of all, that the bill in the principal case was filed on July 2, 1890, which was nearly 10 years ago, and that the time to which any investigation would have related was the latter part of 1878 or the earlier part of 1879; so the filing of the bill divided into nearly equal portions the period with reference to the beginning of which the petitioner was compelled to make

the search to which its petition relates. It is self-evident that an investigation made at the middle of this period would have been much more likely to yield results than one made at its close. Moreover, as we have already said, the case shows that the J. G. Brill Company was during all this time very extensively engaged in the art to which the patent in suit relates, and had extensive dealings with a great many street-car companies scattered over the United States, so that it had unusual facilities for making an investigation of this kind.

Particularly, the probability that an investigation made about the time the principal suit was commenced would have yielded results cannot be denied, in view of the very broad case made by the petition. This is summed up in that part of the petition where it states that the prior use was on 10 different street railways detailed by it,—among the rest, such well-known lines as the Brooklyn Street Railway, the Seventh Avenue Railway of New York City, the Middlesex Railway of Boston, the Union Railway of Providence, the Citizens' Line of Baltimore, and the street railway at Springfield, Mass. It is not only probable, but it seems almost manifest, that if the J. G. Brill Company, with its facilities, had made inquiries, even by correspondence, of the officers of these various railways, with many of whom, presumably, it was dealing, it would readily have been put upon the track of substantially all which it has lately discovered. The petitioner's brief maintains that Bemis, the inventor, was, in the early days to which its new proofs relate, only a mechanic, doing a small business at Springfield; but he was not unknown, and the patent in issue gave his residence at that city. If any attempts had been made 10 years ago to investigate the question of prior use by him, which particular prior use is the main burden of the petition, it cannot be doubted that it would have occurred to any thoughtful person to have commenced them at Springfield; and, according to the matters alleged in the petition, if that investigation had been made the J. G. Brill Company would have at once come upon the strongest line of proofs now presented.

The petition states that in May, 1899, the counsel of the J. G. Brill Company visited Springfield to investigate the matter of prior use, and called on an officer of the railway company who had been in its employ since 1876; that the officer stated generally the facts; that the counsel found one Pierce, whose affidavit is in the case; and that after he found Pierce, which was on the day after he reached Springfield, his investigations were easily completed. Pierce claims to have been in the employ of the company in 1877, and for many years thereafter. The counsel went with Pierce to the old car barn of the railway company, and there found four exhibits, which Pierce dates as early as 1877, and one of which is produced in court as demonstrating prior use. The affidavit of Pierce was taken on the same day, and on May 4th the counsel took the affidavit of one Johnson, who claims to have been in the employment of Bemis in August, 1878, and to have remained with him for several years, and whose affidavit supports the petitioner's case. As already said, these affidavits give the strongest support to the petition of

anything found in it, yet the whole investigation covered less than four days. The circumstances which we have stated show, however, that if the J. G. Brill Company had cared to make the defense, nominally raised by the allegation in the bill and the denial in the answer, with reference to prior use by Bemis, it would, without any difficulty, at or about the time the suit was commenced, have come at once upon the most important facts in its behalf, and thus the thread for all the other facts, on making inquiry in the locality where inquiry would naturally and probably have been made.

It is true that the case thus made by the petitioner with reference to the prior use at Springfield is squarely met by the denials of Bemis and of one Hoadley, who had peculiar opportunities of knowing the facts; but this is not of importance on this particular topic, which relates only to the case as made by the petitioner, although it becomes of importance with reference to another proposition to be spoken of further on.

In all its aspects, the petition makes a case to which the general rules of laches have special application. The affidavit of Martin Brill in behalf of the petitioner states that in 1890 and 1891, which was the very time when the pleadings in the principal case were being made up, and when the J. G. Brill Company should have entered upon its investigation, the era of electrical propulsion of street cars had come; that many street railways had then become electrically equipped; and that this led to radical changes in the running gear, so that cars and equipments were rendered useless and given up. This statement is made as a leading fact to exhibit the difficulties which the petitioner met with in the investigations resulting in the new proofs set out in its petition. On the other hand, it shows equally serious difficulties, which, if a review were permitted, would now rest on the patentee in meeting the issue of prior use, in excess of those which would have rested on it if the issue had been seasonably raised.

Mr. Brill further refers in this same connection to the fact that the subject-matter of the patent in issue relates to interior details of construction, not likely to be known to or observed by more than one or two employés of each railway company; but this difficulty was easily met in the Springfield case, and it might have been met as easily in all the other cases, for aught that appears, if seasonable investigation had been made.

The peculiar necessities which render proper the application of the rules relative to laches, and the difficulty of reaching the precise facts in behalf of the patentee with reference to transactions of so early a day, are especially illustrated in this case, by the fact that this petition succeeds the death of one King, who, it appears, was not only the superintendent of the Springfield Street Railway, but was also concerned in the getting up of the precise car-wheel boxes at that city to which the affidavits relate. The petition also states that the investigations which it describes had been pursued with a great deal of diligence, but that, inasmuch as the period to which they apply is more than 20 years prior to the present time, most of the employés of the various railway companies had left

their employments, or had died, or could not be found, or, if found, could not remember the occurrences in question; and the petition, at various points, gives the details of the difficulties which were met, in several particular instances, in searching for the various witnesses whose affidavits are appended to it. Whatever difficulties of this character may have stood in the way of the petitioner stand equally in the way of the patentee, and render it all the more necessary to regard the rule stated in *Craig v. Smith*, 100 U. S. 226, 234, that the discretion of the court in reference to bills of review should be "exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause."

The petitioner urges that the respondent stands in the position of asking a court of equity to sustain a decree based upon untruth because it would be inequitable to have the truth proved. It is true that ordinarily, in equity, there is no bar which runs against fraud or perjury, which is one species of fraud, until the fraud or perjury has been discovered; but to admit the petitioner's proposition, under the circumstances, would be to reason in a circle. All the allegations of the petition, so far as they touch the question of prior use, are squarely met by sworn affidavits, including that of the patentee. To yield to this proposition of the petitioner would substantially annul the rule of diligence with reference to all patent causes, so far as concerns the defenses of anticipation and prior use; yet it is in connection with these classes of defenses that it is especially necessary to insist on the rule, for reasons often given, which it is not necessary to reiterate here.

In *Re Gamewell Fire-Alarm Tel. Co.*, 20 C. C. A. 111, 73 Fed. 908, already referred to, it was said, at pages 912 and 913, that, on petitions of this character, questions of two classes arise,—materiality and laches,—and that the question of laches is ordinarily for the court below. The reason given for this was that an appellate court, in dealing with an appeal, considers, sometimes, only portions of the record, and is usually ignorant of the details of the history of the case, and thus ordinarily fails to have before it the elements which would enable it to determine properly the question of laches. Instances were, however, referred to in which the supreme court, on proceedings of this character, passed on both the questions of materiality and laches; and other cases of the same kind may be found. In closing, the opinion, at page 914, observed that the question of laches involved in that case too many elements not considered on the appeal, and too many matters not appearing of record in the circuit court of appeals, to permit attention from that court; and therefore that question was remitted to the circuit court. In the case at bar, however, we have a formal petition, setting out all the facts necessary to dispose of the question of laches, while, as already said, the affidavits are so contradictory that the court cannot properly dispose of that of materiality, although ordinarily it is for the appellate tribunal. On the whole, the result is clear that we ought not to aid the respondent in the original cause to shift its position at this late day, under the circumstances we have stated,

and ought not to protract the litigation by remitting the case to the lower court for any purpose whatever.

The petition is denied, with costs for the respondent.

HAGAN et al. v. SCOTTISH UNION & NATIONAL INS. CO.¹

(District Court, E. D. Pennsylvania. November 11, 1899.)

No. 4.

1. INSURANCE—CONFLICTING CLAUSES—CONSTRUCTION.

Where an insurance policy contains conflicting clauses, those in writing will overrule those in print; and the general principle that the policy should be construed against the company, rather than against the insured, will be applied.

2. SAME—MEANING OF PARTICULAR WORDS USED.

The phrase, "for account of whom it may concern," or equivalent terms, clearly evinces a purpose to keep insured the entire title to a boat; and one who purchases a part interest, and adopts the insurance, will be allowed to recover for a loss, although a printed stipulation in the policy is inconsistent with such right.

In Admiralty. This was a libel by the owners of a vessel against an insurance company to recover for a loss by fire. The policy declared that it was issued "for account of whom it may concern." The defense was based upon a clause providing that the policy should be void "if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance." The facts are very fully stated in the opinion of the court. Decree for libellant.

Horace L. Cheyney and John F. Lewis, for libellants.

Henry R. Edmunds, for respondent.

MCPHERSON, District Judge. In December, 1897, Peter Hagan, who was then the sole owner of the tugboat Senator Penrose, took out a fire policy for one year in the respondent company, insuring Peter Hagan & Co., "for account of whom it may concern, to an amount not exceeding \$2,000, on the iron tug Senator Penrose, her hull, tackle, apparel, engines, boilers, machinery, appurtenances, furniture, and supplies." Among the printed provisions of the policy, it is declared that the contract shall be void "if the interest of the insured be other than unconditional and sole ownership," or "if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance, * * * whether by legal process or judgment, or by voluntary act of the insured or otherwise, or if this policy be assigned before a loss." In June, 1898, Hagan sold a half interest in the tug to Martin, but did not notify the company of the sale, or obtain its consent thereto. There was some discussion between Hagan and Martin concerning the effect of the sale upon the policy, and they took the advice of an insurance broker upon the sub-

¹ Reported by Arthur G. Dickson, Esq., of the Philadelphia bar.

ject, coming finally to the conclusion that the clause, "for whom it may concern," was sufficient to protect the interest of Martin without further action. The sale included a half interest in the policy, and Martin accounted to Hagan for the proper share of the premium for the unexpired term. In the month of July the boat was destroyed by fire. Proofs of loss were made, but the company refused to pay, upon the ground that, under the foregoing provisions of the policy, the sale to Martin had made the contract void.

The decision of the case depends upon the effect to be given to the words, "for whom it may concern." This clause, so far as it may be in conflict with other language in the policy, must, upon familiar principles, be regarded as dominant. It expresses the special agreement of the parties, for it is in writing, while the conflicting provisions are in print, and general printed conditions usually give way to deliberately chosen written words. Moreover, even if the court doubted which provision should prevail, another well-known rule requires the policy to be construed against the company rather than against the insured; and therefore, upon either grounds, the clause now under consideration is controlling.

The effect to be given to it seems to be well settled. The supreme court, in *Hopper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219, states it in this language:

"A policy like the one here in question, in the name of a specified party, 'on account of whom it may concern,' or with other equivalent terms, will be applied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the former, or they subsequently adopted it. 1 Phil. Ins. § 383.

"This is the result, though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it. Id. § 384.

"One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made. Id. § 388.

"The adoption of the policy need not be in any particular form. Anything which clearly evinces such purpose is sufficient."

The first step, therefore, in a given case, is to determine what interest the person taking out the policy intended to protect. It is not essential that he should have had any specific individual in mind. It is enough if he intended to protect the interest that afterwards passed to the person injured; and, if he so intended, the policy may be adopted afterwards by a subsequent sole or partial owner of the interest, although such owner may have been unknown to the person taking out the insurance, or to the company, at the time the policy was written.

In the present case, I have no doubt (and I find the fact to be) that Hagan intended to insure, and to keep insured for one year, the entire title to the boat. He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object, the policy would more naturally have been taken out in his own name, omitting the qualifying phrase. But he intended to protect the ownership of the boat, whether vested in himself alone, or shared with, or transferred to, other persons.

This being his intention, and Martin having afterwards adopted the policy by the agreement of sale and by accounting for a proper share of the premium, I think no further difficulty exists. The facts bring the dispute within the rule laid down in *Hopper v. Robinson*, and in other cases, to which reference need not be made. In *Mosser v. Donaldson* (Pa. Sup.) 10 Atl. 766, cited by the respondent, it clearly appeared that the parties intended that two persons only should have the benefit of a similar phrase, and this is the ground upon which a third person was denied the right to share in its protection. I do not think that the decision of the Maryland court of appeals in *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.* (Md.) 7 Atl. 905, is in conflict with the rule stated by the supreme court of the United States, but, if there is a conflict, my duty is plain.

A decree will be entered in favor of the libellant for \$1,533.33, with interest from October 8, 1898, and costs.

THE BENJAMIN A. VAN BRUNT.

PEARCE v. OLD COLONY STEAMBOAT CO.

(Circuit Court of Appeals, First Circuit. November 8, 1899.)

No. 273.

COLLISION—STEAMER PROCEEDING IN FOG—FAILURE OF ANCHORED VESSEL TO SOUND BELL.

A steamer with a large passenger list, nearing the end of her trip, is justified in proceeding along a river to her own wharf before anchoring, notwithstanding a dense fog, provided she uses all the precautions possible under the circumstances, and she is entitled to recover damages caused by a collision with a vessel at anchor in the stream, while so proceeding, through the fault of such vessel in failing to sound her bell. *La Bourgoigne*, 30 C. C. A. 203, 86 Fed. 475, followed.

Appeal from the District Court of the United States for the District of Massachusetts.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellant.
Edward S. Dodge and Charles F. Choate, Jr., for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This collision between the schooner Benjamin A. Van Brunt and the steamer Pilgrim occurred, during a dense fog, between 4 and 5 o'clock on the morning of Sunday, September 11, 1892, in the channel in front of the city of Fall River. The particular locality was about a mile below the wharves of the Old Colony Steamboat Company, whose steamers, of which the Pilgrim was one, were then plying between Fall River and New York. The Van Brunt came in, coal laden, on Wednesday, September 7th, and had been lying at anchor in the channel at this place, waiting her turn to be unloaded at Staples' coal dock, off which she was anchored.

The Pilgrim was a very large steamer, arriving, with a large number of passengers and a heavy freight, on her regular voyage from New York. She had passed in and out by the Van Brunt every day, and knew that the Van Brunt was lying at her anchorage when she last sailed for New York. She had had, however, no information how long the Van Brunt would lie there, and no especial reason to anticipate that she would be there on her return, Sunday morning. She was, however, bound to consider the possibility of her still lying there; and she was also bound by the usual rules affecting navigation in a fog, as applied to narrow channels in which the presence of other vessels must be anticipated.

It is apparent that no proper provision was made by the Van Brunt for the proper use of her bell. She fails to show that it was sounded on the approach of the Pilgrim. The last course of the Pilgrim was taken some five or six miles below. She had a vigilant lookout, but the Van Brunt claims that he was not so far forward as the expressions of the courts ordinarily require. The Pilgrim maintains that his position was the most suitable one for her under the circumstances then existing. This, however, we need not determine, because the fog was so dense it is plain that, if the lookout had occupied the position demanded by the Van Brunt, the collision would not, nevertheless, have been avoided. Ordinarily, the lack of a proper lookout indicates a want of vigilance which weighs against the proofs offered by a vessel deficient in that respect; but in the present case there was no lack of vigilance, because the position which the Pilgrim's lookout occupied was one of deliberate choice, determined according to the judgment of the officers of the steamer, fairly exercised.

Under the circumstances, the case on the part of the Pilgrim is so much like that of the *La Bourgogne*, which came before the district court for the Southern district of New York in 76 Fed. 868, and before the circuit court of appeals for the Second circuit in 30 C. C. A. 203, 86 Fed. 475, that it is fairly settled thereby. The *La Bourgogne* was proceeding to sea down New York Bay, when she met a dense fog. Thereupon she slowed down to some three or four knots an hour, seeking an anchorage. While proceeding to her anchorage, she sighted the *Ailsa* at anchor, and, though she at once reversed, she could not avoid a collision. It was contended that she should have anchored sooner, and that her omission to do so was a legal fault, which made her responsible for the collision. The court, however, held that she was proceeding to a proper anchorage, and that she was excusable. In other words, she was not required to anchor at once, although the fog was so dense that she could not comply with the rule as to the speed of steamers in fogs as commonly stated, and as also stated and applied by this court in *The H. F. Dimock*, 23 C. C. A. 123, 77 Fed. 226, 228. Under the circumstances, she was evidently justified by the court in seeking an anchorage, and excused in using the rate of speed necessary to accomplish that purpose.

So, in the case of the Pilgrim, it would have been unreasonable to forbid her, with her large list of passengers, from leaving the fairway, where, while at anchor, she would have been in some danger in

the dense fog, and from approaching her own wharf, provided she used all the precautions which, under the circumstances, were possible. This she evidently did. The proofs show that she slowed down, and afterwards stopped her engines; that then all her watch on deck listened for sounds; that, after the engines had stopped for about a minute, she started up again under a bell for half speed; but that, before her wheels had made a single revolution, her electric headlight struck the Van Brunt, so that the Van Brunt loomed up. Then the Pilgrim's engines were backed at full speed, and her helm was put to port, with the result that the Van Brunt escaped substantially uninjured, and the Pilgrim was the only vessel to suffer. Had the Van Brunt been sounding her bell, it would have been heard when the Pilgrim stopped her engines, and the collision would have been avoided. Under the circumstances, the Van Brunt was clearly at fault, and the Pilgrim was excusable. It follows that, as the decree of the district court awarded the owners of the Pilgrim the damages suffered by her through the collision, it was correct.

The decree of the district court is affirmed, with interest, and the costs of appeal are awarded to the appellee.

THE PROVIDENCE.

PEARCE et al. v. OLD COLONY STEAMBOAT CO. (two cases).

(Circuit Court of Appeals, First Circuit. November 8, 1899.)

Nos. 179, 272.

1. COLLISION—DETERMINING FAULT—VESSEL VIOLATING STATUTORY RULES.

The rule applied that a steamer violating the statutory rules, by proceeding at an unlawful rate of speed in a fog, in connection with which violation a collision arises, to clear herself from liability must show, not merely that such violation was probably not one of the causes of the collision, but that it could not have been.

2. SAME—AWARD OF DAMAGES—REVIEW ON APPEAL.

The settled rule of the federal courts that successive decisions of two courts in the same case on a mere question of fact are not to be reversed, unless clearly erroneous, is applicable to the report of a commissioner in admiralty fixing the damages resulting to a vessel from a collision, which has been confirmed by the trial court.

3. SAME—MEASURE OF DAMAGES—DEMURRAGE.

The fact that there is no means by which to determine the charter value of a vessel injured by a collision, or that the owner has another vessel by which she is at once replaced, does not prevent the allowance of demurrage for the time she is laid up for repairs; and, where she would have been engaged in making regular trips, the damages may be computed on the basis of her average earnings. *The Cayuga*, 14 Wall. 270, followed.

4. SAME—COST OF REPAIRS—UN SOUNDNESS OF VESSEL.

The owner of a vessel injured in a collision is not entitled, under the circumstances of this case, to be allowed for the increased cost of repairs caused by the fact that, on opening up the vessel, parts adjacent to those parts injured, and not directly involved therein, are found to be unsound, and the cost of repairing the injured parts is thus increased.

Appeal from the District Court of the United States for the District of Massachusetts.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellants.
Edward S. Dodge and Charles F. Choate, Jr., for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. These appeals grew out of two suits in the district court arising out of a collision between the steamer Providence and the schooner Benjamin A. Van Brunt in the channel in front of the city of Fall River, shortly before 7 o'clock on the morning of Sunday, September 11, 1892. The facts in this case supplement those stated in our opinion in *The Benjamin A. Van Brunt* (C. C. A.) 98 Fed. 131, passed down this day. The Providence belonged to the same line as the steamer Pilgrim, and was arriving from New York the same morning, only a few hours later, when she came into collision with the schooner, still anchored, as described in that opinion. The Providence was somewhat injured, and the Benjamin A. Van Brunt was sunk. The result was a libel in favor of the Old Colony Steamboat Company, as owner of the Providence, against the schooner, on which libel the district court found the Benjamin A. Van Brunt alone in fault, and entered a decree against her for the damages which the Providence suffered, from which the owners of the Van Brunt appealed to this court. Her owners also libeled the Old Colony Steamboat Company for the damages suffered by their schooner, which libel the district court dismissed, for the reason already stated, and from the decree of dismissal they also appealed. The result is the two cases in which this opinion is entitled.

The Providence was proceeding to her wharf at between five and six knots. At this locality, and with the fog then existing, this was clearly an unlawful rate of speed, in violation of the statutory regulations. It is claimed, however, on the part of the Providence, that the rate of speed did not contribute to the collision. It is impossible for any court to find that such was the fact. If the Providence had used the same precautions as the Pilgrim, the presumption is that the collision might have been avoided, or, at least, that the consequences would have been no more serious than those of the collision between the Pilgrim and the Van Brunt. However this may be, the rule has been clearly laid down by the supreme court, as shown by us in *The H. F. Dimock*, 23 C. C. A. 123, 77 Fed. 226, 230, to the effect that a vessel violating the statutory rules, in connection with which violation a collision arises, must show, not merely that such disregard was probably not one of the causes of the collision, but that it could not have been.

On the other hand, the evidence shows clearly that the Van Brunt was negligent with reference to sounding her bell on the approach of the Providence, as she was on the approach of the Pilgrim, and therefore both vessels were at fault.

The court below sent the case to a commissioner, who allowed the Providence, as the cost of repairs, \$4,560, and also 18 days' demurrage, at \$670 per day. His report was confirmed, but the Van Brunt, having taken exceptions thereto, brings her exceptions before us. The

rule has been many times stated by the supreme court, of which a late instance will be found in *Towson v. Moore*, 173 U. S. 17, 24, 19 Sup. Ct. 332, to the effect that successive and concurrent decisions of two courts in the same case on a mere question of fact are not to be reversed, unless clearly shown to be erroneous. This rule was applied to a report of a master in chancery which had been confirmed by the court, in *Warren v. Keep*, 155 U. S. 265, 267, 15 Sup. Ct. 83. Under the peculiarities of this case, this rule is a necessary one. It appears that, in making repairs on the *Providence*, additional work was caused by the fact that some of her wood was found to be unsound; the commissioner reporting that, when the *Providence* was opened for repairs, unsoundness was found. The entire cost of repairs was apportioned by the commissioner, and an estimated sum allowed as covering the portion for which the *Van Brunt* was liable. There was before the commissioner a bill of items showing the cost of the work in detail; but, so far as the record shows, the *Van Brunt* did not sift out this bill. She, however, produced several witnesses, who testified only as experts, and gave lump estimates of what the repairs should have cost. Therefore, as we have no method of analyzing the lump estimates of the witnesses for the *Van Brunt*, and as their testimony is not of a character which can be said to clearly preponderate, and as the *Van Brunt* omitted her opportunity of sifting out the bills of repairs, there is no principle on which we can safely substitute a lump estimate made by ourselves for the award of the commissioner, who had full opportunity of examining the bills and of hearing all the testimony produced, including the witnesses for the *Van Brunt*. Consequently, the award of the commissioner must stand so far as concerns this point.

The same method of reasoning disposes, also, of the determination by the commissioner of the number of days for which demurrage should be allowed. The record shows that the *Providence* would have laid off for the season on the 2d of October, or 20 days after the collision, and would then have been replaced by a spare boat, and that her repairs were not then completed. The commissioner made no allowance for any demurrage, except for the time covering the trips which she would have made before the date when she would have been laid off in her regular course of employment. Again, we have the lump estimates of expert witnesses, as against the conclusion of the commissioner, as to the amount of time required for making the necessary repairs caused by the collision, and, for the reasons already stated, we cannot accept them over the commissioner's award.

With reference to the amount of per diem demurrage allowed, there were no circumstances which would enable the commissioner to determine the mere charter value of the *Providence* at that season of the year. In this respect, the case stands like *The Cayuga*, 14 Wall. 270, and *The Mediana* [1899] Prob. Div. 127. The *Cayuga* was a ferryboat, employed in New York harbor; and, immediately after the collision in which she was injured, she was replaced by a spare boat belonging to the same owners. The court held that an allowance of demurrage was not defeated by the fact that there was no charter rate for the ferryboat, nor by the fact that there was a spare

boat ready to replace her. The precise method by which, in *The Cayuga*, the allowance for demurrage was reached, is given in the report of the case in the district court. 2 Ben. 125, 127, Fed. Cas. No. 2, 535. The court there states that, when injured, the vessel was in constant, permanent employment, making regular but short voyages, transporting almost the same number of passengers each day, for a fixed price and for cash. It adds: "It would seem, then, that the actual value of her use for seventeen days could be ascertained more nearly than that of most other classes of vessels. Two witnesses, of large experience upon the ferries, were called to prove this value, and they testify to the amount which the commissioner has reported." These were evidently all the facts which were before the court in *The Cayuga*, and this method of reaching the basis of the allowance was approved in *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, at pages 128, 129, 166 U. S., and page 517, 17 Sup. Ct. In the case at bar, the allowance as equivalent for the demurrage of the *Providence* was what the commissioner estimated would have been her net earnings during the period covered by his report, plus the wages of engineers, dockmen, and watchmen necessary to be maintained aboard her pending the repairs. The circumstances are substantially the same as in *The Cayuga*, except only that the voyages of the *Providence* were longer. The method of reaching a result was precisely the same, the only difference being that in this case the allowance was more exact than in *The Cayuga*. We do not see how it could have been less. Another proposition submitted to us is met by *The Cayuga*, and that is the fact that the owners of the *Providence* kept another boat for winter service, with which they immediately replaced the *Providence* for the balance of her season. In this respect, the case at bar follows *The Cayuga*, where the fact that her owners substituted another ferryboat, which they kept for emergencies, did not defeat the allowance of demurrage, estimated in the way which we have explained. This rule was expressly approved in *The Favorita*, 18 Wall. 598, 603, and apparently approved in *The Conqueror*, at pages 128, 129, 166 U. S., and page 517, 17 Sup. Ct.

One point further remains to be considered. The commissioner allowed 18 days' demurrage; but he stated alternatively that only 16 days would have been the proper allowance for the time necessary to repair the damage caused by the collision if the *Providence* had been sound. He also reported the following: "I find that her unsound condition increased, to some extent, the necessary cost of repairing the damage done by the collision. The exact amount of increase is not made very clear by the evidence; but, upon the whole, I find the amount by which the cost of labor and material needed for repairing the collision damage was increased by her unsoundness to be \$600." This \$600 was included in the \$4,560 already stated. With these items of \$600 and 2 days' demurrage is linked an allowance of \$40 for the services of a superintendent after the expiration of the 16 days referred to. The commissioner reported that the unsoundness would not, but for the collision, have interfered with the use of the vessel until October 2d, or even longer. It is apparent that the unsoundness thus specially reported on by the commissioner

was not in any part of the steamer which required restoration on account of the damage done by the collision, but was in parts adjacent thereto, and somewhat connected therewith. The commissioner must be assumed to have understood the rule of *restitutio in integrum*, applicable to cases of this character, and therefore it is presumed that he would not report specially with reference to unsoundness which that rule required to be made good; and, indeed, some of the expressions in his report support this presumption. On the other hand, the authorities cited by the appellants with reference to this part of the commissioner's report are not applicable, because they relate only to the propriety of discriminating, in ascertaining the amount of damages to be awarded, between the repairs of the parts injured by the collision, whether sound or unsound, and the repairs of the adjacent parts not injured by the collision; and the commissioner, as we have already said, made this discrimination.

Therefore, apparently, the question presented by this part of the commissioner's report is whether or not the owner of the vessel injured is entitled to be allowed for the increased cost of repairs caused by the fact that, on opening up the vessel, parts adjacent to those parts injured by the collision, and not directly involved therein, are found to be unsound, so that, on that account, the cost of repairing the part injured is increased over what it would have been if the adjacent parts had been sound. The rule of *restitutio in integrum* is a profitable one, in almost any view of it, to the owner of the injured vessel, and, ordinarily, on its fullest application, it ought not to be practically extended beyond what the necessity of the case requires. There may be instances where adjacent parts which are unsound are so closely connected with the parts directly injured by the collision that they cannot be distinguished in making repairs, so that repairs of all the parts amount only to repairs of a single whole; but in order to establish a proposition of that kind, and thus enlarge the field of application of the rule of *restitutio in integrum*, the facts should be very clear and strong, which certainly is not true with reference to this particular case. If the item of \$600 referred to, and all demurrage in excess of 16 days, and the \$40 additional allowance to the superintendent, are all omitted, the owners of the Providence will yet have left all which the rule of *restitutio in integrum* can justly give them, and therefore these items must be disallowed.

Because the amount awarded for the damages suffered by the Providence must be corrected in these particulars, and because, on the proofs shown by the record, the steamer, as well as the schooner, must be held in fault, so that each must contribute equally to the damages caused by the collision to each, according to the admiralty rule restated by us in *The Chattahoochee*, 21 C. C. A. 162, 74 Fed. 899 (see the same case in 173 U. S. 540, 19 Sup. Ct. 491), both the decrees appealed from must be reversed.

On each appeal the decree of the district court is reversed, the case is remanded to that court for further proceedings in accordance with the opinion passed down this day, and the appellants recover the costs of appeal.

THE SAMUEL DILLAWAY.

DELAWARE, L. & W. R. CO. v. DONNELL et al.

(Circuit Court of Appeals, First Circuit. November 8, 1899.)

Nos. 269, 270.

1. COLLISION—VESSELS CROSSING—CARE REQUIRED OF TUG WITH TOWS—LOOK-OUTS.

A tug having three tows on a single line, covering altogether about 3,000 feet in length, is bound to use extreme care, in navigating the ocean at night, to avoid collisions, and may be required by the conditions to maintain a lookout aft as well as the regular lookout in the bow. Such a tug will be held in fault for a collision of one of the tows with a sailing vessel crossing, which might have been, but was not, seen in time for the tug to have passed astern of her.

2. SAME—DETERMINING FAULT—EFFECT OF NEGLIGENCE.

Independently of the question whether or not the want of a proper lookout contributed to a collision, the fact of negligence in that respect necessarily weighs with great force against the vessel thus negligent in determining questions of fact in dispute where the testimony cannot be reconciled.

3. SAME—ACTION IN EXTREMIS.

Where the testimony of the captain of a schooner which was sailing closehauled, and which was shown to have been properly manned, and to have kept a proper lookout, was to the effect that on approaching within an eighth of a mile of a tug, which, with tows, was crossing his course, his judgment was that, if he continued on his course, his vessel would come in collision with the tug, and the court was unable to say that, if the schooner had continued on her course, a collision would not have resulted, and the initial fault was that of the tug, the schooner will not be held in fault because, under such circumstances, she attempted to tack, and, through no fault in her navigation, came into collision with one of the tows.

Appeals from the District Court of the United States for the District of Massachusetts.

Charles T. Russell and Arthur H. Russell, for appellants Delaware, L. & W. R. Co.

Edward S. Dodge, for appellees Albert H. Smith and William T. Donnell and others.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This is a case of a collision occurring between 3 and 4 o'clock on the morning of October 28, 1895, between the schooner Samuel Dillaway, bound from Bath, Me., for a southern coal port, and the tug C. B. Sanford, having in tow three coal barges, bound from Boston for Hoboken. All the vessels were light. The collision occurred between Cape Cod and Nauset lights. There was no difficulty arising from the condition of the atmosphere, and whatever issues were at any time made with reference to the condition of the lights of the various vessels have disappeared from the case. The wind was strong, blowing about 15 miles an hour, and variable over three or four points of the compass between south and southwest. The tow was in a common form on the New England coast,—

three barges in line behind the tug, with about 130 fathoms of hawser between each, and covering altogether about 3,000 feet. The tug and barges all belonged to the appellant. One of the barges—the Chemung—and the schooner were damaged by the collision. A libel was filed by the appellant, as owner of the tug and tow, against the schooner, to which an answer was put in by her master as claimant. Also a libel was filed by the owners of the schooner against the owner of the tug and barges, to which an answer was also duly filed. The pleadings in the first libel conform to the answer to the second, and the pleadings in the second libel to the answer to the first. The decrees in the court below were in favor of the schooner on both libels, and each appeal was taken by the owner of the tug and barges.

The appellant made a question at the hearing before us, based on the theory that the libel filed by the owners of the schooner was strictly a cross libel, involving the same issues as though filed against the Chemung or the tug, one of them alone or both jointly; but no assignment of error raised any question of that nature. If it had been otherwise, the proposition would have been futile, because the libel in behalf of the owners of the schooner was filed against the appellant for a marine tort, committed by its agents, whether they were the officers and crew of the tug or the officers and crew of the barge Chemung, or both sets of officers and crew jointly; and, there having been no application by the owner of the tug and barge for a limitation of liability, the proceeding under the second libel was strictly in personam.

The case in behalf of the appellant is stated in its libel as follows:

"The weather was clear and bright. The wind was moderate. Proper lights were set and burning upon the said tug and all of said barges. A competent man was on lookout, and one at the wheel. While so proceeding, and using every required and possible precaution to see vessels and avoid collision, the green light of the said schooner Samuel Dillaway was seen on the port about two points aft of the beam of the said towboat C. B. Sanford. As the said towboat was too far ahead to starboard her wheel and go across the stern of said schooner, she was slowed down, and her course changed to starboard, to allow said schooner sufficient room to pass. But the said schooner, instead of continuing upon her course, as she ought to have done, and might easily have done, either changed her course, or so carelessly maneuvered, that she struck the said barge Chemung on the port side abreast the mizzenmast. The said towboat and barges were proceeding at a rate of not over four miles an hour at the time that the light of said schooner was first seen. * * *

"All said loss and damage was caused solely by the negligence and fault of said schooner, and those in charge of her said navigation, in not avoiding and keeping out of the way of said barge, as she ought to and might easily have done, and such collision was not in any manner or degree caused or contributed to by the said barge or the said towboat, or those in charge of her navigation."

The case in behalf of the schooner, as stated in her answer to the libel against her, is as follows:

"The schooner Samuel Dillaway is a three-masted schooner. At the time of the collision she was bound from Bath, Me., light, to some southern coal port to seek a cargo. The weather was clear. The wind was strong and variable from south-southwest to south. For from twenty minutes to half an hour preceding the collision the claimant, who was then master of the schooner Samuel Dillaway, the second mate of the schooner, and two compe-

ient seamen were constantly on deck, one of said seamen being stationed forward, on the lookout, and the other at the wheel of the schooner. The schooner was closehauled on the port tack, heading about west-southwest. While thus proceeding, the two masthead lights of the towboat, which afterwards proved to be the C. B. Sanford, were seen by those on the schooner, about four points on the starboard bow of the schooner, and later the red light of the said towboat was also seen. The lights of the several barges in tow of the Sanford were also seen and noted by those on the schooner. Said schooner continued closehauled on the port tack, as she had been from the time when any lights of the Sanford had first become visible and been seen. But the towboat C. B. Sanford, with the barges in tow, continued to approach the schooner, finally showing her green light for a few moments to those on the schooner in addition to her red light, until the said towboat was within about one-eighth of a mile away, and on the starboard bow of the schooner, when the towboat shut out her green light, and showed her red light alone to those on the schooner. It then became evident to those on the schooner that it was the intention of those on the towboat to attempt to go across, and to attempt to tow the barges across the bow of the schooner; and it being then entirely apparent to those on the schooner that, if the schooner continued upon the course upon which she was then sailing, she would inevitably collide with the towboat or some of the barges, the claimant, master of the schooner, gave the requisite orders, and attempted to tack the schooner. The schooner, however, owing to the variable wind and to the sea, misstayed, fell off again, and struck the barge Chemung, sustaining some injury. After remaining in contact with the Chemung for some minutes, the schooner got clear of her, and the towboat Sanford, still proceeding on her course, towed the barge Chenango against the starboard quarter of the schooner, causing further injury to the schooner."

In addition to these statements of the positions of the various parties, we think but little need be said as to the facts. It is maintained by the schooner that, with the wind as it was,—she being closehauled and the tug and tow running south,—it was mathematically impossible for her light to have been seen two points abaft of the beam of the tug; but, as it is conceded by the appellant that the schooner was not an overtaking vessel, within article 20 of the international rules of 1885, which were in force at the time of this collision, this question involves nothing of importance, and it follows that article 17 and article 18 of those regulations apply. Therefore we can safely proceed on the theory that it was the duty of the tug and tow to keep out of the way of the schooner, and that the tug, if the vessels were so approaching at any time as to involve risk of collision, was bound to slacken her speed, or stop and reverse, if necessary, and to take all other precautions which might be suitable to avoid the danger arising from the proximity of the various vessels.

There was much discussion at the bar with reference to the relative speed of the two vessels, the solution of which would not aid us without the determination of other elements; but we reach a satisfactory conclusion easily without concerning ourselves in reference to this topic. There is also a dispute whether or not, at any time, the Dillaway saw the green light of the tug, which is of no consequence except as bearing on the question of the vigilance of those who were manning the deck of the schooner, which we will refer to in its proper place.

With reference to the manner in which the tug, with this long tow, was bound to perform her duty in avoiding the schooner, and with reference, also, to the degree of vigilance and preparation which she

was bound to use in that connection, we have already laid down the rule in *The Gladiator*, 25 C. C. A. 32, 79 Fed. 445-447, and in *The Mount Hope*, 29 C. C. A. 365, 84 Fed. 910, 912, that, while we cannot condemn tows of this class as unlawful, we must hold them to use extreme care in the interests of common safety. Extreme care with reference to a tug situated as the *C. P. Sanford* was not only intensifies the ordinary rule requiring a lookout whose business is strictly and solely that of lookout within the requirements of the decisions bearing on that topic, but, from the necessities of the condition, it goes further, inasmuch as a steamer navigating the ocean without a tow, with a sailing vessel coming up on crossing lines, either from the starboard or port, may easily leave the schooner astern. This is impracticable where a tug has a tow of the length of that in the case now before us. It is plain that even greater vigilance must be demanded of a tug and tow like this in question than from large ocean-going steamers, from which, under certain circumstances, two lookouts are required. *The Oregon*, 158 U. S. 186, 193, et seq., 15 Sup. Ct. 804. Therefore, in addition to the ordinary lookout in his proper position at the bow of the tug, the conditions may, at times, require that the deck of the tug aft shall be properly manned, so that vessels approaching on either the starboard or port beam, in proximity to the tug and tow, may be promptly and seasonably discovered, and the movements of the tug promptly and seasonably directed accordingly. This additional precaution was apparently needed under the peculiar circumstances of the tug in the case at bar, yet there was on the watch during the critical period no person except the man at the wheel and the mate of the tug, also called the pilot. Both these were in the pilot house. Capt. Lewis, of the tug, also happened to be in the pilot house, although it was not his watch. There were windows all around the pilot house, and they were all open. Capt. Lewis says the mate stood on the starboard side, by the window, although he himself says he stood in front of the wheel. The deck hand stood behind the wheel, so that, if Capt. Lewis's testimony is correct, he was in range between the mate and the light of the schooner. There was no other person on the deck of the tug, either forward or aft. Capt. Lewis was sitting down on a cushion on the port side of the pilot house, yet he was the first to discover the schooner's light. The mate testifies that Capt. Lewis was facing towards the starboard, but that he looked around, and could not have seen the schooner's light unless he had turned. He also testifies that the captain called his attention to the light. It is therefore evident from the testimony in behalf of the tug that the discovery of the Dillaway's light was accidental, and by one who was not on the watch or on the lookout, and who was not in position to see it except by chance. This puts it beyond question that the tug was not maintaining a proper lookout, and was very far from exercising that vigilance which her tow required. If the matter alleged in the libel filed by the appellant be taken as alleged,—that, when the tug discovered the light of the Dillaway, she was too far ahead to go under the stern of the schooner,—this alone would demonstrate the lack of a suitable lookout, even if it were not made positive by the evidence to which we

have referred. Therefore, not only was the tug clearly in fault in the matter of a lookout, but the ordinary rule is applicable that, independently of the question whether or not the want of a lookout contributes to a collision, the fact of negligence in that respect, whenever there is a dispute like this at bar, necessarily preponderates with great force against the vessel deficient in that respect, in weighing proofs pro and con, unless they are capable of being reconciled. This practical rule is only an application of the facts that the best disposed persons are prone to imagine theories to excuse the results of their own oversights, and that on the high seas the rapid occurrence of events, in connection with the approach of two colliding vessels at night, naturally leaves confusion in the minds of those who fail to maintain proper vigilance and a state of preparation, and who are, therefore, surprised by unexpected, sudden catastrophes. Taking the facts with reference to the lack of a proper lookout on the part of the tug, in connection with the allegation of her libel that, when the green light of the schooner was sighted, the tug was too far ahead to starboard her wheel and go across the stern of the Dillaway, we cannot escape the conclusion that the tug was at fault. Whether this fault was the sole cause, or only contributed to the result out of which these appeals arise, will be determined when we come to investigate the conduct of the schooner in the light of the pleadings and proofs in the record.

We must notice the fact that the proofs in behalf of the tug do not harmonize with the allegations of her libel. In particular, as we have said, the latter states that when she sighted the schooner the tug was too far ahead to go across the stern of the Dillaway. On the other hand, Capt. Lewis, of the tug, testifies that after he had sighted the schooner he kept his course for about ten minutes, and then slowed down to half speed, so as to give the schooner a chance to go across his bow; that then the schooner bore about a point forward of his beam; that, after remaining slowed down for about five minutes, he saw both lights of the schooner about one-eighth of a mile away, and three points forward of his beam; and that when he saw both lights he put his helm hard a-port, and thus swung to the starboard, inshore. He maintains that half speed entirely stopped the progress of the tug, which is not unreasonable, in view of the strong south wind in her teeth. The tug's engineer testifies that she had been running at about 90 revolutions—which was full speed—until half past 3, when she slowed down to about 40, and that after that she was just about holding her own, thus confirming the testimony of Capt. Lewis on this point. This, however, does not improve the condition of the tug, because, during the 10 minutes after sighting the schooner, in which the tug kept her course and speed, she had sufficient time to starboard her helm, and thus to sheer off, and to run under the stern of the schooner by an ample margin. It was suggested in argument that it was impossible for Capt. Lewis, on first sighting the schooner, to determine whether her course was towards or away from the tow and tug; but he testifies that when he saw the Dillaway he supposed that she was steering about southwest by west, which was on a line rapidly converging with that of his own

course. It is true that it may be argued that some other parts of his testimony conflict with this, but the result of that, if insisted on, would be to neutralize his entire evidence, and thus leave him without any case. Moreover, if he was not sure as to her course, he was bound to guard against the uncertainty.

Capt. Lewis also maintains that after he slowed down he gave the schooner ample room to pass ahead if she had kept her course; testifying that, if she had done so, she would have gone across his bow very readily. On the other hand, Capt. Smith, of the Dillaway, testifies that at first he did not apprehend a collision, but that when he was within about an eighth of a mile of the tug he formed the judgment at the time that, if his vessel should keep her course, she would strike the tug amidships, and that the only thing for him to do was to tack ship, and try to get out of the way. The testimony of Capt. Lewis, while apparently not intended to falsify, was wavering and contradictory, not only on this point, but on many of the more substantial questions in the case. Not only this, but the record shows that the Dillaway was under proper discipline, her deck properly manned, and with a proper lookout; so that, for the reasons we have already given, we must accept the statements from the schooner as against those from the Sanford, where they conflict and cannot be reconciled, with reference to all matters of bearings, courses, and proximity.

In only two particulars does there arise any question with reference to the aspects of the proofs offered by the Dillaway. One of the witnesses testifies that Capt. Smith went below after sighting the tug and before the collision, but Capt. Smith directly contradicts this; and it is not improbable that the witness was mistaken, as Capt. Smith was not actively on the watch, the second mate keeping the deck, so that the master was going to and from the cabin, as circumstances required. He had given orders to be called whenever any lights were seen, or any other emergency demanded him. Again, the witnesses for the Dillaway testify to having seen the green light of the tug shortly before the collision. This fact is not of importance in the case, except as it bears on the vigilance of the schooner. There is no evidence that the tug purposely starboarded so as to expose her green light; but, as the schooner was bearing well on the bow of the tug shortly before the collision, and as the tug had mainly, if not wholly, lost steerageway, so that she might have swung a point or two back and forth with the strong but variable southerly wind, and as, also,—which is not an unusual fact,—the lights of the tug crossed at least half a point, it is not impossible that the schooner might have seen her green light, even though she did not purposely starboard her helm. Therefore the schooner was not only properly manned, with a proper lookout, but her testimony is consistent with itself throughout, and it must be accepted as against that of the tug. It follows we cannot find that the evidence of Capt. Smith that, at the time he tacked, his own judgment was that the vessels would have collided if he had kept his course, is overborne by any proofs in the record.

Therefore, the tug having been grossly at fault in the particulars to which we have referred, and the judgment of Capt. Smith, formed on the spot, having been that her fault would necessarily have brought on a collision if the schooner had held her course, and there being no question as to the maneuvers of the schooner when she tacked, and none that her misstaying was not her fault, is there anything in the case which would justify us in finding that, if she had not changed her course, the collision would not have occurred, or that, even if it would not have occurred, her change of course was not justified, under the circumstances, as in extremis? For the reasons already given, we feel compelled to accept the statement of Capt. Smith that he exercised an honest judgment under the circumstances. It is also to be borne in mind that, if the collision had occurred, probably there would have resulted, from the fact that the vessels approached each other at nearly a right angle, a loss of life. The schooner's drift was towards the tug; and, while the tug had slowed down, so that it may be the vessels would have gone clear if the schooner had held her course, yet the fact that the tug had slowed down, and had come to a standstill, if she did come to a standstill, would not have been known to Capt. Smith, as he bore from the tug at the time the schooner tacked. Thus the schooner was brought into a state of anxious uncertainty by the tug holding her course after the schooner was sighted, or by not sighting her seasonably; and we are unable to say from the record that, if the schooner had continued on her course, a collision would not have resulted. In *The H. F. Dimock*, 23 C. C. A. 123, 77 Fed. 226, 230, decided by us on September 26, 1896, and in *The City of Augusta*, 25 C. C. A. 430, 80 Fed. 297, 299, 300, decided by us on April 15, 1897, will be found observations with reference to the effect of the want of a proper lookout on the weight to be given conflicting proofs, and with regard to the result of an exercise of an honest judgment on the part of a vessel in extremis, which are very pertinent to this case. It is thus impossible to determine that the schooner contributed to the collision in such way that the law holds her responsible for it, in whole or in part; and, under the circumstances, we must fall back on the original fault of the tug in not using the extreme care which the law required from her while having so long a tow, and in her consequent omission to sight the schooner seasonably, or to slow down or swing under her stern as soon as she was sighted.

In No. 269 the decree of the district court is affirmed, and the costs of appeal are awarded to the appellees. In No. 270 the decree of the district court is affirmed, with interest, and the costs of appeal are awarded to the appellees.

REAVIS et al. v. REAVIS et al.

(Circuit Court, N. D. California. November 27, 1899.)

No. 12,158.

JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP — REAL INTERESTS OF PARTIES.

Complainants filed a bill in a circuit court of the United States in California against defendants, who were citizens of that state, alleging that complainants were heirs at law of a decedent from whom, prior to his death, one of the defendants, who was also a brother, and one of his heirs, had procured a conveyance of all his property without consideration, and which was invalid by reason of the decedent's insanity; that subsequently such defendant, who was insolvent, had conveyed such property to his co-defendant in payment of an antecedent indebtedness. The prayer of the bill was that such conveyances be set aside as to such shares of the property as would have been inherited by complainants. *Held*, that the court could not determine from such allegations and prayer that the interest of the defendant, who was a co-heir with complainants, would be best served by their success, so as to require such an arrangement of parties as would make him a complainant, and defeat the court's jurisdiction, there being no proof of fraud or collusion on the part of complainants.¹

In Equity. On motion by respondent Clarke to dismiss for want of jurisdiction.

Goodwin & Goodwin, for complainants.

McKune & George, for respondent Clarke.

MORROW, Circuit Judge. The complainants in this action are residents and citizens of the state of Missouri, and the respondents residents and citizens of the state of California. Complainants, in their amended bill, allege that they are the heirs at law of one Andrew Reavis, deceased, and that the respondents David M. Reavis, James J. Reavis, and Crawford W. Clarke have fraudulently acquired, held, and used certain real and personal property formerly belonging to the said Andrew Reavis, and that, by reason of this fraud, David M. Reavis and James J. Reavis, prior to April 27, 1892, held, and since the last date the said Crawford W. Clarke has held, and now holds, said property. James J. Reavis is the son of David M. Reavis, and Ann E. Reavis is the wife of D. M. Reavis. The allegations of the bill with regard to the subject of the action are substantially as follows: That Andrew Reavis was, on January 2, 1885, the owner of a ranch in Lassen county, known as the "Dixie Valley Ranch," worth \$30,000, and of the annual rental value of \$3,000, and also of cattle and other personal property on this ranch, of the value of \$50,000; that at the date named Andrew Reavis was committed, by order of the superior court of this state for the county of Alameda, to the state asylum for the insane at Stockton, and his brother, D. M. Reavis, was appointed as his guardian, and directed to pay the expenses of his maintenance at this asylum; that James J. Reavis, the nephew of Andrew Reavis, had been, for about five years previous to the com-

¹ For diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249, and *Mason v. Dullaghan*, 27 C. C. A. 298.

mittal of the latter to the state asylum for the insane, his confidential agent and attorney in fact, and Andrew Reavis and the respondents D. M. Reavis, James J. Reavis, and Ann E. Reavis had lived together on the most intimate terms; that the respondent Clarke was during this time the confidential agent of D. M. Reavis, who was indebted to him at the time of the committal of Andrew Reavis in the sum of more than \$250,000, and for about \$40,000 of this debt James J. Reavis and Andrew Reavis had, as accommodation makers, joined David M. Reavis in executing notes to Clarke; that after Andrew Reavis became insane, D. M. Reavis agreed with Clarke to get control of his property, so that he could mortgage and pledge it to him, Clarke knowing at that time that Andrew Reavis was insane; that D. M. and James J. Reavis went to Stockton on the 28th day of January, 1886, and, having obtained permission from the superintendent of said asylum, removed thence Andrew Reavis on January 29, 1886, and caused him to sign and acknowledge a deed on that date, conveying all of his property known as the "Dixie Valley Ranch" to D. M. and James J. Reavis, which deed was made without consideration, and while Andrew Reavis was incompetent, and unable to understand the transaction; that thereafter James J. Reavis removed Andrew Reavis to his home on the premises aforesaid, where he remained until his death; that shortly after obtaining the deed from Andrew Reavis, James J. Reavis conveyed to D. M. Reavis whatever claim he had to the property, without consideration, and for the purpose of enabling D. M. Reavis to comply with his promise to Clarke as aforesaid; that, notwithstanding this conveyance, James J. Reavis continued in the management of all of the said property for D. M. Reavis, and for Clarke, and on the demand of D. M. Reavis turned the proceeds, profits, and issues of all of the said property over to Clarke from the time that Andrew Reavis became insane until April 27, 1892, as a credit on the indebtedness of D. M. Reavis to Clarke, Clarke knowing that they were derived from the property; that on April 27, 1892, David M. Reavis, James J. Reavis, and Ann E. Reavis, conveyed by deed and bill of sale all of the said real and personal property to Clarke, who has ever since been in possession of the same; that Clarke did not pay the other defendants, or either of them, any money for this deed or bill of sale, but gave to the respondent D. M. Reavis a credit on his indebtedness; that on January 2, 1885, D. M. Reavis caused Andrew Reavis to make what purported to be his last will; that he was insane, and known to D. M. Reavis to be so at the time he made it; that by his said will he bequeathed \$6,000 to D. M. Reavis, and various sums to the other complainants, aggregating about \$12,000; that his will was, when executed, taken charge of by D. M. Reavis, and by him kept until demanded by complainants; that all the acts of the respondents by which they sought to acquire the title to the said property were done for the purpose of defrauding Andrew Reavis out of the whole thereof, and complainants out of their interest therein; and that by reason of their fraudulent conduct the deed from Andrew Reavis to D. M. and James J. Reavis, and the deed and bill of sale to Clarke, are void and of no effect, and that the respondents D. M. and James J. Reavis did hold, and Clarke now

holds, four-fifths of the said property, and the issues, profits, and proceeds thereof, in trust for complainants. Complainants pray for a decree in accordance with these allegations, and declaring that the respondent Clarke has held and now holds the said property, its issues, rents, increase, profits, and proceeds in trust for complainants, to the extent of four-fifths thereof; that four-fifths of the said property and its issues, rents, profits, increase, and proceeds belong to complainants, according to their respective rights therein, as the heirs of said Andrew Reavis; ~~that~~ the respondents David M. Reavis, James J. Reavis, and Crawford W. Clarke, account fully for said property, and the value derived therefrom; and that said Clarke execute to complainants all such conveyance or conveyances as may vest in them, and each of them, the right and title to their interests in said property. Respondent Clarke filed a plea in abatement, to which complainants demurred, and, the demurrer having been withdrawn by consent of counsel, the plea was overruled.

An answer and amended answer have been filed by respondent Clarke, and the issues joined by complainants' replication, and testimony has been taken. A motion has been made in behalf of the respondent Clarke to dismiss the amended bill, to which motion a replication has been filed by complainants' counsel, and testimony taken thereon; and the case now comes before the court upon this motion.

Counsel for respondent Clarke base this motion to dismiss upon the ground that the complainants have brought this suit for the benefit of themselves and D. M. Reavis; that, under a proper arrangement of parties, D. M. Reavis would be a complainant, and not a respondent to this action, and under such circumstances this court would have no jurisdiction of the case, since there would be no diversity of citizenship between the parties. It is provided in the act of March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and regulate the removal of causes from state courts, and for other purposes" (18 Stat. 470):

"Sec. 5. That if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States it shall appear to the satisfaction of said circuit court at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

The question, therefore, is whether the interests of D. M. Reavis require such an arrangement of the parties as will make him a complainant, instead of a respondent, in this action. If so, the court will arrange the parties according to their interests. *Perin v. Megibben*, 3 C. C. A. 443, 53 Fed. 86; *Cilley v. Patten* (C. C.) 62 Fed. 498; *Board v. Blair* (C. C.) 70 Fed. 414; *Water Co. v. Babcock* (C. C.) 76 Fed. 243. The situation of the parties, it is contended by counsel for the respondent Clarke, shows that the interests of D. M. Reavis, as well as of the complainants, would be best served

by setting aside the deed conveying the property to D. M. and James J. Reavis, and thus securing from the respondent Clarke all the property described in the bill. Such identity of interest cannot, however, be inferred from the bill, the prayer of which is, not that all the property, but that four-fifths of the property, be conveyed to the complainants, being heirs at law, according to their respective rights; from which it does not appear that D. M. Reavis would gain any advantage in the event of complainants obtaining a decree in accordance with the prayer of ~~their~~ bill, except upon the hypothesis of counsel that, if successful, complainants were to hold part of the property in secret trust for D. M. Reavis, of which there is no proof.

What purports to be the last will of Andrew Reavis was made on January 2, 1885. This will provided for a legacy of \$6,000 to D. M. Reavis, who was appointed executor; some few small legacies; and that the balance be divided equally among the heirs of Andrew Reavis. The evidence shows that for a long time prior to the date of making this will Andrew Reavis had been in failing health, and that his mind became affected, so that on January 13, 1885, he was committed to the state asylum for the insane at Stockton, where he remained until January 29, 1886. Counsel for respondent Clarke contend that there is no evidence of the insanity of Andrew Reavis at the time of his making the will, but it is very clear that complainants have proceeded on the hypothesis that the will is invalid. The testimony of the witness Lusk as to the declarations of D. M. Reavis, made to him in January, 1885, has been introduced to show that D. M. Reavis was present when the will was made; that a settlement was then had between D. M. and Andrew Reavis, and that the former executed a note for \$20,000 to the latter,—being more than he owed him; this note being made so that Andrew Reavis might dispose of the sum by will. It is also pointed out by counsel in the same connection, that D. M. Reavis was insolvent in the year 1890 and after, and that D. M. and James J. Reavis were in possession of the property described in the bill from January 29, 1886, to April 27, 1892, when it was deeded to Clarke. From these circumstances counsel infer that it was impossible for complainants to realize under the will, and they therefore, at the instance of D. M. Reavis, entered upon this suit to set aside the deed of Andrew Reavis to D. M. and James J. Reavis for their mutual benefit, and with the secret understanding before mentioned. The suit was brought by complainants, however, as a result of their having learned of the mental condition of Andrew Reavis at the time of his making the will, and the testimony of the witness Lusk regarding the declarations of D. M. Reavis to him does not establish any such collusion between the complainants and D. M. Reavis as is inferred by counsel. Other evidence has been introduced for the purpose of showing collusion, but this goes only to the declarations of D. M. Reavis himself, and consists of no more than a statement that he intended to "have his friends commence an action for the Dixie Valley," and the expression of the conviction that he would get the "Dixie Valley Ranch all right."

Counsel endeavor to gather from the deposition of the witness Hurd evidence of intimate relations between complainants and D. M. Reavis under a show of antagonism. No such conclusion can be reached from a reading of this deposition. Judge Hurd came to this state in March, 1893, for the purpose of investigating the condition of the estate of Andrew Reavis, deceased, the complainants in this case having grown suspicious of the behavior of D. M. Reavis with regard to the legacies which they had been informed by him they were to receive under the will of Andrew Reavis. While engaged in this business, Judge Hurd accidentally obtained information as to the condition of the estate of Andrew Reavis, which was further substantiated by the admissions of D. M. Reavis, and on his return to Missouri made a report thereupon to the complainants in this case. The depositions of the complainants agree that the determination to bring this suit was arrived at as a result of a conference of the complainants after finding that they had been misled by D. M. Reavis, and under the advice of Judge Hurd prior to the visit of D. M. Reavis to Missouri, which occurred subsequently to Judge Hurd's return.

The attempt of Clarke to retain Goodwin, one of the counsel for complainants herein, on or about July 1, 1893, and the facts in connection with that attempt, do not afford any proof of such collusion.

The alleged fraudulent acts of D. M. Reavis will be the subject of investigation when this case comes before the court upon its merits.

Whether there was an absolute sale of the Dixie Valley property by the deed of August 1, 1879, and the bill of sale of August 10, 1879, whether the will of Andrew Reavis is valid or invalid, and whether the deed of Andrew Reavis to D. M. Reavis and James J. Reavis is to be set aside, are all questions which concern the merits of the controversy, and cannot well be finally determined by the motion now before the court.

It does not appear from any testimony to which reference has been made, that any beneficial or pecuniary advantage can accrue to D. M. Reavis as the result of a decree in favor of complainants. On the other hand, he is charged by the complainants with fraudulently conspiring to deprive them of their property, and the winning of this suit by complainants will render him liable for an accounting of the property between January 29, 1886, and April 27, 1892. His real interest cannot, therefore, be better served by making him a complainant in this case. No satisfactory proof has been shown of collusion in the making or joining of the parties so as to render his case cognizable in this court. The motion to dismiss the bill will therefore be denied.

PEOPLE v. SANITARY DIST. OF CHICAGO.

(Circuit Court, N. D. Illinois, N. D. November 11, 1899.)

1. REMOVAL OF CAUSES—FEDERAL QUESTION.

Where it appears from the allegations of a bill that a federal question forms an ingredient in the cause, it is removable, although other questions of law and fact may also be involved.¹

2. SAME—CONSTRUCTION OF FEDERAL STATUTES.

A bill filed by the state of Illinois in a state court against the Chicago drainage district, a corporation created by act of the legislature, to enjoin the defendant, in the prosecution of the work for which it was chartered, from reducing the level of the water in the Illinois & Michigan Canal, and alleging as grounds for such relief that by the acts of congress authorizing the state to construct the canal, and granting lands in aid thereof, the state was required to forever maintain such canal as a navigable waterway for the free passage of any property of the United States, and that under the terms of such acts the state could confer no power on the defendant to destroy the same,—shows that a federal question is involved in the suit, which renders it removable.

On Motion to Remand to State Court.

Edward C. Akin, Atty. Gen. (H. M. Snapp, of counsel), for the People.

Runnells & Burry, C. C. Gilbert, and John C. Black, for defendant.

KOHLSAAT, District Judge. The sole ground of removal alleged by the defendant is that the matter in dispute herein involves the decision of questions arising under the laws of the United States. It is settled that, in order that this case shall be removable, it must appear by the bill itself that "some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of a law of the United States, or sustained by the opposite construction" (*Starin v. City of New York*, 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388), and, if the bill does not contain any statements disclosing this situation, the want of them cannot be supplied by the allegations in the petition for removal or in subsequent pleadings. *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85. The gist of the claim of the people of the state of Illinois in the bill herein is that the right has accrued to them to have the Chicago river maintained at its present level at the point where it connects with the Illinois & Michigan Canal, or, in the alternative, that sufficient water be supplied to said canal, by such parties as may interfere with the present level of said river, to maintain the depth of water in the "summit level" of said canal at the same height that it would be maintained by the natural flow of water therein from the Chicago river at its present level; and the question to be determined on this hearing is as to whether or not antagonistic constructions of the laws of congress stated or referred to in said bill will affect the determination of the rights claimed by the people of the state of Illinois, or the relief asked for in their bill.

¹As to jurisdiction in cases involving federal questions, see note to *Bailey v. Mosher*, 11 C. C. A. 308, and, supplementary thereto, note to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

When a federal question "forms an ingredient in the original cause," it is removable, even though other questions of fact and law may be involved in it. *New Orleans, M. & J. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Omaha Horse Ry. Co. v. Cable Tramway Co. (C. C.)* 32 Fed. 729. It is a positive allegation of the bill that in the act of congress of 1822, granting the right to the state of Illinois to construct the Illinois & Michigan Canal, it was expressly provided that "said canal, when completed, should be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge." And it is a further allegation of said bill that by the terms of the grant of lands and right of way for said canal by congress it was required that the state of Illinois should "forever maintain as a navigable waterway for the free passage of any property of the United States the canal which should be constructed by said state with the aid of said lands granted," and that under the terms of said grant by congress "the state or its legislature would be prohibited from destroying the navigability of said canal or granting to any person the right to destroy the same." It will be seen from the foregoing extracts from the allegations of the bill that, while the sanitary district is a creature of the Illinois legislature, and as such, and in pursuance of the powers granted by said legislature, is proceeding to do that which the bill seeks to have enjoined, yet it may become a vital question, in determining the ultimate rights of the parties as to whether or not the alleged prohibitions in the said federal laws limit the power of the state of Illinois to grant to the sanitary district the right to interfere with the navigability of the Illinois & Michigan Canal; all the rights and powers of said sanitary district being derived by grant of the legislature of said state. See decision of circuit court of appeals in *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 15 C. C. A. 167, 68 Fed. 2. I therefore hold that a federal question is shown by said bill to be involved herein, and the motion to remand is denied.

SPECKERT et al. v. GERMAN NAT. BANK.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1899.)

No. 676.

REMOVAL OF CAUSES—RIGHT OF RECEIVER OF NATIONAL BANK—WHEN A VOLUNTARY PARTY.

The receiver of a national bank is a proper, but not a necessary, party to an action against the bank pending in a state court at the time of his appointment, and while he may properly be admitted as a party, on his application, to defend in behalf of his trust, such admission does not give him the right to remove the cause to a federal court. The right of removal given him by the federal statutes applies only to cases where he is a necessary party to the action.¹

Appeal from the Circuit Court of the United States for the District of Kentucky.

¹ As to suits by and against receivers of federal courts, see note to *Plow Works v. Finks*, 26 C. C. A. 49.

John L. Dodd, for appellants.

A. P. Humphrey, for appellee.

Before TAFT, LURTON, and DAY, Circuit Judges.

DAY, Circuit Judge. On April 4, 1894, the appellants commenced this action in the Jefferson circuit court of Kentucky against the German National Bank and others. The bill alleged that the defendants had entered into a conspiracy to induce the complainants to subscribe to stock in the Louisville Deposit Bank, and, to that end, had made certain false and fraudulent representations in reference thereto. The Deposit Bank had become involved, and its assets had been diverted, as was alleged, to pay certain debts of one Moses Schwartz, who was charged as a co-conspirator with the German National Bank. On January 14, 1895, the answer of the German National Bank was filed. Proofs were taken, and the cause prepared for trial. In January, 1897, the German National Bank was put into the hands of a receiver, by order of the comptroller of currency. On June 28, 1897, the receiver filed an application to be made a party to this suit in the state court, which application was granted, and the receiver was duly made a party to the action. Thereupon the receiver filed a petition to remove the cause from the state court to the United States circuit court for the district of Kentucky. The state court made an order granting the petition and accepting the bond. October 4, 1897, on the filing of the transcript in the circuit court of the United States for the district of Kentucky (85 Fed. 12), plaintiffs moved to remand the case to the state court. On February 8, 1898, the court overruled this motion. Thereafter an amended bill of complaint was filed, which was demurred to by the German National Bank and the receiver. On October 3, 1898, the demurrer was sustained, and upon the 15th of the same month, plaintiffs having declined to plead further, the bill was dismissed.

Upon the appeal two questions are presented: Should the circuit court of the United States have maintained jurisdiction of the case? Second, should the demurrer to the bill as reformed have been sustained? We find it necessary to consider only the first of these questions. An elaborate and able argument has been made by counsel for appellees as to the rights of receivers of national banks to prosecute original actions in the federal courts, and to remove cases commenced against them from the state to the federal courts. We do not think it necessary to enter upon a consideration of the rights of receivers of national banks in such actions, and the only question presented of record which we deem it necessary to decide is whether a receiver, under the circumstances shown in this case, having been admitted as a party in the proceeding in the state court, has any right to remove the case. By the act of July 12, 1882 (22 Stat. 162, c. 290), cutting down the federal jurisdiction in cases where national banks are parties, it was provided as follows:

"That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall

be the same as and not other than the jurisdiction for suits by or against banks not organized under any law of the United States, which do, or might do, banking business where such national banking associations may be doing business when such suits may be begun."

In *Bank v. Cooper*, 120 U. S. 779, 7 Sup. Ct. 777, 30 L. Ed. 816, it was held by the supreme court that the act of 1882 prohibited the acquiring of federal jurisdiction by removal, as well as by original suit. See, also, *Petri v. Bank*, 142 U. S. 644, 12 Sup. Ct. 325, 35 L. Ed. 1144.

Section 4 of the act of March 3, 1887, re-enacted August 13, 1888 (25 Stat. 433, c. 866), provides:

"All national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between the individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The effect of the act of 1882 was to place national banks, for the purpose of the jurisdiction of the courts of the United States, upon the same footing as other banking institutions in the state wherein they are located, and to prevent the removal of cases to the federal courts by national banks because of their organization as federal corporations. National banks now have the same right to bring suit in the federal court that any citizen has, and the jurisdiction of the federal court is not enlarged in their favor, or right of removal granted to them in actions against them. It is conceded that the bank had no right to removal in this case. There is no diversity of citizenship or other grounds upon which removal could have been had by it. Had the receiver a better right of removal? In the case of *Bank of Bethel v. Paliquioque Bank*, 14 Wall. 384, 20 L. Ed. 840, it was held that a suit could be maintained by the creditor of a national bank in a state court, and that it might be prosecuted, after the failure of the bank, without making the receiver a party. In this case it is held that a creditor of a national bank may resort to a state court for an adjudication of his claim, and such adjudication is conclusive upon the receiver. In *Denton v. Baker*, 24 C. C. A. 476, 79 Fed. 189, it was held that, while the receiver of an insolvent national bank may interpose in a suit to enforce a claim against the bank, he is not necessarily a party to the suit; that a judgment in such suit, to which he is not a party, is binding upon the receiver, in the absence of fraud or collusion. In *National Bank of Commonwealth v. Mechanics' Nat. Bank*, 94 U. S. 437-440, 24 L. Ed. 176, it was held that claims against an insolvent bank, whose validity are established by a judgment in a court of competent jurisdiction, and claims that are proven to the satisfaction of the comptroller, stand upon the same footing. In that case a suit against the insolvent bank was sustained, although the receiver was not a party thereto. In *Bank v. Colby*, 21 Wall. 609, 22 L. Ed. 687, it was held in a suit against a national bank, where its

property had been attached at the suit of an individual creditor, that the receiver might intervene in order to discharge the attachment. In that case the corporation had been dissolved by decree of the district court of the United States, and it was held that, in view of that fact, the suit against the bank had abated.

We have therefore reached the conclusion, in the light of these authorities and the construction of the statutes applicable to this case by the supreme court of the United States, that the receiver, after his appointment, was a proper party to the action, and being vested with the property of the bank and required to look after its interests, with a view to the conservation and distribution of its assets, was properly admitted by the state court to defend the action brought against it. While this is true, he was in no sense a necessary party, and the action could have been prosecuted without his presence, and the judgment rendered in the action would have been conclusive against him as well as the bank. The question upon which the case turns, in our view, is, can a receiver, under the circumstances of this case, not being a necessary party to the action, but having been admitted to defend in the interest of his trust, remove the cause to the federal court? In view of the decisions of the supreme court in analogous cases, we are constrained to hold that he cannot. We have not been cited to any cases exactly in point in the supreme court, but find adjudications establishing the proposition that one who comes voluntarily into an action is subject to the disabilities of the parties already in the case as to the right of removal. In *Cable v. Ellis*, 110 U. S. 389, 4 Sup. Ct. 85, 28 L. Ed. 186, it was held, in a suit in equity involving title to real estate and priority of liens pending in a state court, where the highest court of the state had decided some of the points in controversy, and had remanded the case to the court below to have other issues determined, and where one who became interested in the property by grant from one of the parties to the suit had intervened to protect his rights at a time when the right of removal had expired as to all parties, that the intervention of such party was to be regarded as incidental to the original suit, and that he was subject to the disabilities resting on the party from whom he took title; and that, the right of removal having expired before he intervened, his right of removal was also barred. In *Railway Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. 472, 28 L. Ed. 455; *Cable v. Ellis*, supra, was approved, and the court, speaking through Mr. Chief Justice Waite, said: "A substituted party comes into a suit subject to all the disabilities of him whose place he takes, so far as the right of removal is concerned." See, also, *Jefferson v. Driver*, 117 U. S. 272, 6 Sup. Ct. 729, 29 L. Ed. 897. It is urged in the argument by counsel for appellees that these are cases where a person voluntarily comes into the suit after the right of removal has expired, and, being substituted in the case, has no higher right than the original party to the suit. It is said that receivers of national banks have higher rights to stand upon than the bank itself. This may be true in some instances, yet in the present case we are not advised of any defense to the claim in question which the bank could not have made

as well as the receiver. The receiver succeeds to the interest of the bank, and his right to defend against this claim is no broader than that of the bank itself.

It is also true that, under the statutes of the United States as they now stand, the bank never had any right to the removal of the cause, and therefore the case is not precisely analogous to those cited, in which the supreme court has held that, the right of removal having expired in favor of the original party, the substituted party comes into the case subject to the disabilities of him whose place he takes. But the receiver comes into an action duly prosecuted in the court of the state, with all the necessary parties, to a final and conclusive judgment. His presence is voluntary, and not essential to a determination of the controversy. The conclusion that we reach is that the receiver, not coming into the cause as a necessary party, although properly admitted for the purpose of controlling the defense, the case involving property in which he was largely interested as a trustee, had no right of removal. The federal statutes, giving a receiver the right to remove, apply to cases where the receiver is a necessary party to the action, whether the suit is commenced against him originally or otherwise. This decision is in harmony with a case admittedly in all respects like the one under consideration, decided in the circuit court of appeals for the Eighth circuit. *Bank v. Smith*, 19 C. C. A. 42, 72 Fed. 568. The judgment of the circuit court is reversed, and the cause remanded, with directions to remand the same to the state court from whence it was removed, the receiver, out of the funds in his hands, to pay the costs in the circuit court and in this court.

CONNOR v. ALLIGATOR LUMBER CO. et al.

(Circuit Court, E. D. North Carolina. December 4, 1899.)

RECEIVERS—ANCILLARY SUIT BY TO QUIET TITLE—JURISDICTION.

Where a federal court of equity, in a suit for the partition of lands, has appointed a receiver for such lands, he may, by leave of the court, file a bill in equity to protect his possession, and to require the defendants, as authorized by a state statute, to set up for adjudication an adverse claim made by them, alleged to constitute a cloud on the complainant's title, which will seriously interfere with any partition that may be ordered by the court; and such bill, being ancillary to the original suit, is within the jurisdiction of the court, regardless of the citizenship of the parties.¹

In Equity. On demurrer to bill.

F. H. Busbee and E. F. Aydlett, for complainant.
Womack & Hayes, for defendant Johnson.

PURNELL, District Judge. Bill in equity, by leave of the court granted August 3, 1899, by H. G. Connor, receiver appointed by this

¹ As to supplementary and ancillary proceedings and relief in federal courts, see note to *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 36 C. C. A. 135; as affected by citizenship of parties, see note to *Shipp v. Williams*, 10 C. C. A. 260.

court in causes pending in which the Alligator Lumber Company, C. R. Johnson, and H. T. Greenleaf, with others, are defendants. The purpose of one of the causes in which the appointment of a receiver was made was to obtain partition of what is termed the "Blount Patent," containing about 150,000 acres, situate in Dare county, and receiver was empowered to retain possession of and manage the same, under the direction of this court, and now retains such possession. The Alligator Lumber Company, of which the other defendants are officers and owners of the stock, obtained conveyances, which are claimed by defendants to cover a part of said land, but they have not set up the same in any suit at law, but are claiming the same, which is a cloud on complainant's title, and will greatly interfere with the partition, or sale for partition, of said land, as the same may be ordered by the court. The relief sought is to compel the defendants, or either of them, to make a full disclosure of their pretended claim to the land, to restrain and enjoin them from asserting any claim or title to the land belonging to complainant, as set forth, or interfering with the possession of complainant as receiver, and to quiet title. On August 4th an injunction was issued restraining defendants from entering on any of the lands referred to, and from any trespass upon, cutting any timber, or attempting to take possession of, any part in possession of complainant as receiver of the Blount patent. Defendants demur to the bill:

"First. For that this court has no jurisdiction thereof, the complainant and these defendants being all citizens and residents of the state of North Carolina. Second. For that the said complainant hath not, in and by the said bill, made and stated such a cause as doth or ought to entitle him to the relief thereby sought and prayed for from and against these defendants, for that (a) the complainant hath an adequate and speedy remedy at law; (b) for that it is substantially averred that these defendants claim possession and title to the lands therein described and alleged under the patent therein set forth in said bill of complaint, marked 'Exhibit D,' and that the same is void upon its face, or must appear to be void whenever relied upon by these defendants in the assertion of any rights thereunder; (c) for that this suit is, in effect, an action of ejectment, and an action to try title to land, which cannot be done in this court of equity. Third. For that it appears by the said bill of complaint that the East Coast Cedar Company, the People's Bank of Buffalo, N. Y., W. A. Ensign and Chas. A. Ensign, trading as W. A. Ensign & Co., M. H. Brown, Bank of Commerce, in Buffalo, N. Y., by Henry H. Persons and John H. Hazell, receivers, and the Phoenix National Bank of New York, are necessary and proper parties to a complete determination of the rights of these defendants herein, inasmuch as it is sought by this suit in equity to determine and finally adjudicate the title of these defendants to the lands described in the bill of complaint in a suit in which these named persons and corporations, claiming title thereto adversely to these defendants, are not parties."

The demurrer cannot be sustained, on two grounds: Question raised as to the jurisdiction of the court was abandoned on the argument, and could not be sustained. There is no question of the jurisdiction of the original actions in which the receiver was appointed, and no one doubts the well-established principle that, when a court of equity takes jurisdiction of a subject-matter, it draws into its jurisdiction everything pertaining to that subject, even of matters of which the court would not originally have had jurisdiction; in short, it will administer the whole estate to a finish. *Gumbel v. Pitkin*, 124

U. S. 132, 8 Sup. Ct. 379, 31 L. Ed. 374; *State v. Roanoke Nav. Co.*, 84 N. C. 705; *Rice v. Water Co. (C. C.)* 91 Fed. 434. Under these authorities, many of the questions raised by the demurrer were recognized in the argument as settled beyond discussion. The question really discussed and insisted upon was whether a receiver pendente lite can maintain this suit; whether it is not, in substance, to try title to real estate,—an action of ejectment in a court of equity. Having jurisdiction of the original action, and having appointed a receiver, the property is in custodia legis, and the court will protect its officer in his possession, and treat opposition to such officer as opposition to the court itself. It is not an action of ejectment. When defendants answer, and raise a bona fide question of title, it will be in apt time to consider and raise these questions. It is now, as appears, a suit brought by permission of the court, to remove a cloud upon title and possession held as stated, that when the land is sold or divided for partition there shall be no cloud, and seems to be one of those suits contemplated in, and authorized by, Act N. C. 1893. Can the receiver maintain such a suit? This is one of those proceedings which must be, to a great extent, controlled by the state practice not inconsistent with that of the federal court. In consequence of former decisions, notably *Macy v. Busbee*, 85 N. C. 329, the legislature of North Carolina, in 1893, passed the following act:

“That an action may be brought by any person against another who claims an estate or interest adverse to him for the purpose of determining such adverse claims. That if the defendant in such action disclaim in his answer any interest or estate in the property or suffer judgment to be taken against him without answer the plaintiff cannot recover costs.” Laws 1893, c. 6.

It will be noted that this act is broader and more comprehensive than the act of Mississippi, considered and construed by the supreme court of the United States in *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855; hence that decision is not conclusive, except so far as the general principles apply. For a perfect understanding of the North Carolina act, the decisions of the supreme court to meet which the act was passed, and the further fact that, under the code practice prevailing in the state, law and equity are administered by the same court, in one and the same civil action, the distinction being abolished, must be understood and considered. True, in *Macy v. Busbee*, Justice Ruffin says, to justify the interposition of the courts for the purpose of removing a cloud upon title, the difficulty complained of must appear to exist, and the cloud sought to be removed present at least some semblance of validity. But the act was to meet this and similar decisions. It seems to have been intended to give a right of action against busybodies, intermeddlers, and interferers with the title of others, whose claim or pretense does not present some semblance of validity, to compel them to disclose for adjudication their muniments of title or claims, and not wait until, in the course of events, witnesses die, or evidence, by some means, becomes unavailable against their claims. The act seems to be as broad as it could be made for the purpose evidently intended. It would present an anomaly not contemplated in the provisions for an independent federal judiciary, though even if the state law were not as I conceive it

to be, to hold that this court could appoint a receiver in a controversy of which it unquestionably has jurisdiction, and not have power to protect that receiver in the possession of property in custodia legis, or remove from his title or possession a cloud which seriously interferes with the further order of the court for a sale or a division of the property. This, too, seems to have been considered and decided in *Re Tyler*, 149 U. S. 181, 13 Sup. Ct. 785, 37 L. Ed. 689; *Rouse v. Letcher*, 156 U. S. 49, 15 Sup. Ct. 266, 39 L. Ed. 341; *Ledoux v. La Bee* (C. C.) 83 Fed. 761, and cases cited.

When defendants set up sole seisin in the original action, showing that they are not tenants in common and in possession, it will be time enough to take the extreme view of the case taken in the argument, and ask if an action of ejectment can be tried in a court of equity; or, should adverse title be set up, it will be in apt time to make up issues to be tried by a jury on the law side of the docket. The case has not reached that stage, and in its present status these questions are aliunde. In its present status, it may accomplish the purposes of the North Carolina act by compelling defendants to make their claims in a way to be adjudicated, or have judgment taken against them which will remove a cloud upon the title of parties to the original suit, that the court may proceed in the administration of the affairs involved. For the reasons stated, and others not necessary to state, the demurrer is overruled. Defendants will, by the next rule day, file such further pleadings as they may be advised in the premises. A decree will be drawn accordingly.

BERWIND v. CANADIAN PAC. RY. CO. et al.

(Circuit Court, S. D. New York. December 6, 1899.)

1. CORPORATIONS—SUIT BY STOCKHOLDERS—NECESSARY AVERMENTS.

A plaintiff suing as a stockholder is not required to set out his efforts to induce the corporation to bring the suit, in compliance with equity rule 94, where it is alleged in his bill that the corporation is controlled by the defendants.

2. EQUITY PLEADING—SUFFICIENCY OF BILL.

Where a bill contains sufficient allegations of fact to constitute a cause of action, it is not subject to demurrer, because it contains further allegations, stating conclusions of law, which are insufficient.

In Equity. On demurrer to bill.

Frederick S. Duncan, for plaintiff.

Thomas G. Shearman, for defendants.

WHEELER, District Judge. The bill sets forth in much detail that the defendant the North Star Construction Company built and owned the stock of the Duluth & Winnipeg Railroad Company, which owned the stock of the Duluth & Winnipeg Terminal Company, and owned the stock of the North Star Iron Company; that the construction company owed its president, Foley, a note of about \$600,000, and had deposited with him the common and preferred stock and bonds of the railroad company, the bonds of the terminal company, and

stock of the iron company, which were substantially all its assets, as collateral security, and he was about enforcing collection of the note; that a majority of the capital stock of the construction company was delivered to the Canadian Pacific Railway Company upon an agreement, through its president, Van Horne, that the latter would take up and hold the debts of the construction company until the bonds of the railroad company could be marketed and sold in sufficient number to pay that indebtedness, and upon a representation by the Canadian Pacific Railway Company that, upon assuming the control of the enterprise which the majority of the stock of the construction company would confer, it would manage the same with diligence and energy, and promote the same in every way for the general interest of all the stockholders of the construction company, and that the interests of the minority would be preserved in like manner with those of the majority; that, pursuant to this control, new directors and officers were elected in the interest of the Canadian Pacific Railway Company, through whom the property was mismanaged, to lessen its apparent value; that the debts, although taken up, were not held till bonds could be marketed and sold, but the securities pledged were collusively sold and bid in for much less than the amount of the debts on which they were pledged, and for much less than their value; that the mortgage of the railroad was collusively foreclosed, and the corporation reorganized into the defendant the Duluth, South Shore & Atlantic Railway Company, and sold; that great gains have through these transactions been realized by and for the Canadian Pacific Railway Company, of which an account has been requested; and that the orator has been a stockholder of the construction company to the amount of \$25,000 during all these proceedings, and brings this bill in behalf of himself and all others similarly situated who may come in. The prayer is for an account and payment into court of securities.

The orator is alleged to be a citizen of New York; the defendant the Canadian Pacific Railway Company is alleged to be a corporation of, and William C. Van Horne, its president, a citizen of, Canada; the defendant Duluth, South Shore & Atlantic Railway Company is alleged to be a corporation and citizen of Michigan; and the North Star Construction Company to be a corporation and citizen of New Jersey. The defendant corporations have severally demurred to the bill, and assigned want of jurisdiction of the parties, want of jurisdiction in equity, and want of ground for relief as causes of demurrer.

Jurisdiction of the parties seems to be well shown by *De Neufville v. Railway Co.*, 26 C. C. A. 306, 81 Fed. 10. The objection that efforts of the plaintiff to induce the construction company to sue are not set out according to the rule of the supreme court in equity is also covered by that case, in view of the allegation that the control of that corporation has been with the other defendants during the time of these transactions. The construction company and the new railroad company, as parties interested in the subject-matter, and the president of the Canadian Pacific, as an officer through whom the transactions were had, appear to be proper parties, according to well-known practice in equity pleading.

The bill does allege, with much verbiage, many conclusions of law which, as argued for the defendants, do not, of themselves, afford ground for relief; but, when they are supported by allegations of fact, the conclusions of law do not take away the effect of these allegations. Enough of fact is set forth to show, if true, that the Canadian Pacific Railway Company obtained control of the assets of the construction company in such manner as to be accountable for their management, disposition, and avails, which the forms of corporate action, and of legal proceedings, collusively taken in the interest of the Canadian Pacific Railway Company, as alleged, do not take away. In this view, the demurrer cannot be sustained, but must be overruled. Any other conclusion would seem to overrule *De Neufville v. Railway Co.*, 26 C. C. A. 306, 81 Fed. 10. Demurrer overruled, defendants to answer over by January rule day.

WARE et al. v. HOOPER et al.

(Circuit Court, S. D. California. November 27, 1899.)

CONTRACT—CONSTRUCTION—SALE OR PLEDGE.

Two water companies, owned by the same stockholders, and operated together, were largely indebted, and unable to raise money to pay their debts or carry on their operations, by reason of the fact that the title of their most valuable property was disputed and in litigation. In this state of their affairs, the corporations and their stockholders entered into a written contract with their principal creditor, who held a mortgage which was due, by which they agreed to deposit a controlling part of the stock of each corporation with a trustee, to become the absolute property of the creditor at a stated time, if the indebtedness had not at that time been paid, in consideration of which the creditor agreed to extend the time for payment of the mortgage, to take up their remaining indebtedness, to advance money to complete certain contracts, and, in the event he became the owner of the stock, to make further advances necessary to develop the property. *Held*, that such contract was one of conditional sale of the stock, and not of pledge, and that, in the light of the circumstances, it was not unconscionable.

This was a suit in equity to redeem certain shares of stock claimed to have been deposited as a pledge. On final hearing.

Dillon & Dunning, for complainants.

Borden & Carhart and Freeman & Bates, for defendants.

ROSS, Circuit Judge. This suit was brought for the redemption of 1,949½ shares of the stock of the defendant West Los Angeles Water Company, and 1,615½ shares of the defendant West Side Water Company, deposited by the complainants and their assignor, John A. Pirtle, with Balfour, Guthrie & Co., under a certain written agreement, of date March 11, 1897, and for relief against certain assessments made by the corporations mentioned on the stock thereof owned by the complainants. There having been a redemption, during the hearing of this cause, from the sales of that stock under those assessments, the only question remaining is as to the alleged right of the complainants to redeem the stock first referred

to. The case shows that these companies are corporations organized under the laws of the state of California. Prior to March 11, 1897, the West Side Water Company had, and was operating, in the southwestern portion of the city of Los Angeles, a water system of its own, consisting of wells, engines, and a distributing plant. The West Los Angeles Water Company owned 60 acres of land, on which it had developed several hundred inches of water, and had acquired rights of way for six or seven miles for pipe lines to be used in the distribution of its water for irrigation and domestic uses in the same section of the city, and in adjacent territory. The stock of the two corporations was owned by the same persons, and the same persons constituted the board of directors of each corporation. The corporations were, according to the averments of the bill, and as a matter of fact, acting together. The bill alleges that their stock was on the 11th of March, 1897, reasonably worth \$1,000,000, and that their joint and several indebtedness did not then exceed \$107,962, which, according to the bill, was due mostly to the defendants Hooper and to certain corporations in which they were largely interested, and was amply secured by mortgage upon all of the property of the West Los Angeles Water Company to the defendant George W. Hooper, as trustee. The bill further alleges that for the purpose of obtaining funds with which to pay that indebtedness, and to further extend and improve its business, the West Los Angeles Water Company had, prior to the 11th day of March, 1897, caused to be issued 700 first mortgage bonds, of the par value of \$500 each, dated March 15, 1896, and payable 10 years after date, with interest at 6 per cent. per annum, and had secured the payment thereof by mortgage on all of its property, rights, and franchises to the California Safe-Deposit & Trust Company, a corporation, as trustee for the owners and holders of the bonds, which bonds were in the possession of the defendant Charles A. Hooper, and subject to his control; that the defendant Charles A. Hooper had authority to sell those bonds, and could have done so prior to the 11th of March, 1897, in sums sufficient to pay the indebtedness of the said corporations, and procure the funds necessary for the further prosecution of their business, but failed to make such sales, and that by reason of such failure the corporations became in great financial distress, and unable to procure money from any other source than the defendants Hooper; and that, such being the case, the said corporations and their stockholders were on March 11, 1897, forced to enter into an agreement in writing with the defendant C. A. Hooper, which is set forth at large in the amended bill, and which provides, in substance, that the corporations defendant would execute and deliver a valid mortgage, covering all of the property of the West Side Water Company, to secure the bonds executed by the West Los Angeles Water Company, to the California Safe-Deposit & Trust Company, as trustee for the owners and holders of the bonds, aggregating in amount \$350,000, and also a valid mortgage to George W. Hooper, as trustee, on all of the property of the West Side Water Company, to secure the payment to him on or before June 15, 1897, of the indebtedness of \$107,962, with interest

thereon at 7 per cent. per annum from November 28, 1896, and would obtain the written consent and ratification of all of the stockholders of the West Side Water Company to those mortgages; and also agreed that the stockholders of the two corporations would indorse and deliver to Balfour, Guthrie & Co., at San Francisco, Cal., full shares of the stock of each company sufficient to constitute a majority thereof, and would accompany such stock with written instructions to that firm to deliver the stock to Charles A. Hooper, as absolute owner thereof, on June 15, 1897, provided that on that date the indebtedness then payable to George W. Hooper, trustee, and any indebtedness then owing to C. A. Hooper, by the two corporations, or either of them, had not been fully paid. By the agreement of March 11, 1897, the corporations further covenanted to obtain written contracts from the owners extending the then existing options to purchase the E. $\frac{1}{2}$ of block 22 and all of block 37 of the Providencia and Scott tract of land, situated in Los Angeles county, until July 1, 1897, and that they would consummate all of the foregoing agreements provided for on their part within 30 days from March 11, 1897. By Charles A. Hooper it was agreed that upon the consummation of the covenants on the part of the corporations within the time specified, and provided he obtained the consent of one J. F. Sims thereto, he would procure from George W. Hooper, trustee, an extension of the time of payment until July 15, 1897, of the indebtedness then existing from the West Los Angeles Water Company to George W. Hooper, trustee, and also would pay to Lacy & Co., of Los Angeles, an indebtedness of \$5,400 then existing from a certain construction company to that firm, and that in the event he should become the absolute owner of a majority of the stock of the corporations on June 15, 1897, as provided for in the contract, he would, on delivery of such stock to him, and the transfer thereof as he should direct on the books of the companies, and upon receiving the resignation of a majority of the then directors of each company, and the election of such directors as he should name, and the placing of such directors in the control of the property of the corporations, cause the said indebtedness to George W. Hooper, trustee, to be extended one year from June 15, 1897; and that during such year he would operate and finance the affairs of the corporations, providing such moneys therefor as the directors of the corporations should consider best, for which moneys so advanced, and for any others which might be owing to him, he should receive interest, payable monthly, at the rate of 6 per cent. per annum; and that the indebtedness to George W. Hooper, trustee, should, during the said year's extension, bear interest at the same rate, payable monthly; and that so long as any indebtedness existed to him or to George W. Hooper, trustee, from the companies, or either of them, he would, provided the minority of the stockholders of the companies desired it, consent that the bonds of the West Los Angeles Water Company might be sold at 90 cents on the dollar of their face amount, but reserving the right in him, in the event of an offer being made for any of such bonds at that price, to take the bonds himself at the same price in liquidation of the indebtedness then

existing to him and to George W. Hooper, trustee, and thereupon to refuse to sell further bonds at the said price; and that prior to June 15, 1897, the corporations might sell the bonds, in lots of not less than \$25,000, at 90 cents on the dollar, and that said George W. Hooper, trustee, would deliver the bonds sold to the purchaser on payment to him of the purchase price, and credit the money received as of date June 15, 1897; and that in case any funds should be required prior to June 15, 1897, to pay for necessary work thereafter performed in excavating and back-filling for the construction of a certain extension of the plant, known as the "Vermont Avenue Extension," and for any arrangements it might be necessary to make should the firm of Lacy & Co. default in their contract for the furnishing of pipe and fixtures, or should Lacy & Co. or their contractors default in the hauling and laying thereof, he would, if the stockholders of the corporations should first furnish one-half of the funds necessary for those expenditures, furnish the other one-half thereof as a loan to the corporations, which loan should fall due on June 15, 1897, and bear interest, payable monthly, at the rate of 6 per cent. per annum (it being also provided that any contracts for the Vermont Avenue Extension which should require payment prior to June 15, 1897, should be necessary, and let at the lowest contract rates, and that the said Charles A. Hooper should have timely notice when the same should be paid); the corporations further declaring, in and by the contract of March 11, 1897, that the title of the West Side Water Company to all of its property to be included in the mortgages mentioned was perfect, and subject to prior liens to the extent of \$10,900 principal, and no more, and that they would furnish to the said Charles A. Hooper certificates of title to that effect.

It is contended on the part of the complainants, not only that the defendant Charles A. Hooper forced the defendant companies to enter into the contract, but that its provisions are so extortionate and unconscionable that a court of equity ought to hold it invalid. It is further claimed that the contract was made without consideration, and that upon its face it constituted a pledge, only, of the stock in controversy.

I am unable to see any good ground for any of these contentions. The record shows that at and prior to the time of the making of the contract in question the defendant companies were largely indebted; the chief amount being that evidenced by the mortgage for \$107,962 to George W. Hooper, as trustee, the principal part of which was due to the defendants Hooper, and to corporations in which they were largely interested, and that were under their control. The major part of that indebtedness appears to have been incurred for pipe laid for the carrying and distribution of the waters developed and claimed by the water companies. It is contended that at the time of the making of the contract of March 11, 1897, the combined property of the two companies aggregated in value more than \$1,000,000. Its chief value depended upon whether the West Los Angeles Water Company, in which was the great bulk of the property, really owned the water it developed upon its 60

acres of land. If so, the property, including the pipe line and its distributing system for the furnishing of water for domestic purposes throughout the southwestern portion of the city of Los Angeles and adjacent territory, and the furnishing of the water for irrigation purposes, was, no doubt, of great value. But the fact, as shown by the record, is that its right to the water so developed was then being contested in the courts, not only by individual persons claiming riparian rights, but by the city of Los Angeles as well. The real value of the property of the West Los Angeles Water Company therefore depended upon the result of that litigation, and that is obviously the reason why the bonds which had been prepared and secured by a mortgage upon the property of the West Los Angeles Water Company were not available for the discharge of its indebtedness. No prudent business man would buy bonds secured only upon property the chief element of whose value was in litigation, and there is testimony to the effect that efforts made for the sale of the bonds met with no success for that reason. The contention on the part of the complainants that the defendant Charles A. Hooper prevented the sale of the bonds has no justification in the record. There was some talk of somebody wanting to buy the bonds, but no one willing to buy was ever produced or named; and, in view of the condition of the title to the water, it is wholly unreasonable to suppose that any sane man would have bought them at anything like their face value. As neither company appears to have had any other resource than its water and water plant, together with the land upon which the water was developed, it is evident—and such is the testimony on the part of the complainants as well as the defendants—that the companies were unable to pay their indebtedness. The mortgage to George W. Hooper, as trustee, being due, could, of course, have been foreclosed; but such does not appear to have been the wish of the holder of the mortgage. Charles A. Hooper came to Los Angeles from San Francisco for the purpose of making, if possible, some satisfactory arrangement with the corporations. Repeated interviews were had between him and the various stockholders of the corporations, including the complainant Ware and his assignor, Pirtle, upon the subject of the indebtedness of the companies, and in an effort to avoid a foreclosure of the then due mortgage, and to adjust the business relations of the respective parties in some satisfactory manner. These conferences continued from time to time for a week or more, and seem to have been participated in by the stockholders generally, both in and out of formal meetings. They culminated in the contract of March 11, 1897. It is idle to say, as do counsel for the complainants, that the corporations defendant were forced by the Hoopers, or either of them, to enter into that contract. Their directors were, no doubt, convinced by the financial circumstances of the companies (which, however, neither of the Hoopers appear to have brought about) that the best thing the corporations could do was to enter into that agreement. That it was voluntarily done on the part of the defendant water companies abundantly appears from the evidence, including that of the complainant Ware and of his

assignor, Pirtle. Speaking of the negotiations leading up to the execution of the contract in question, Pirtle states in his testimony:

"The condition of the company was that it was in financial embarrassment by reason of the general depressed financial condition of the country at that time. Could not place our securities, and therefore failed to pay the pipe contract; and there were some local debts which we were desiring to pay, to save the credit of the company; and the fact that Mr. Hooper was a moneyed man of San Francisco, well connected, and on the promises and talks that we had, we thought that the remaining stock left us would be of great value, under the conditions, with everything paid, and the companies financially successful, and within a year the bonds could be sold."

The complainant Ware, in answer to the question of his counsel: "What induced the two companies (the two defendant water companies) and their stockholders to enter into the agreement of March 11, 1897, with the defendant Hooper?"—answered:

"On the reputation of C. A. Hooper and his brother, George W. Hooper, as [at] that time known to us, was of such a character that, in our conference on the subject with our directory, we decided that, to obtain his active aid and assistance as he had outlined to us, half of our holdings in the present company would be more valuable than to face a condition of affairs that were then facing us, with a prospective foreclosure of mortgage calling for bills that were at that time due on the part of Mr. Hooper; and, relying upon promises to put us upon good ground, we entered into that contract."

The witness Hallett, also one of the stockholders of the West Los Angeles Water Company, when asked why the contract in question was entered into, answered:

"Well, we owed Mr. Hooper some money. It was due, and he wanted it, and we weren't able to pay it at the time, as I understand it. This seemed to be in the nature of a compromise to put off the evil day, or something of that kind."

There is nothing in the record to the contrary of this. That the contract was based upon sufficient consideration does not admit of question, and that it constituted a conditional sale, and not a pledge, of the stock of the corporations deposited with Balfour, Guthrie & Co., not only appears from its clear and unambiguous language, but from the testimony of the complainant Ware and of his assignor, Pirtle, above referred to, where each of them testifies, in effect, that they considered that, with Charles A. Hooper taking hold of the property under the terms and conditions specified in the contract, half of their stock would be more valuable than the whole of it under the old conditions. Nothing more need be said, I think, to show that the contract of March 11, 1897, did not constitute a pledge of the stock in question, but a conditional sale of it, and that, upon the happening of the conditions therein specified, it became the absolute property of the defendant Charles A. Hooper. The evidence shows that those conditions were met, and that Hooper thereupon received the stock in question as, and thereupon became, its absolute owner. Being of that opinion, I need not consider any other matter argued by counsel, except to say that unless the West Los Angeles Water Company succeeds in making good its claim to the water developed by it, and which, as has been said, was in litigation at the time of the execution of the contract in question, it is difficult to see how the defendant Charles A. Hooper will ever get

back the many thousands of dollars the evidence shows he paid out under and in pursuance of the provisions of the agreement. I think it clear, in view of the facts appearing in the record, that the contract cannot be properly held to have been extortionate or unconscionable on his part. A decree will be entered dismissing the bill at the complainants' cost.

CHARLES v. CITY OF MARION et al.

(Circuit Court, D. Indiana. December 11, 1899.)

No. 9,755.

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

It is essential to due process of law that there shall not only be notice of a time and place for a hearing, but, what is more important, that there shall be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved.

2. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR STREET IMPROVEMENT—CONSTITUTIONALITY OF STATUTE.

The validity, under the constitution of the United States, of the statute of Indiana (Burns' Rev. St. 1894, § 3626) providing that lot owners "shall be liable to the city for their proportion of the cost of street and alley improvements in the ratio of the front line of their lots owned by them to the whole improved line of the street and alley improvements," and which apparently makes no provision for considering or determining the question of benefits to the property assessed, is sufficiently doubtful, in the absence of its construction in that regard by the supreme court of the state, to warrant the granting of a preliminary restraining order in a suit by a lot owner to enjoin the enforcement of an assessment made thereunder.

3. TEMPORARY INJUNCTION—GROUNDS—SUFFICIENCY OF SHOWING.

In order to justify the granting of a temporary restraining order, it is sufficient if the plaintiff shows the existence of a prima facie right with a threatened injury to that right by defendant, and that the granting of such order will be less injurious to the defendant than the refusal to grant it will be to the plaintiff.

In Equity. On motion for temporary restraining order.

Miller, Elam & Fesler, Honk & Ratliff, Marshal Frank, and Charles St. John, for complainant.

G. A. Henry, F. W. Sweazey, and Hawkins & Smith, for defendants.

BAKER, District Judge. The supreme court of this state has expressed no recent opinion upon the constitutionality of the statute (Burns' Rev. St. 1894, § 3626) providing that lot owners "shall be liable to the city for their proportion of the costs of street and alley improvements in the ratio of the front line of their lots owned by them to the whole improved line of the street and alley improvements." Prior to the decision in *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, the supreme court of this state and of many other states had held that state legislation providing for an assessment of the costs of street and alley improvements by the measurement of the front line of the lots along and in front of which such improvements were made was valid. But in

none of the cases decided by the supreme court of this state was prominence given to the question ruled in *Village of Norwood v. Baker*, supra. The principle there settled is that a property owner cannot be assessed, for the construction of a public street or alley, in excess of the amount of benefits conferred upon the property; and that such benefits are those only which are peculiar to the property, and do not embrace benefits derived from such public improvement by the landowner as one of the public at large. The statute of this state expressly provides for an assessment of the costs of a street improvement by the measurement of the front line of the lots along which the improvements are made, and makes no provision for an assessment on the basis of the benefits actually received by the property owner by the construction of such public improvements. The constitution of the United States, as well as of this state, forbids the taking of private property for public use, by taxation or otherwise, without just compensation; and, in the case of an assessment of benefits for street improvement, that just compensation consists in the benefits that the lot owners receive by reason of such public improvement. The statute provides that, when such improvement has been completed, the common council shall cause a final estimate of the total cost, to be made by the city engineer, and shall require such engineer to report, among other things, to the common council, the total cost of such improvement, the average cost per running front foot, the name of each property owner on that part of the street improved, the number of front feet owned by each of such property owners, and the amount of the cost for such improvement due upon such lot or parcel of ground bordering on such street or alley, "which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of ground, respectively." Upon the filing of such estimate the common council shall give two weeks' notice of the time and place when and where a hearing can be had upon such estimate before a committee of the common council, to be appointed to consider such estimate, and such committee shall make report to the common council recommending the adoption or alteration of such estimate, and the common council may adopt, alter, or amend such estimate and the assessments therein.

It is suggested in argument that the notice and hearing above provided for is such notice and hearing as constitute due process of law. The statute is mandatory in requiring the engineer to make his assessment and estimate upon the basis of assessing the whole cost of the improvement by the front-line measurement, and, as he is an officer acting under special, delegated, statutory authority, an assessment or estimate made by him on any other basis than that prescribed by the statute would be void. The matter referred to the consideration and judgment of the common council and its committee is the assessment and estimate so made by the engineer, and nothing else, and the only authority conferred upon the common council or a committee of that body is either to adopt that estimate, or else simply to make alterations in the estimate so made. Evi-

dently the alterations contemplated are simply such alterations as are necessary to make the estimate of the engineer conform to the statute prescribing the method by which the engineer shall be governed in making the estimate. The statute does not purport to confer authority upon the common council to institute an inquiry de novo, and to hear witnesses and consider testimony for the purpose of fixing the assessment on the basis of the actual benefits received by the property of the landowner by the construction of the public improvement. It is elementary that the constitution authorizing the assessment and levy of taxes is not self-executing. It must be carried into execution by appropriate legislation, and no taxing officer or taxing body can make a valid assessment unless they pursue with reasonable strictness the precise method prescribed by the statute. There is no provision of the statute of this state called to the attention of the court which points out the method, or confers authority upon the common council to hear and determine the question of actual benefits received by the property of the landowner by the construction of a street improvement. It is not sufficient, to constitute due process of law, that the statute provides for a hearing and notice. It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved. If the hearing had before the common council was to determine the benefits actually received by the property owner, it is strange, indeed, that the statute commands the engineer to make and report his assessment and estimate upon a basis which wholly disregards, and, in effect, forbids, his considering the question of benefits at all. In my opinion, there is no provision of the statute that provides a tribunal, and clothes it with power, and points out the method of its procedure for the purpose of ascertaining and determining the benefits actually received by the property of a landowner by the construction of a street improvement. It may be that the supreme court of this state will, by judicial construction, import into the statute, which simply authorizes the alteration of the estimate of the engineer, a power in the common council, or in a committee of that body, to hear evidence, and determine for itself the amount of actual benefits received by the landowner by the construction of a street improvement. But such judicial construction, it seems to me, would clearly fall within the principle of judicial legislation. It is not necessary, however, on the present application for a temporary restraining order, that the court should pronounce a definitive judgment on the foregoing questions. In order to justify the granting of a temporary restraining order, it is sufficient if the plaintiff shows the existence of a prima facie right, with a threatened injury to that right by the defendants, and that the granting of a temporary restraining order would be less injurious to the defendants than the refusal to grant it would be to the plaintiff. For these reasons a temporary restraining order will be granted until the final hearing of the cause.

VON SCHRODER v. BRITTAN.

(Circuit Court, N. D. California. November 20, 1899.)

EQUITY PLEADING—ANSWER—INCONSISTENCY OF ALLEGATIONS.

A defendant in a suit in equity may plead as a defense all facts which he has a right to prove, and which, if proved, can have any effect on the judgment of the court; and it is no valid objection to an answer that it contains allegations setting up the defense in different aspects, as that one paragraph contains a denial which is qualified in another, or that different provisions of a statute of limitations are set up as defenses in different paragraphs.

In Equity. To abate a nuisance, and to recover damages for injury occasioned by unlawful acts of respondent. Exceptions to answer. Answer not under oath.

A. H. Ricketts, for complainant.

William Leviston and Heller & Powers (L. S. B. Sawyer, of counsel), for respondent.

MORROW, Circuit Judge. This is an action to abate a nuisance, and to recover damages for the injury sustained by complainant by and through the unlawful acts of respondent. The nuisance charged is that a certain brick wall of respondent's building, upon premises adjoining those of the complainant, in the city and county of San Francisco, leans over and encroaches upon complainant's land in a wrongful and improper manner, and so as to cause the wall of a brick building owned by the complainant, and standing upon his land, to be out of plumb, dangerous, and out of repair. The bill of complaint prays that respondent may be compelled, by the decree of the court, to remove the encroaching wall from the property of the complainant; to put the property of complainant in good and sufficient repair; and to make satisfaction to complainant for all damages done to his property by reason of the nuisance charged in the complaint; and that respondent may be restrained by an injunction from maintaining the encroaching wall. The respondent has filed her answer to the bill of complaint; the complainant has filed his objections to the answer; and these objections are now before the court for consideration. The answer is not under oath, an answer under oath having been expressly waived by the complainant.

The objections are eight in number. The first is that in subdivision 4 of the answer respondent denies that she has ever been the owner or in possession of the brick building described in the bill, while in subdivision 11 of the same answer respondent alleges that on or about July 9, 1896, she acquired the title to said brick building and the lot upon which it is erected. The second is that in the fourth subdivision of the answer respondent denies that the east brick wall upon her lot leans to the east of a perpendicular line, or slopes or encroaches upon complainant's lot, or makes complainant's brick building dangerous and out of plumb; while in subdivision 11 of the answer respondent alleges and shows that the building erected upon her lot has settled, and did create the nuisance

complained of. The third is that in the sixth subdivision of the answer respondent denies that the nuisance complained of was created by any former owner of the lot or building contiguous on the west to complainant's property, while in subdivision 11 respondent alleges and shows that the brick building upon the lot was erected on or before the 15th of June, 1898, and that the nuisance complained of occurred before the 1st of January, 1891; and yet in subdivision 6 of her answer respondent denies that there was any plain, palpable, or notorious nuisance at the time of the purchase by her mentioned in the bill of complaint, or that any nuisance was known to her at the time she acquired title by purchase, and in subdivision 6 of said answer respondent denies that she wrongfully maintains the nuisance complained of, while in subdivision 11 she alleges that the east wall of her building leans to the east, and creates the nuisance complained of in the bill, and that said nuisance has existed for more than six years last past. Complainant's exceptions 4, 5, and 6 allege that the answer is "argumentative and uncertain" in respect to those sections in which respondent sets out that the cause is barred by the certain provisions of the Code of Civil Procedure set up in respondent's answer, in that the material facts, or any facts or circumstances, are not given to support the allegations. Complainant's exception 7 alleges that the answer is "inconsistent and self-contradictory," because respondent in the twelfth subdivision of the answer alleges that complainant's cause of action is barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of California, while in subdivision 13 of the said answer respondent alleges that complainant's cause of action is barred by subdivision 2 of section 338 of the said Code, and in the fourteenth subdivision of said answer that complainant's cause of action is barred under the provisions of section 343 of said Code. Complainant's exception 8 alleges that there is an attempt by respondent in the answer to set up matter as ground for the affirmative relief of respondent, and an attempt to set up a defense in favor of the respondent, inconsistent with the defense contained in the answer elsewhere. Complainant prays that respondent may be compelled to put in a full and sufficient answer to the bill of complaint.

Complainant's exceptions to the answer may be thus classified: Exceptions 1, 2, 3, and 7 charge that the answer is "inconsistent and self-contradictory"; exceptions 4, 5, and 6 charge that the answer is "argumentative and uncertain"; exception 8 is based upon the ground that the respondent attempts to set up matter for affirmative relief in her own favor, and that the defense attempted to be set up is inconsistent with the defense contained in the answer elsewhere.

The denials and allegations in the answer, which these exceptions point out as inconsistent and contradictory, do not appear to be of that character. A careful reading of the answer shows that it fully responds to the allegations of the bill, and sets up in answer the facts upon which the respondent relies for a defense. An objection cannot be considered as real or substantial, but, rather, technical and overcritical, that finds an inconsistency in a denial of the re-

spondent that she is the owner or in the possession of a certain building, and an allegation qualifying that denial by setting forth the facts showing a reversionary interest in the lot and building thereon, such reversion being expectant upon the termination of a lease for a term of years. Nor can exceptions to an answer be considered substantial based upon the complaint that the answer is argumentative and uncertain in this: that the respondent has set up the several provisions of the statute of limitations which she deems applicable to her defense. These and the other allegations excepted to are but allegations setting forth the different aspects of her defense,—a method of pleading allowable in bills, and certainly permissible in an answer.

In *Leslie v. Leslie*, 50 N. J. Eq. 155, 24 Atl. 1029, a rule was declared respecting the allegations of an answer which appears to be applicable to this case. The rule is this:

"That all substantial doubts, whether the matters objected to are pertinent or not, are to be resolved in favor of their pertinency, and that nothing should be expunged from the answer which the defendant has a right to prove, and which, if proved, can have any influence on the judgment of the court, either in deciding whether or not the complainant is entitled to any relief whatever, or the nature, character, or extent of the relief to which he may be entitled, even down to the question whether he shall have relief with or without costs."

Under this rule, there is no question but that the answer in the present case should be allowed to stand. The exceptions will therefore be overruled.

SOUTHERN BUILDING & LOAN ASS'N et al. v. RECTOR.

(Circuit Court of Appeals, Eighth Circuit. November 20, 1899.)

No. 1,229.

BUILDING ASSOCIATIONS—USURY—ALABAMA STATUTES.

Under the statutes of Alabama relating to building and loan associations, as construed by the supreme court of that state, such associations are exempted from the general usury laws of the state, and their contracts are not rendered usurious by the taking of premiums and interest exceeding in the aggregate the legal rate of interest.¹

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

On the 12th day of October, 1894, H. M. Rector, the appellee and defendant below, executed to the Southern Building & Loan Association of Huntsville, Alabama, one of the appellants and plaintiffs below, an obligation, of which the following is a copy:

"The Southern Building and Loan Association.

"\$6,500.00.

Huntsville, Ala., October 12th, 1894.

"Six years after date, I, Henry M. Rector, promise to pay to the Southern Building and Loan Association, a corporation duly chartered under the laws of the state of Alabama, with its principal place of business in the city of Huntsville, in said state, at its office in said city, the sum of sixty-five hundred dollars, with interest thereon at the rate of five per centum per annum, paya-

¹ Statutory exemptions from operation of usury laws, see note to *Andruss v. Association*, 36 C. C. A. 343.

ble monthly, on or before the 5th day of each month, and a premium of five per centum per annum, payable monthly, on or before the 5th day of each month, for a loan made to me, under my application, bearing date the 20th day of September, 1894, on 130 membership shares in said association, evidenced by certificate No. 10,729 for 130 shares, issued on the 24th day of September, 1894; and I hereby transfer, assign, and set over as collateral security to said association, for the payment of said sum loaned to me, and for the payment of the monthly installments on said shares, interest, and premium required of me, said 130 membership shares in said association. And it is stipulated that, in the event I make default in the payment of said installments, interests, premiums, or fines to said association for a period of three months, then this bond shall mature and become payable, and I hereby authorize said association to cancel said shares, and the same shall be thereby forfeited.

"Witness my hand and seal.

H. M. Rector. [Seal.]

"Witness: F. S. Mallory."

On the same day Rector conveyed to Joseph Martin, one of the appellants and plaintiffs below, as trustee, certain real estate in Hot Springs, Ark., in trust to secure the payment of the obligation. This is a suit in equity to foreclose the deed of trust. The circuit court found and decreed "that the note and mortgage sued on are usurious under the laws of Alabama," and rendered a decree for the principal sum of the mortgage debt, less payments only. From this decree the plaintiffs appeal to this court.

J. W. House and Lawrence Cooper, for appellants.

Sterling R. Cockrill (Ashley Cockrill, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Is the contract valid under the laws of Alabama? This is the only question in the case. The contract was made and was to be performed in the state of Alabama, and its validity and legal effect must be determined by the laws of that state. The brief of the learned solicitors for the appellee contains an exhaustive and instructive review of the authorities on the question as to whether the contracts of the institutions commonly known as "building and loan associations" are usurious. It is earnestly contended that the appellant in this case has assumed the name of building and loan association, and adopted some of the methods of such associations, as a mere cover for taking usury; that in fact it is not, in the proper sense of that term, a building and loan association at all, but an association for lending money at usurious rates of interest. If we were at liberty to consider this case upon principle, and apart from the laws of Alabama, we might find it difficult to answer counsel's contention. But the validity and legal effect of this contract must be tested by the laws of Alabama, and the decisions of the supreme court of that state construing those laws, and not by the laws and decisions of other states. Applying that test, we find that under the laws of Alabama, as construed by the supreme court of that state, the contract in suit is not usurious. Contracts of building and loan associations identical with the one here in suit have uniformly been held valid by the supreme court of that state. The case of *Sheldon v. Association* (Nov. term, 1898) 25 South. 820, contains a full discussion and consideration of the question whether contracts of building and loan associations, like

the one here in suit, are usurious under the laws of Alabama, and holds that they are not. We refer to the case without quoting from it. At the same term, in a case involving the same questions, to which the appellant in the case at bar was a party,—Johnson v. Association (Ala.) 26 South. 201,—the decree of the lower court, which was in its favor, was affirmed on the authority of Sheldon v. Association. The court holds, in substance, that contracts of building and loan associations in that state, like the one in suit, are exempted from the operation of the general usury laws of the state, and that under the laws of the state regulating such associations and defining their powers, and under their charters, they may lawfully stipulate for the payment of all sums called for by the contract in suit. It is but fair to the lower court to say that these late decisions of the supreme court of Alabama were not brought to its attention. The case of Johnson v. Association is not officially reported, and was brought to our attention by certified copy of the opinion of the supreme court. The decree of the circuit court is reversed, and the cause remanded, with instructions to render a decree in favor of the appellants for such sum as may be found to be due on the contract in suit, treating it as valid, and not usurious. It is so ordered.

INTERSTATE COMMERCE COMMISSION V. CHICAGO, B. & Q. R. CO. et al.

(Circuit Court, N. D. Illinois, N. D. December 4, 1899.)

No. 25,101.

CARRIERS—REASONABLENESS OF RATES—TERMINAL CHARGES.

The action of railroads entering Chicago in dividing their charges on live stock shipped to that city, which previously included delivery of the stock at the stock yards, so as to make a separate rate for the haul to points on their lines and a terminal charge covering its transfer from their own tracks to the stock yards, is not only legal, but desirable, as relieving shippers whose stock does not go to the yards from payment of the terminal charges; hence, where the terminal rate is just and reasonable in itself, it is not unlawful.

This was a petition by the interstate commerce commission for an order enjoining the several railroad companies defendant to cease and desist from making certain charges which the commission had declared to be unreasonable and unjust. On final hearing.

S. H. Bethea, Dist. Atty., W. A. Day, and S. H. Cowan, for petitioner.

Chester M. Dawes, Robert Dunlop, Robert Mather, Sidney F. Andrews, William Brown, Charles B. Keeler, Lloyd W. Barrows, and Frank B. Kellogg, for defendants.

KOHLSAAT, District Judge. On the 3d day of March, 1899, the interstate commerce commission filed its petition in this court for the enforcement of its order made on the 20th day of January, 1898, requiring the defendants, respectively, to "cease and desist, on or before April 1, 1898, from charging, demanding, collecting, or receiving

the sum of \$2 per car load of live stock as compensation for terminal services rendered in making delivery of live stock at the stock yards of the Union Stock Yards & Transit Company, in the city of Chicago, state of Illinois, which said charge is found and held, in and by said report and opinion of said commission, to be unreasonable, unjust, and unlawful." This proceeding is had in accordance with the interstate commerce act, and, in a proper case, this court would grant the prayer of the petition.

Prior to June 1, 1894, shippers of live stock to Chicago over the lines owned or operated by the respective defendants might, at their option, have had the same delivered, without extra charge, to the Union Stock Yards, which lie within the limits of that city. To all intents and purposes, the rates from Missouri river live stock centers then absorbed all the terminal charges. The defendants had no adequate facilities for handling stock upon their own lines. The report and findings of the commission held the stock yards to have been the common depot of the several defendants for the delivery of stock consigned to Chicago. With that finding I concur.

Prior to the year 1893, the stock-yards company, which owns or controls the tracks required for the movement of freight between the tracks of the several defendants and the stock yards, had given to the defendants the free use of said tracks; the carriers being at the expense only of the actual cost of haulage and handling. In 1893 the stock-yards company assumed the entire work of hauling cars from the intersection of said stock-yards tracks with defendants' lines, respectively, to the yards, and charged the defendants therefor on the basis of what it had cost defendants theretofore for the same service. On June 1, 1894, the stock-yards company added to this sum a trackage charge of 40 cents per car each way, then for the first time imposed. Partly to meet this new expense, and partly to reimburse themselves for the actual outlay theretofore borne by them in delivering at the stock yards, the defendants, respectively, by concerted action, duly filed schedules of new rates to that point, with the commission, as required by the act, whereby they created a rate to points on their lines in Chicago, and a terminal charge to cover the expense of delivering stock from their tracks to the said stock yards. This terminal charge was fixed at \$2 per car. The trackage charge above referred to amounted to the sum of 80 cents per car. Thus, the former through rate to the stock yards, taking the Chicago and terminal rates together, was arbitrarily increased in the sum of \$1.20 per car. Since that time the Chicago rate has been greatly reduced, so that the question now presented is whether the imposition of the terminal charge of \$2 upon the theretofore existing Chicago rate was unlawful and unjust.

Upon the hearing of defendants' demurrers to said petition (94 Fed. 272), this court held that it was entirely within the power of petitioner, in a proper case, to require the defendants to cease and refrain from the enforcement of a freight rate which the petitioner found to be unjust and unlawful, even though the commission has no power to prescribe a rate. Manifestly, if the defendants did effect a segregation of their freight charges from Missouri river and other

stock-shipping centers to the Chicago stock yards, so that the Chicago rate did not include the expenses or charges incurred in the delivery at the stock yards from the tracks of defendants, and did make a special rate from their tracks to the stock yards, there can be no question of double charge involved. Unless the one or the other of these charges, in and of itself, is unjust and unlawful, or the same was illegally made, the petitioner's contention must fail. The justice and fairness of the Chicago rate is not called in question in this proceeding.

The act provides in what manner rates may be changed. The defendants have complied with that requirement, and there can be no doubt but that they have, as they legally might, divided up or segregated their Chicago and terminal charges. That such segregation could have been legally accomplished, and was both advisable and desirable, was unequivocally held in the case of *Walker v. Keenan*, 19 C. C. A. 668, 73 Fed. 758. This, too, is the spirit of the *Covington Stock-Yards Case*, 11 Sup. Ct. 461, 35 L. Ed. 37. It is just and reasonable that one who ships to points on the tracks of the several defendants in Chicago should not be required to pay a rate which is based in part upon the actual cost to the carrier of delivery at the stock yards from the point to which he ships. He should not be required to go to the stock yards to get his money's worth.

Therefore the only question remaining is as to the lawfulness and justice of this terminal charge, in and of itself. The petitioner admits that, if it is to be considered by itself, it must be held to be reasonable, and therefore just and lawful. Having held that it must be so considered, there remains no alternative but to deny the prayer of said petition, and the same is denied. In view of the above, it becomes unnecessary to pass upon the question as to whether or not this cause is properly within the interstate commerce act.

VICTOR G. BLOEDE CO. OF BALTIMORE CITY v. JOSEPH BANCROFT & SONS CO.

(Circuit Court, D. Delaware. December 11, 1899.)

No. 4.

1. PRODUCTION OF BOOKS AND PAPERS.

Section 724, Rev. St. U. S., confers authority on the federal courts in civil actions at law to require under pain of judgment of nonsuit or by default production of books and writings, containing evidence pertinent to the issue, not only at the trial, but after the joining of issue and before trial, for inspection in order to prepare for trial.

2. SAME—INSPECTION BEFORE TRIAL.

Even on the assumption that the scope of section 724, Rev. St. U. S., is confined to production only at the trial, quære, whether by virtue of section 914, Id., in conjunction with section 13 of chapter 107 of the Revised Code of Delaware, as amended by the act of April 19, 1895 (20 Del. Laws, p. 187), the court would not be authorized to order production for inspection before trial.

3. CONTRACT—ACTION FOR BREACH—EVIDENCE.

The plaintiff's case includes not only the making and breach of the agreement declared on but the amount of damages, if any, to which the

plaintiff is entitled, and evidence tending to ascertain such amount is pertinent to the issue.

4. PRODUCTION OF BOOKS AND PAPERS.

Under section 724, Rev. St. U. S., generality in the designation of books or writings is not objectionable if the subject-matter to which they relate is specifically mentioned in the motion and notice.

5. SAME.

Discovery by production of documents or otherwise, having for its object the promotion of justice through the disclosure of material facts, will, subject to certain well-recognized exceptions, be awarded in aid of an action at law, unless it clearly appears that a discovery could not avail the case of the party applying for it.

6. SAME.

But it will not be awarded to gratify mere curiosity or to enable one party to make undue inquisition into the affairs of another; nor will the court extend discovery beyond the legitimate requirements of the case to be aided thereby.

(Syllabus by the Court.)

Lewis C. Vandegrift and Charles M. Curtis, for plaintiff.

Benjamin Nields, Herbert H. Ward, and William S. Hilles, for defendant.

BRADFORD, District Judge. Application has been made by motion after due notice for an order requiring the defendant to produce before the trial of this cause for inspection by the plaintiff and its attorneys and agents certain books and writings alleged to be in the possession or under the control of the defendant and to contain evidence pertinent to the issues therein. The declaration is in assumpsit and contains nine counts. The defendant has not demurred either specially or generally to the declaration, or any of its counts, but has relied on the pleas of non-assumpsit and the statute of limitations. On these two pleas the cause is at issue. The several counts are voluminous and in some instances somewhat complicated. It is unnecessary here to attempt a particular or complete analysis of them. It, however, appears from the declaration that from time to time during a period prior to June 1, 1893, and extending back of June 9, 1891, pursuant to a parol contract between Victor G. Bloede and the defendant, the former furnished to the defendant and the defendant bought from him certain pulp colors and other colors and materials; that the plaintiff, who had succeeded to the business of Bloede, and the defendant entered into a parol contract on or about June 1, 1893, whereby the defendant for divers considerations set forth in the declaration undertook, among other things, and so long as the plaintiff and defendant should continue mutually agreed on the point, to buy from the plaintiff pulp colors and other colors and materials such as Bloede in and prior to June, 1891, had made and sold to the defendant, as above mentioned; and also, if the defendant should at any time manufacture such colors or materials or have the same manufactured for it by any person or corporation other than the plaintiff, to pay to the plaintiff an amount to be mutually agreed on between them or to be determined by arbitration or a royalty to be similarly determined; and also, if the defendant should cease to buy such colors or materials from the plaintiff, or if the plaintiff

should discontinue its business, to pay to the plaintiff a royalty for the use and manufacture by the defendant of such colors or materials, to be determined and derived as set forth in the declaration, but in any event the royalty to be paid to the plaintiff to be the same as the royalty paid by the defendant to Bloede prior to June, 1891; and the plaintiff in and by said contract undertook, among other things, to furnish to the defendant such full information as would enable the latter to manufacture such colors and materials, in case it should cease to purchase the same from the plaintiff or the latter should for the reasons set forth in the declaration be unable to manufacture the same. It is alleged in the declaration that the plaintiff has fully performed all things on its part necessary to be done to enable it to maintain its action. The breach as assigned in some of the counts is the failure of the defendant to pay royalty as stipulated, and, as assigned in others, the refusal by the defendant to submit to arbitration touching royalty claimed. The damages are laid in the sum of \$150,000.

The defendant contends that the present application should for several reasons be denied. It is urged that the court has no power to order that books or writings be produced before trial in an action at law. Section 724 of the revised statutes which is a reproduction in substance and almost in terms of section 15 of the judiciary act of September 24, 1789, is as follows:

"Sec. 724. In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order the court may, on motion, give judgment against him by default."

There has been much contrariety of judicial opinion on the question whether this section authorizes an order for the production before trial of books or writings. Its phraseology is unfortunate and calculated to shroud its meaning in doubt. It is, however, remarkable in view of the antiquity of the law and of the number of cases which have arisen requiring its construction that its intent on the point under discussion is still the subject of controversy. The weight of authority throughout the country taken as a whole as well as of reason appears to support the proposition that the section confers authority on the federal courts in civil actions at law to order in proper cases production of books and writings containing pertinent evidence, not only at the trial, but after the joining of issue and before trial for inspection in order to prepare for trial. In *Geyger's Lessee v. Geyger*, 2 Dall. 332, Fed. Cas. No. 5,375, where the original section was under consideration, the circuit court for the district of Pennsylvania in 1795 broadly declared the purpose of the law as follows:

"The provision contained in the judicial act was intended to prevent the necessity of instituting suits in equity, merely to obtain from an adverse party, the production of deeds and papers relative to the litigated issue."

In *Bank v. Tayloe*, 2 Cranch, C. C. 427, Fed. Cas. No. 2,548, decided by the circuit court for the District of Columbia in 1823, there was a motion for production before trial. Geyger's Lessee v. Geyger was cited in opposition. The court, however, ordered the defendant to produce his bank-book and vouchers prior to the trial "for the inspection of the plaintiff's counsel, in the presence of the defendant's counsel, if he wished to be present." In *Jacques v. Collins*, 2 Blatchf. 23, Fed. Cas. No. 7,167, the circuit court for the southern district of New York in 1846 granted an application that certain correspondence and documents be produced before trial for inspection or that service be made before trial of verified copies of the same to enable the defendants to prepare for trial. In *Finch v. Rikeman*, 2 Blatchf. 301, Fed. Cas. No. 4,788, decided by the same court in 1851, there was a motion for production before trial of books of account and for leave to take copies. The motion was denied, not because the application was for production before trial, but for the reason that the direct consequence of granting it would or might be to subject the defendants to a penalty. Judge Betts in delivering the opinion of the court said:

"It is plain, from the language of this statute, that Congress did not intend to vest in parties litigant an unrestricted right to all written evidence in the possession of an adverse party, which might be pertinent to an issue in a trial at law; the qualification being explicit, that the right is allowable only in cases and under circumstances in which the Court of Chancery, by the ordinary rules of proceeding in that Court, would compel the production of books and documents. * * * The plain limitation to the right to the interposition of this Court by giving final judgment, is, that the application by a party for the production of papers be one which a court of equity would sustain on a bill of discovery. The right, in our opinion, rests entirely on that condition. * * * We think it against the rules of Equity, to allow a bill of discovery in such a case, unless the bill relinquishes all claim to the penalty which may be superinduced by the production and exhibition of the books, and, for that cause, the motion must be denied."

U. S. v. Youngs, 10 Ben. 264, Fed. Cas. No. 16,783, was an action in the district court for the southern district of New York to recover duties alleged to be due to the United States on sugars imported by the defendants. There was a motion to compel the production by the plaintiff of the official weighers' returns of the weight of the sugar in order that the defendants might have inspection or take copies of such returns to enable them to prepare for trial. The right to discovery was claimed not only under the act of Congress but under a section of the New York code. The case, however, was decided on section 724 of the revised statutes. The court after referring to authorities granted the motion. Judge Choate in the course of the opinion said:

"The reference in the statute to proceedings in chancery, evidently meaning by bill of discovery, is not used as limiting or designating the parties against whom the power of the statute may be invoked. It appears merely to and is used to define the cases and circumstances under which the power will be exercised, that is to say, the evidence must be of that kind which can be compelled by a bill of discovery and the circumstances necessary to be shown upon a bill of discovery as to the relevancy of the evidence and the necessity for its production, etc., must be shown to compel its production on motion."

In *U. S. v. Hutton*, 10 Ben. 268, Fed. Cas. No. 15,433, where it was held that section 724 gives no remedy until issue has been joined, the same court said:

"The right of one party in a suit to demand an inspection or copies of books and papers in the possession of the other, either for the purpose of preparing a pleading or of preparing for trial, has long been recognized as a right which the courts should, in some form and under proper circumstances, enforce. Independently of statutory provisions, the right has generally been enforced by bringing a bill of discovery in chancery for the purpose. But to avoid the delay and expense of such a proceeding, statutes have been passed, both state and federal, substituting, for the bill of discovery, a proceeding in the action itself, by way of motion and order. The production of books and papers is, so far as the federal courts are concerned, regulated by Rev. St. § 724. * * * But this statute seems clearly to limit the remedy to cases in which issue is joined, one test of the statute to the right to a production of the books and papers being that they contain evidence 'pertinent to the issue.'"

In *Easton v. Hodges*, 7 Biss. 324, Fed. Cas. No. 4,258, in the circuit court for the eastern district of Wisconsin, Judge Dyer referred, without any suggestion of doubt as to their validity, to the rules of that court as providing methods for obtaining in actions at law inspection of books and documents and copies thereof. In fact the rules of that court then regulated and now regulate the manner of securing production before trial of books and writings under section 724.

In *Coit v. Amalgamating Co.* (C. C.) 9 Fed. 577, which was a suit in equity in the circuit court for the eastern district of Pennsylvania, there was a motion for a rule on the defendant to show cause why he should not produce certain books and papers. Judge Butler, while not deciding the point now presented, evidently entertained no doubt that under section 724 production before trial could properly be ordered. He said:

"The practice in equity formerly was to obtain information and use of the contents of books and documents in a party's possession, by bill of discovery, requiring the respondent to set out the contents at large in the answer; as this was found to be laborious, expensive, and tending to encumber the records unnecessarily, it was so changed as to require simply an acknowledgment of the existence and possession of the documents, and upon such acknowledgment to obtain their production by motion. Where such information and use were needed in trials at law, the practice was the same until the more convenient one, provided by statute, was adopted,—wherein an affidavit designating the books or documents, and averring the materiality of their contents, is substituted for the bill, and the absence of a counter affidavit is treated as acquiescence in what is stated. All the purposes of a formal bill are thus effected without any of the cost, labor, and delay of the former practice. There is no good reason why this more convenient and expeditious method should not be applied in equity to cases such as that now before the court. * * * There certainly ought not to be any greater degree of difficulty, or circumlocution, in obtaining an exhibition of such relevant and material matter in suits in equity than at law. In each equal care is required, and should be observed by the court, to avoid unnecessary exposure of a party's private affairs, or improper prying into his case,—by limiting the order for production and examination, to what is shown to be important to the mover's case."

In *Gregory v. Railroad Co.* (C. C.) 10 Fed. 529, a motion for production before trial of books, papers and vouchers was granted by the circuit court for the northern district of Iowa. Judge Love, after quoting section 724, said:

"From this provision it is clear that the plaintiff's motion cannot be denied. But how, when, and where the books, etc., shall be produced must be determined by the sound and just discretion of the court. * * * The right of a litigating party is to inspect, to examine, and take copies, with view of securing information, and offering their contents in evidence. This right the law secures

to him, and the court will order it to be done in such a way as to prejudice as little as possible the owners of the books. * * * It will be seen by examining the foregoing provision, that the court is to govern its discretion by the practice in such cases in chancery. The practice in equity has been long established, and the court will make an order in strict pursuance of that practice."

In *Paine v. Warren* (C. C.) 33 Fed. 357, where a bill of discovery was filed, it appeared that the complainant had commenced an action in the state court which, before any pleadings were filed, was removed to the circuit court for the southern district of New York. After removal a motion was made in the circuit court to compel the defendant to allow inspection of his books to enable the plaintiff to frame his complaint. This motion was denied as issue had not been joined. Judge Wallace in delivering the opinion of the court in the suit for discovery said:

"The motion to compel production was denied, as it should have been, for the reasons thus stated, and the plaintiff has now filed a bill of discovery on the equity side of the court in aid of his suit at law. If the original suit is at law, this practice is authorized. * * * No pleadings have yet been filed in the first action, and it is therefore impossible to determine by the usual method whether the suit is on the law side or the equity side of the court. But the cause of action set forth in the bill of discovery is one cognizable at law. It is probably true that it is one of which equity also has concurrent jurisdiction, because the remedy there would be more adequate and complete in some respects than the plaintiff can obtain at law. * * * The plaintiff has the choice at his election of either one of two courses which will afford him an efficient remedy. He can dismiss his bill of discovery and treat his original suit as an action at law, and when the pleadings are perfected and issue joined, can apply to compel an inspection and production of necessary and material books and papers in the defendant's possession; or he can treat it as a suit in equity, and frame a bill with appropriate averments and interrogatories for discovery, and move, if necessary, for an inspection according to the course of equity practice."

In *Brewster & Co. v. Tuthill Spring Co.* (C. C.) 34 Fed. 769, a bill in equity was filed in the circuit court for the northern district of Illinois to compel specific performance of an agreement which, among other things, provided that the complainant or his authorized agent should have the right to inspect the books of certain licensees under a patent and to make copies thereof. The bill prayed, among other things, that the defendants be compelled to allow the complainant's agents to inspect their books containing certain accounts and to take copies. The first ground of defense was that the court had no jurisdiction because the complainant had a plain, adequate and complete remedy at law. Judge Blodgett in delivering the opinion of the court said:

"As to the first point made, that complainant has an adequate remedy at law, I can see no reason why the complainant in an action at law cannot recover all the damages for the breach of this contract that could be awarded by a court of equity, and could have action for successive breaches of the same; and by section 724 of the revised statutes complainant can compel the production of defendants' books to the same extent that this court can do sitting as a court of equity."

In *Exchange Nat. Bank of Atchison v. Washita Cattle Co.* (C. C.) 61 Fed. 190, the circuit court for the eastern district of Missouri held that the power conferred by section 724 to order the production of

books and writings includes the power to grant inspection of them with permission to make copies before trial. Judge Thayer in that case said:

"This is a motion by the plaintiff to obtain an inspection of the defendant's books and permission to take copies of entries therein, the case being now at issue. The jurisdiction to make such an order must be derived from section 724, Rev. St. U. S., as the state statute is not applicable. *Gregory v. Railroad Co.* (C. C.) 10 Fed. 529. The statute (section 724) says nothing about an order for the inspection of papers and permission to take copies of entries, etc., but it must be presumed that the purpose of compelling a party to produce his books is to enable the opposite party to examine them, and, if necessary, to make copies of entries. Therefore it is reasonable to hold, and the court so decides, that the power to order the production of books includes the power to grant an inspection."

In *Lucker v. Assurance Co.* (C. C.) 67 Fed. 18, where it was held by the circuit court for the district of South Carolina that the right given by section 724 is not limited to production only at the trial, but extends to inspection with permission to copy before trial, Judge Simonton said:

"It seems, however, to be a narrow construction of section 724 to limit its operation to the actual trial. Its purpose, clearly, is to provide a substitute for a bill of discovery, and to secure at law the purposes which such a bill would subserve. All the cases recognize this. On a bill for discovery, necessarily, the facts sought would be discovered before trial. Besides this, the section says that this order for the production of papers can be made 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.' * * * There is another point of view of this matter. The object of a motion of this character is to enable a party, in advance of the submission of the issue, to ascertain the strength or weakness of his case. An inspection of the papers may end the case. It is better to reach this result in this short way than in the middle of a trial."

In *Henszey v. Mining Co.* (C. C.) 80 Fed. 178, Judge Simonton in the circuit court for the eastern district of North Carolina granted a motion for leave to examine certain mines touching which a charge of mismanagement by a receiver had been made. He said:

"The motion appears to me to be analogous to the motion made for the production, by parties, of books or writings in their possession, which contain evidence pertinent to the issue (Rev. St. U. S. § 724), and to the motions under the code practice for admission or inspection of writings or examination of the parties, before trial."

The cases adopting the narrower construction of section 724 are fewer and less satisfactory in their reasoning than those holding that production can be compelled before trial. In *Hylton's Lessee v. Brown*, 1 Wash. C. C. 298, Fed. Cas. No. 6,981, decided in 1806 by the circuit court for the district of Pennsylvania, notice had been given by the defendant to plaintiff's counsel to produce at the trial a certain will. Before the jury was impaneled the defendant read the notice and also an affidavit to show that the will was in the possession of the plaintiff. The objection of counsel and the action of the court are stated as follows:

"It was objected, by the plaintiff's counsel, that the motion was premature, and should be made during the trial; because, the act of Congress says, that the courts shall have power, in the trial of actions at law, on motion, and notice, to order papers to be produced, which contain evidence pertinent to the issue; so that the court, until the trial is gone into, cannot know whether it

is pertinent or not; and the order is to be made on the trial. The court overruled the motion."

Mr. Justice Washington, however, in speaking of the scope of the provision now embodied in section 724, said:

"The remedy provided by the act of Congress, is merely cumulative; and, to save the time and expense of a bill of discovery, it enables this court to do, in a summary way, what they might do, if a bill of discovery were filed on the equity side of the court, and no more."

So in *Triplett v. Bank*, 3 Cranch, C. C. 646, Fed. Cas. No. 14,178, decided in 1829 by the circuit court for the District of Columbia, notice had been given by the plaintiffs to the defendant to produce at the trial certain letter books of the latter. The plaintiffs' counsel claimed that he had a right to examine them before the trial to ascertain whether they contained matter pertinent to the issue, and moved the court for an order requiring the defendant to produce the books. The action and opinion of the court appear in the report as follows:

"The court refused to make the order; not being satisfied that the books contained any matter pertinent to the issue, (no particular letter being designated,) and not being of opinion that the plaintiff has a right to inspect the books for the purpose of ascertaining whether they contained any such matter."

In *Iasigi v. Brown*, 1 Curt. 401, Fed. Cas. No. 6,993, decided in 1853, Mr. Justice Curtis, in delivering the opinion of the circuit court for the district of Massachusetts, said:

"By the common law, a notice to produce a paper, merely enables the party to give parol evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of Congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a nonsuit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case, and obtaining such an order as the act contemplates. * * * The application for such an order may be made, on notice, before trial. There is a manifest convenience in allowing this. But, at the same time, I think the court should not decide finally on the materiality of the paper, except during the trial; because it would occupy time unnecessarily, and it might be very difficult to decide beforehand, whether a paper was pertinent to the issue, and whether it was so connected with the case, that a court of equity would compel its production. These points could ordinarily be decided without difficulty during a trial, after the nature of the case, and the posture and bearings of the evidence are seen."

No reason is perceived why a court of law after issue joined in an action pending therein should have greater difficulty in determining the pertinency of evidence contained in documents of which production before trial is sought than a court of equity in deciding on the propriety of compelling discovery or production of similar documents for inspection before trial in aid of the plaintiff's or defendant's case in an action at law. To adopt the narrower construction of section 724 on the ground that a court of law cannot well ascertain after issue joined but before trial the pertinency of the contents of books or writings would practically involve condemnation of the long established and beneficial practice in chancery of awarding discovery or production of documents in aid of an action at law. In *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201, Fed. Cas. No. 9,448, decided in 1868, Mr. Justice Clifford, in delivering the opinion of the

circuit court for the district of Massachusetts, said, with reference to the granting of motions for production under section 15 of the judiciary act:

"Undoubtedly the power conferred is a discretionary power, but it is one which should be firmly exercised in a case falling within the conditions specified in the provision, when it appears that there is just ground to apprehend that delay will defeat the action of the court, and that the party is unable to obtain the evidence by subpoena duces tecum, and that the case and circumstances are such that notice to produce is not a safe and adequate remedy. * * * No doubt is entertained that the motion may be made, in a pending action at law, before the day of trial; but the requirement of the order of the court must perhaps be that the books and writings be produced at the trial of the action. Such an order may be absolute or nisi, as the circumstances may justify or require. Production before the trial is not perhaps contemplated by the words of the provision, nor is it in general necessary. * * * Where the motion is accompanied by satisfactory proof that the case is one in all respects within the conditions of the provision, and it is also satisfactorily shown that there is just ground to apprehend that the books and writings may be destroyed or transferred to another, or removed out of the jurisdiction before the day of trial, the order should be made without delay, and be absolute."

It is evident that Mr. Justice Clifford was unprepared or unwilling to assume without qualification the position theretofore taken in the same court by Mr. Justice Curtis in *Iasigi v. Brown*, or unnecessarily to assail that position. There has been and probably is some difference of opinion as to the precise view entertained by the former on the question whether production before trial can be ordered under the statute. In Massachusetts it has been considered that the views of Mr. Justice Clifford and Mr. Justice Curtis on that point conflict with each other. In *Caspary v. Carter* (C. C.) 84 Fed. 416, Judge Putnam in the circuit court for the district of Massachusetts, after referring to *Iasigi v. Brown* and *Merchants' Nat. Bank v. State Nat. Bank*, said:

"The practice under this statute seems very unsettled, even to the extent that decisions in this circuit are not consistent. We are not required, under the circumstances, to determine whether production can be compelled before trial; but Mr. Justice Curtis and Mr. Justice Clifford apparently differed on this point, as shown by the cases cited."

In *Caspary v. Carter* the application was for production before trial and was refused, not on the ground that the court was without authority to order such production, but because the pertinency and materiality of the contents of the books and documents of which production was desired did not sufficiently appear. In *U. S. v. National Lead Co.* (C. C.) 75 Fed. 94, in the circuit court for the district of New Jersey, there was an application by the plaintiff for leave under the supervision of the court to examine before trial certain books of the defendant. The application was refused on two grounds: first, that section 724 does not authorize an order for production before trial, and, secondly, that the production of the books might expose the defendant to a penalty or forfeiture. Judge Green, in discussing the first ground, said:

"The application is that the court should require the defendant to produce now, immediately, before trial, certain books alleged to contain matters pertinent to the issue, that they may be examined by the plaintiff for the very purpose of preparing its cause for trial. But by the very words of the statute the exercise of the power vested in federal courts to require production of such

books or writings is limited to causing such production to be made at the trial. The words are not, broadly, 'in any action at law at any time' the court may require the production of books, but there is an express limitation found in the words 'on the trial of any action.' It is, then, at that particular time—at the trial, and at no other time—that the court may, in its discretion, order books to be produced. * * * The words of the statute are so clear that no construction other than this obvious one could be made. It is at the trial that books and documents are to be produced, not at any other time."

Judge Green in support of his position referred to *Iasigi v. Brown* and *Triplett v. Bank*, and stated that many other cases could be cited to the same effect. Diligent search has failed to disclose any authorities favorable to the conclusion reached by the learned judge on the point now under discussion other than those already mentioned. Two observations justly may be made touching the case of *U. S. v. National Lead Co.* There was an evident misconception of the language of the statute, the words "on the trial of any action" being erroneously substituted for the words "in the trial of actions at law"—phrases not necessarily equivalent, even when considered alone. Further, it seems to have been assumed without sufficient warrant that the words of the section were so clear as obviously to exclude any other construction than that adopted. But this certainly is not the case. If its provisions be strictly construed according to its language it seems well-nigh impossible to reach any satisfactory or definite conclusion as to its meaning. The statute, however, is remedial and as such entitled to a liberal construction. It provides for production of books or writings "in cases and under circumstances" where the parties "might be compelled to produce the same by the ordinary rules of proceeding in chancery." A proper case must, of course, exist. The books or writings must contain pertinent evidence and the party applying for their production must have an interest in that evidence as tending to support his case as plaintiff or defendant. It is, and was at and prior to the time of the passage of the judiciary act, within the settled jurisdiction of chancery and a usual practice to order production before trial of an action at law of documents containing pertinent evidence for inspection by a party having the requisite interest therein and desiring to use the same in preparing himself for trial. It must be assumed that Congress, in passing the judiciary act was aware that the "circumstances" under which production might be compelled in chancery embraced cases where the purpose of the party applying was to inspect, examine and take copies of the books or writings before the trial of an action at law in order to prepare for such trial. It is reasonable, then, to conclude that the statute authorizes the court in actions at law to order production for inspection, after issue joined, in all cases and under all circumstances where it might have been ordered in chancery in aid of parties to such actions, and that this court sitting as a court of law can in such actions under pain of nonsuit or default enforce the production of books or writings to the same extent and for the same purposes as when sitting as a court of equity and compelling production in aid of such actions. Unless the terms "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules

of proceeding in chancery" are to be wrested from their natural meaning, it is difficult to perceive that production before trial is not equally with production at the trial within the scope of the provision. There is no sufficient warrant for an assumption that Congress intended that production of books and writings for inspection should be had only at the trial. Such a practice would in many instances be inconvenient, dilatory and expensive, with nothing to justify it, leading to postponements to allow time for inspection and calculated to embarrass or defeat the due administration of justice. It is obviously proper that an examination of books and writings extending over a period perhaps of weeks or months should be concluded before the commencement of the trial. If the section receives the liberality of construction to which its character as a remedial statute entitles it, it is broad enough to include not only production at the trial but production for inspection before trial. I am, however, by no means satisfied that this court would not be authorized in an action at law to order production of books or writings before trial, even were the scope of section 724 confined to production solely at the trial. Section 13 of chapter 107 of the revised code of Delaware, as amended by the act of April 19, 1895 (20 Del. Laws, p. 187), provides for production before as well as at the trial of actions at law. On the assumption that production before trial is not within the scope of section 724, congress has in purely affirmative words conferred on the courts of the United States power in actions at law to compel under pain of nonsuit or default production at the trial. Neither that section nor any other enactment provides that the power of compelling production shall not extend to production before trial. If such power does not exist under section 724, it is not by reason of any prohibition therein contained but simply because it has not thereby been granted. If it has not been so granted, if congress has not directly dealt with the subject of production before trial, it is difficult on principle to perceive why this court should not by virtue of section 914 of the revised statutes follow the state practice as embodied in the state statute referred to in so far as it relates to production before trial. The production of books and writings for inspection before trial as compared with their submission to a jury by way of proof is a matter of practice in contradistinction to a matter of evidence. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117, is clearly distinguishable. That case discloses an express statutory limitation of the mode of proof in actions at common law in the federal courts, subject to certain specified exceptions, and decides that "every action at law in a court of the United States must be governed by the rule, or by the exceptions which the statute provides." It is undoubtedly true that in many cases congressional legislation with respect to a given subject may, even without words of exclusion, properly be held to furnish the sole rule applicable to it. But here, while congress, on the narrower construction of section 724, has in affirmative terms conferred power on the federal courts in actions at law to order production at the trial, the statute apparently contains nothing expressly or impliedly excluding the operation of section 914 with respect to state practice, statutory or otherwise, au-

thorizing an order for production before trial. It does not follow from the fact that means have been provided whereby books or writings may be required to be produced at the trial that congress intended that they should not under any circumstances be required by the court to be produced before trial. Certainly there is no conflict or inconsistency between a law authorizing an order for production before trial and a law in purely affirmative terms authorizing an order for production at the trial. Such provisions in the absence of a prohibition, expressed or plainly implied, are essentially consistent with and supplementary to each other. In view of the foregoing considerations and of the long established and beneficial practice in courts of equity of compelling discovery by the production of documents before the hearing or a trial at law, as the case might be, it is inadmissible to assume that congress recognized that securing a discovery from the plaintiff or defendant by the production of books and writings or otherwise in an action at law prior to the trial was either inherently improper or inconsistent with the due administration of justice. In *Chappell v. U. S.*, 160 U. S. 499, 512, 16 Sup. Ct. 397, 401, 40 L. Ed. 510, the court, speaking of section 2 of the act of congress of August 1, 1888 (25 Stat. 357), relating to condemnation of land for public buildings, said:

"The direction, in the act of Congress, that the practice, pleadings, forms and modes of proceeding, in cases arising under it, 'shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State,' must, as was said by this court in an analogous case, following the decisions under the corresponding provision of section 914 of the revised statutes, 'give way, whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress.'"

Here, on the assumption that section 724 authorizes production only at the trial, the adoption of the state practice as to production before trial would not in any manner or in the least degree be inconsistent with the terms, defeat the purpose, or impair the effect of that section. No reason is perceived why, on the narrower construction of the section, such state practice should not be adopted for the advancement of justice. But, as the section properly construed contemplates production before as well as at the trial it must, to the exclusion of the state statute and section 914, be held the exclusive source of authority on the part of this court in actions at law to order production.

The books and writings of which production is sought are described in the motion and notice and accompanying affidavit as follows:

"All books, papers, writings, accounts, day books, blotters, journals, ledgers, cash books, letter books, order books, shipping bill books, invoices of goods bought or received, of the defendant in the possession of the company, its officers, servants, or agents, kept, made or received by the company, its officers, servants or agents in the business of said company, from January 1st, 1893, to June 9th, 1897, showing:

"(1) What coloring materials, goods, wares and merchandise, pulp colors and other colors and materials were manufactured by the plaintiff for and delivered to the defendant from June 1st, 1893, to January 1st, 1895;

"(2) Showing what coloring materials, pulp colors and other colors and dye materials were manufactured by said defendant from June 1st, 1893, to June 9th, 1897;

"(3) Showing what coloring materials, pulp colors and other colors and dye materials were manufactured for said defendant by any other person, corporation or association other than the plaintiff from June 1st, 1893, to June 9th, 1897;

"(4) And showing what coloring materials, pulp colors and other colors and dye materials were used by the defendant from June 1st, 1893, to June 9th, 1897."

Victor G. Bloede, president of the plaintiff, in the affidavit accompanying the motion and in a supplementary affidavit subsequently filed, states in substance that the plaintiff has a just and true cause of action against the defendant as the same is set forth in the pleadings in this case and as he verily believes is justly and truly entitled to recover therein from the defendant; that the above mentioned books and writings are in the possession or control of the defendant within the district of Delaware and contain evidence pertinent to the issue; that they will show that large quantities of goods, pulp colors, dye materials and coloring materials were manufactured by the plaintiff for and delivered to the defendant from June 1, 1893, to January 1, 1895, and also that large quantities of such goods, colors and dye and coloring materials were manufactured and used by the defendant and were manufactured for the defendant by a person or persons other than the plaintiff between June 1, 1893, and June 9, 1897; that a more particular description of the books and writings cannot be given by the plaintiff; that the plaintiff through its attorney has requested of the defendant an opportunity to inspect such books and writings and to take copies and make abstracts thereof, but such request has been refused by the defendant; that it is necessary in the preparation of the case for trial that the plaintiff, its attorneys or agents, should have such inspection with liberty to take copies and make abstracts; and that inspection and perusal of such books and writings only at the trial would be of no benefit to the plaintiff in the preparation of its case, the books and writings being voluminous, numerous and unfamiliar to the plaintiff, its officers, attorneys or agents. In opposition to the motion for production the defendant presented the affidavit of Samuel Bancroft, Jr., its president, in which he states:

"That said defendant has in its possession or control certain books, papers, writings, accounts, day books, blotters, journals, ledgers, cash books, letter books, order books, shipping bill books, invoices of goods bought or received and that said books, papers, writings, invoices, and accounts cover the period from January 1, 1893, to June 9, 1897, and that the entries in said books, papers, writings, invoices, and accounts relate solely to the business of the defendant, and to the case of the defendant, and not to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of the deponent's knowledge, information and belief contain anything impeaching the case of the defendant, wherefore the defendant objects to produce the same and says, they are privileged from production."

This affidavit does not fully and fairly meet the allegations in the affidavit supporting the motion. It does not contradict the statement in the supporting affidavit of what the books and writings of the defendant will show. It does not directly deny any of the material averments of fact in that affidavit. It contains at best only an argumentative denial of them and alleges supposed conclusions

of law. Such a statement, if contained in an answer to a bill of discovery, clearly would be insufficient. There is equal, if not stronger, reason for holding it insufficient here. It is objected by the defendant that the cause of action as alleged is the breach of an agreement and that the books and papers of which production is sought are not claimed to contain evidence tending to establish such agreement. This objection proceeds on the assumption that evidence to be pertinent to the issue in this case within the meaning of the statute must relate to the contract set up, and not merely to the quantum of damages recoverable by reason of its breach. But the plaintiff's case includes not only the making and breach of the agreement but the amount of damages, if any, to which it is entitled, and evidence tending to ascertain such amount is pertinent to the issue. Chancery has power to compel discovery by production of documents or otherwise to enable a plaintiff in an action at law to prove his damages. It is further objected by the defendant that there is a fatal lack of particularity in the description of the books and writings of which production is sought. But this objection cannot be sustained. Even were the question here whether such generality of description would be fatal in the case of a mere notice to produce, authority would not be wanting tending to show its sufficiency. In *Vasse v. Mifflin*, 4 Wash. C. C. 519, Fed. Cas. No. 16,895, it was held that a notice to the defendant to produce "all letters, papers and books in his possession, relating to moneys received by him under the award of the commissioners acting under the Florida treaty," was sufficiently specific, "the letters called for being described by their subject-matter, which the plaintiff might not have had the means of describing by their dates." But the question in this connection does not relate to the laying of sufficient ground for the introduction of secondary evidence of the contents of books or writings. It is whether a proper case has been made for an order under section 724 for the production of the books and writings themselves. The plaintiff from the nature of the case, in the absence of information, and as stated in the supporting affidavit, has not the ability to describe with particularity the books or writings containing evidence pertinent to the issue and referred to in that affidavit. The defendant, however, can without difficulty ascertain and produce the books and writings containing such evidence. To require the plaintiff specifically to point out the books or writings would be to demand of him an impossibility. To require the defendant to collect such books or writings can involve no hardship. If the court make an order that a defendant produce all books and writings containing entries in relation to a given subject-matter and he fails to comply with such order, "the court may, on motion, give judgment against him by default." A discretionary power is thus conferred on the court, not for the punishment of innocent omission, but for the advancement of justice. Failure by a defendant to comply with such an order does not necessarily result in a judgment by default. While willful non-compliance would have that effect, an innocent omission after the exercise of due diligence would not be so visited. But the court will rigidly exact, under pain of a nonsuit or default, from a

party required to produce books or writings the observance of the utmost good faith in the manner and extent of compliance. No reason, therefore, is perceived why under section 724 generality in the designation of books or writings is objectionable if the subject-matter to which they relate is specifically mentioned in the motion and notice. Under a closely analogous provision of law Judge Dyer in *U. S. v. Three Tons of Coal*, 6 Biss. 379, Fed. Cas. No. 16,515, and Judge Gresham in *U. S. v. Distillery No. 28*, 6 Biss. 483, Fed. Cas. No. 14,966, held that descriptions of books and writings in motions for their production quite as general as that given in this case were sufficient. Discovery by production of documents or otherwise having for its object the promotion of justice through the disclosure of material facts, it has become a fundamental principle that, subject to certain well recognized exceptions not applicable to this case, it will be awarded by chancery in aid of an action at law, unless it clearly appears that a discovery could not avail the case of the party applying for it. *Mitf. Eq. Pl.* *193; 1 *Daniell, Ch. Prac.* *637; 2 *Story, Eq. Jur.* §§ 1483, 1493a; *Story, Eq. Pl.* §§ 562, 567. But it will not be awarded to gratify mere curiosity or to enable one party to make undue inquisition into the affairs of another. Nor will the court extend discovery beyond the legitimate requirements of the case to be aided thereby. So, under section 724 production of books or writings is authorized only so far as they contain evidence pertinent to the issue. An exposure of business details and secrets, not pertinent to the issue, to enable one to discover clues to guide him in conducting an investigation of possible claims or defences against an adversary is not to be tolerated. Under existing circumstances the plaintiff is entitled to inspection before trial. The pleadings, however, do not warrant the granting of the motion without qualification. It is too broad. To meet the case as presented an order will be made that the defendant produce in this court on Monday, March 5, 1900, at 11 o'clock a. m. for inspection by the plaintiff, its agents or attorneys, and with leave to the plaintiff, its agents or attorneys, to take copies and make abstracts, under the further order and direction of the court, all books and writings in the possession or power of the defendant showing all or any of the following particulars: (1) what pulp colors and other colors and materials were manufactured by the plaintiff for and delivered to the defendant between June 1, 1893, and January 1, 1895; (2) what pulp colors and other colors and materials were manufactured by the defendant between June 1, 1893, and June 9, 1897, similar or substantially similar to the pulp colors or other colors or materials furnished by Victor G. Bloede to the defendant on or prior to June 9, 1891; (3) what pulp colors and other colors and materials were manufactured for the defendant otherwise than by the plaintiff between June 1, 1893, and June 9, 1897, similar or substantially similar to the pulp colors or other colors or materials furnished by Bloede to the defendant as above mentioned; and (4) what pulp colors and other colors and materials were used by the defendant between June 1, 1893, and June 9, 1897, similar or substantially similar to the pulp colors or other colors or materials furnished by Bloede to the defendant as above mentioned. Let an order be prepared accordingly.

STEWART v. HARMON et al.

(Circuit Court, D. Indiana. December 13, 1899.)

No. 9,785.

RAILROAD RECEIVERS—ACTIONS AGAINST—SERVICE OF PROCESS ON AGENT.

The statute of Indiana (2 Burns' Rev. St. 1894, §§ 5334, 5335) providing that every railroad company or other person owning, controlling, or operating any railroad in the state, and having no office or fixed place of business in the state, shall appoint an agent in each county into or through which such railroad runs, on whom process may be served in actions against such company or person, that service on such agent shall be held a legal service on the defendant, and requiring such company or person to also file in each county an instrument authorizing service on such agent, applies to receivers of a court operating a railroad within the state, and in an action in a state court against such receivers the court acquires jurisdiction over the defendants by service of summons within the county on a person stated in the sheriff's return to be the general agent of the receivers, the defendants not being permitted to defeat the jurisdiction by showing their failure to comply with the law.

At Law. This is an action against the defendants, as receivers of the Baltimore & Ohio Southwestern Railway Company, commenced in a state court, and removed by defendants. On motion to quash the service and dismiss for want of jurisdiction over the defendants.

Lincoln Dixon, for plaintiff.

E. W. Strong and McMullen & McMullen, for defendants.

BAKER, District Judge. On the 8th day of July, 1899, the plaintiff filed her complaint in the circuit court of Jennings county, Ind., in two paragraphs, for the purpose of recovering damages for a personal injury alleged to have been received through the carelessness and negligence of the receivers, their servants, agents, and employes, while the plaintiff was riding as a passenger in one of the cars of the defendant receivers. On the same day a summons was duly issued by the clerk of the Jennings circuit court to the sheriff of that county, commanding the defendants, receivers of said railway company, to appear before the circuit court of Jennings county on the 3d day of October, 1899, that being the next ensuing term of that court. The return of the sheriff to the summons is as follows:

"Came to hand July 8, 1899, and is now returned served as commanded by reading to H. J. Berkshire, the general agent of the above-named Judson Harmon and Joseph Robinson, receivers of said Baltimore and Ohio Southwestern Railway Company, at its station at North Vernon, Indiana (said receivers were not found in my bailiwick), and by delivering to said Berkshire a true copy of this summons, this July 8, 1899.

Charles Tripp, Sheriff."

The defendants, on the 16th day of August, 1899, filed their petition and bond for the removal of said cause into the circuit court of the United States for the district of Indiana, and said cause was removed, and a transcript of the record was filed in this court, on September 14, 1899. On the 7th day of November, 1899, the defendants filed their motion in writing in this court to set aside the sheriff's return of service of the summons herein, and to dismiss the action for want of jurisdiction over the defendants, because this court has not acquired jurisdiction of the persons of the defendants, or either

of them, and for the reason that the sheriff's return shows no service whatever upon the defendants, or either of them, and because the sheriff's return shows that the Jennings circuit court had no jurisdiction of the persons of the defendants, or either of them. In support of this motion the defendants cite and rely upon the case of *Hawkins v. Peirce* (C. C.) 79 Fed. 452. In that case the service of summons was quashed, and the case dismissed, on the ground that the state court from which the cause was removed had never acquired jurisdiction of the person of the defendant by the proper service of process. The return of the sheriff in that case showed that the summons was served by leaving a copy with Harry S. McLeod, agent for the company, February 13, 1897. The question whether service on an agent of the receiver would have been sufficient to give the state court jurisdiction was neither involved nor considered in that case. The return affirmatively showed that the only service had was upon a person who was the agent of the corporation, which was at the time in the hands of a receiver, and not upon a person who was the agent of the receiver.

The statute of this state provides (2 Burns' Rev. St. 1894, § 5334) that:

"Every railroad corporation owning any railroad or the franchises thereof, created under any law of this state, and having no office, director, or fixed place of business in this state, and the vendee, lessee, or other person owning, running, controlling or operating any railroad into or through this state, shall appoint and keep an agent in each and every county in this state into or through which such railroad may run, on whom process may be served in any action brought in the proper county against any of the parties therein named, and service on him shall be held to be a legal service on the defendant the same as if service had been made on the president and directors thereof."

The next section provides that:

"Each and every party mentioned in the preceding section shall file a written instrument in the clerk's office of each and every county in this state into or through which such railroad may run, under the seal of such corporation, vendee, lessee, or other party owning, running, controlling or operating any railroad into or through this state, signed by the president and secretary, if any, authorizing the service of such process, and consenting that the service thereof upon such agent shall be held to be valid in law, and waiving the benefit of error on appeal, by reason of service having been made on such agent."

This statute made it the duty of the receivers to appoint an agent in each county of this state through which the railroad operated by them ran, upon whom service of process might be had in any case properly brought therein. These statutory provisions imposed upon the receivers the obligation and duty to file the written instrument required by the statute. The law deduces the agreement on the part of the receivers to answer in the courts of the state on service made upon their agents from the fact of their operating and controlling a railroad running into or through the state, and the presumption from that fact of assent to such service is conclusive. No averment or evidence to the effect that they had not intended to come under the law of the state is admissible to defeat the jurisdiction. The reason of this rule is that the obligation to file the stipulation is imposed upon them for the protection of the citizens of this state dealing with the receivers; and when, by their own act, their obligation to file the

stipulation is perfect as between them and the citizen, they will not be permitted to relieve themselves from a liability which the written stipulation would have imposed by pleading their own failure, whether negligent or willful, to comply with the statute. In such case the law conclusively presumes that they have done that which they ought to have done. The maxim that no man shall take advantage of his own wrong is as applicable to receivers of corporations as to any other person, and they are estopped to deny that they have executed the stipulation which would have authorized their agents to be served with process as required by the statute. Such stipulation is a condition precedent to their right to operate a railroad into or through any county in this state.

The return of the sheriff affirmatively shows that the receivers did have a general agent in the county of Jennings empowered to represent them in the conduct of the business of the receivership in that county, and, as it was the duty of the receivers to file an instrument in the clerk's office of that county authorizing service upon such agent, the legal presumption is that they had performed their duty, and had conferred such authority upon the agent. But whether they had executed such an instrument conferring such authority is immaterial, for they will not be heard to aver their own failure to perform a legal duty imposed upon them, in order to defeat the jurisdiction of the courts of the state. *Ehrman v. Insurance Co. (D. C.) 1 Fed. 471*; *Berry v. Indemnity Co. (C. C.) 46 Fed. 439*; *Diamond Plate-Glass Co. v. Minneapolis Mut. Fire Ins. Co. (C. C.) 55 Fed. 27*. The motion to dismiss is overruled.

GARNETT v. PHOENIX BRIDGE CO.

(Circuit Court E. D. Pennsylvania. November 29, 1899.)

No. 19.

1. MASTER AND SERVANT—MASTER'S DUTY AS TO APPLIANCES FURNISHED.

The relation of master and servant is not analogous to that of guardian and ward, and the obligation of the master in regard to appliances furnished for the use of the servant is no different from what it would be if such appliances were furnished for the use of one not a servant, his liability in either case being measured by his failure to use ordinary care to see that they are reasonably safe for the use to which they are to be applied.

2. SAME—INJURY OF SERVANT—UNSAFE APPLIANCES.

A master cannot be held liable for an injury received by an adult servant by falling from a trestle on which he was standing, which was eight feet high and five inches broad at the top, on the ground that such trestle was not a reasonably safe appliance for the purpose for which it was used, no objection having been made thereto by the servant.

3. SAME—FITNESS OF APPLIANCES—TOOLS NOT INHERENTLY DANGEROUS.

The rule that appliances furnished by a master must be reasonably fit for the purpose for which they are to be used has reference to their fitness with relation to the safety of the employé using them, and the fact that a wrench furnished by a master for the use of the employé in screwing nuts upon iron rods broke because of insufficient strength for the work cannot render the master liable for an injury received by the servant by falling in consequence of the breaking of the wrench, as the wrench itself

was not a dangerous tool, and the injury resulting from its breaking was one that could not have reasonably been anticipated.

4. SAME—DUTY OF MASTER TO INSTRUCT SERVANT.

The failure of a master to instruct an adult servant of average intelligence as to the manner in which he should use a wrench in screwing nuts on a rod so as to avoid falling in case the wrench should break is not negligence.

On Motion by Plaintiff for a New Trial.

A. S. Ashbridge, Jr., for plaintiff.

Joseph H. Taulane and Richard P. White, for defendant.

DALLAS, Circuit Judge. This action was brought to recover for personal injury suffered by the plaintiff, in consequence, as alleged, of the negligent conduct of the defendant. When the accident occurred the plaintiff was a man of about 40 years of age, and of at least ordinary intelligence. Having previously been employed successively in two rolling mills, he, in May, 1896, entered the service of the defendant corporation, which was then engaged in erecting the board walk on the beach at Atlantic City. At first, and for about two weeks, he helped to raise girders with a windlass, and then he was sent out into the water to loosen an endless rope from joists which were brought by sea near to the shore. The men who composed "the riveters' gang" were required to "use the hammer to set and rivet the heads." They were paid higher wages than the plaintiff received, and for this reason he, although he had never done such work, applied, but unsuccessfully, to be put upon that gang. His wages were, however, made equal to those of a riveter; and on July 23, 1896, a Mr. Fisher, whom the plaintiff, in testifying, characterized as "the superintendent in charge of this work," gave the plaintiff a wrench about 18 inches long, and told him to help tighten the nuts upon the rods which extended from beam to beam, or from girder to girder; and this the plaintiff, though inexperienced in the use of a wrench, and without receiving or asking any instructions, proceeded to do. In doing it he stood upon a trestle about eight feet in height and five or six inches in width at its top, which rested upon the sand directly under the board walk. The wrench was designed to fit a two-inch nut, and its length had been extended by adding about two feet of pipe to it. At the time of the accident the plaintiff was standing on the top of the trestle, and was holding with his left hand to one of the girders. He had set the wrench on a nut which was about two feet above his head, and pulled with his right hand on the end of the piece of pipe until, when about one turn had been made, the wrench opened in the jaw, and he, in consequence, fell from the trestle, and was seriously hurt. These are the facts, so far as material, to which the plaintiff himself testified, and this statement of them substantially presents his own story of the accident and the attending circumstances.

There is, perhaps, no rule which has been more frequently enunciated by the courts than that which defines the master's duty respecting the appliances provided by him for the use of his servants, and yet there is probably no rule which is more constantly invoked

without properly regarding its principle and limitations. The relation of master and servant is not analogous to that of guardian and ward. The employed is not to be regarded as an infant, nor the employer as his caretaker. A master owes no duty to his servant, which, under like circumstances, he does not owe to any other person. "Negligence is where a person neglects or omits to do a thing which he is by law obliged to do," and the legal obligation of a master to take ordinary care for the prevention of harm to his servant does not result from any doctrine which is peculiar to the contract for personal service, but from the general rule that every one is, in his acts and conduct, bound to be duly careful to avoid doing hurt to others. Wherever, by invitation, and not as a trespasser, one man comes upon the premises of another, or is, as matter of business, supplied by another with any article which is liable to inflict injury when being used, he, though not a servant, is entitled, precisely as if he were, to assume that the place or the article is reasonably safe, and to be informed of any latent source of danger of which he is ignorant. *Dixon v. Bell*, 5 Maule & S. 198; *Thomas v. Winchester*, 6 N. Y. 397; *Smith v. Railroad Co.*, 19 N. Y. 127; *Caswell v. Worth*, 5 El. & Bl. 849; *Blakemore v. Railroad Co.*, 8 El. & Bl. 1035; *MacCarthy v. Young*, 6 Hurl. & N. 329; *Copeland v. Draper*, 157 Mass. 558, 32 N. E. 944, 19 L. R. A. 283; *Story*, Bailm. §§ 275, 390, 391a; *Redf. Carr.* § 513, note. The relation of master and servant existed between the plaintiff and the defendant at the time this accident occurred. Therefore, while the plaintiff had assumed all the risks incident to his employment, the defendant, though not the guardian of his person, had become bound to protect him from any injury, while pursuing that employment, which might be averted by the exercise of ordinary care to furnish him with reasonably safe appliances. *The France*, 20 U. S. App. 215, 8 C. C. A. 185, 59 Fed. 479; *Paving Co. v. Odasz's Adm'x*, 20 U. S. App. 326, 8 C. C. A. 471, 60 Fed. 71; *Reilly v. Campbell*, 20 U. S. App. 334, 8 C. C. A. 438, 59 Fed. 990; *Baulec v. Railroad Co.*, 59 N. Y. 356-359. "The liability of the master for injuries to the servant received in the service is based upon his personal negligence, and the evidence must establish some personal fault or neglect of duty on his part, or what is equivalent thereto, in order to justify a verdict, and he is entitled to the presumption that he has performed his duty until the contrary is made to appear. * * * If the injury to the servant is attributable to the master's neglect in omitting to furnish safe and adequate appliances for the work, according to the nature of the business, or competent co-servants, or even if he neglects to give persons unacquainted with the use of machinery proper instruction with respect to its use, he is liable." *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648. Unless, then, some breach of duty—some fault—on the part of the defendant has been made to appear, the present action, it must be conceded, cannot be maintained. But it is insisted that a threefold violation of duty has been shown, in that an unfit trestle was furnished, an unfit wrench was supplied, and no instruction respecting the use of the latter was given. The vague complaint which is made of the trestle is utterly groundless, and, as I believe, an afterthought. That a robust man, accustomed to physical

labor, incurred peril, and one not ordinarily incident to such labor, by standing, while tightening a nut, upon a trestle of sufficient strength to bear his weight, and which was but eight feet high and was five inches in width, cannot rationally be supposed; and I feel quite sure that, if the plaintiff had been told at the time he went upon this structure that he was placing himself in a situation of danger, he would himself have scouted the suggestion. At all events, there was nothing about the trestle which he could not see and understand, and, as he then made no objection to it, he has no right to do so now. With reference to the wrench, the question presented is apparently more substantial, but its right solution may, I think, be easily reached if the true nature and scope of the master's obligation be precisely borne in mind. The obligation referred to has frequently been said to require that the machinery and appliances provided for the use of the servant shall be reasonably, not absolutely, fit; but this terse statement of the matter is deficient because of its omission to define the term "reasonably fit," and to supply this omission those cases must be consulted in which it has been held that reasonable fitness is such as may be attained by the bestowal of that degree of care and diligence which, under the circumstances, and in view of the nature of the work to be done, an ordinarily prudent master, if properly regardful of the welfare of his servants, would exercise for their safety. *Reilly v. Campbell*, supra; *Baulec v. Railroad Co.*, supra; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605. The interest of employers themselves is so strongly in favor of providing instrumentalities suitable for their business that it may well be left to their discretion to determine their fitness for the purpose for which they are intended. *Tuttle v. Railroad Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114. To see that they are so may be said to be a duty which the master owes to himself; but his duty to the servant relates to safety, and to nothing else. Therefore, if it be assumed that the breaking of the wrench in this instance resulted from its lack of sufficient strength, and not from the manner of its use, yet the bare fact of its breaking did not concern the plaintiff; and that, by its breaking, any injury would be occasioned to him, no foresight short of prophetic vision could even have suggested; and consequently it is impossible to presume that a man of ordinary prudence would have taken thought to prevent it. It is not necessary to hold—and I do not say—that the master's liability attaches only where the article in question is inherently very dangerous, involving "death or great bodily harm to some person, as the natural and almost inevitable consequence" of omission of care (*Thomas v. Winchester*, supra); but I am of opinion that, where the implement, though defective, might, and commonly and generally would, be used without the slightest risk, the master is not called upon to apprehend the occurrence of an extraordinary mishap which he could not have reasonably contemplated as a probable consequence of the existence of the defect. As "illustrations of liability for instrumentalities," there are enumerated in *Shear. & R. Neg.* § 197, "defects in ropes, ladders, derricks, shafts of a mine, buildings, locomotives, cars, car buffers, brakes, couplings,

railway tracks, machinery, and elevators"; and the materiality, under the circumstances of this case, of the difference between any of these instrumentalities and the tool here involved is manifest, inasmuch as no diligence is required where none could reasonably be demanded by the exigencies of the particular service, or where, in view of the consequences that may result, caution is not called for by any peril or danger which is likely to be encountered. *Railway Co. v. McDaniels*, 107 U. S. 460, 2 Sup. Ct. 932, 27 L. Ed. 605. The knives of a planing machine, the saws of a sawmill, the revolving wheels of a factory, and many other mechanical devices and accessories, are, in their nature, dangerous, and therefore the employer is justly required to adopt proper measures for the protection of those engaged in and about their operation; but the notion that the conductors of the vast industrial enterprises which distinguish our age and country are deficient in ordinary prudence if they do not take care that none of the many to whom they give employment shall be hurt through the breaking of a handsaw, a hammer, or a wrench, is repugnant to common sense and defamatory of the law. The plaintiff did not ask for instructions, and none could have been given which would have been of any use. He might have been told that, if he should rely upon his grip of the wrench to support him on the trestle, he would be likely to fall upon the hard sand below and be hurt, in case the wrench should either break or slip from the nut. But this, of course, was as obvious to him as to anybody else; and, indeed, it is evident that he quite well understood that the wrench was not intended, and could not be depended upon, to secure him against falling, for he took the natural precaution of holding on to a girder. I do not think that contributory negligence should be imputed to him because this was not so done as to be efficacious, but surely the defendant is not to blame that it was not so.

It is not necessary to review the evidence at length. It contains nothing which would warrant any modification of the views I have expressed. The testimony of the witness who was examined as an expert on behalf of the plaintiff went to the question of general fitness, and not of safety. Moreover, the opinion to which he testified was wholly based upon his examination of an especially prepared wrench, which was produced as an exhibit upon the trial, and its relevancy, therefore, was dependent upon the correctness of the hypothesis that this model wrench was, in its material features, identical with the actual wrench in question; and that it was not so in fact was distinctly and absolutely proved. The plaintiff's motion for a new trial is denied.

UNITED STATES v. SAUNDERS, Collector, et al.

(District Court, D. Washington, N. D. December 1, 1899.)

CUSTOMS DISTRICTS—COMPENSATION OF COLLECTOR—CHANGE IN STATUTE.

Act Aug. 28, 1890 (26 Stat. c. 814), "to reorganize and establish the customs collection district of Puget Sound," not only by its title, but also by its provisions, shows the intention of congress to make a complete revision of the law relating to the organization of such district; and sec-

tion 3, fixing the compensation of the collector at a salary of \$3,500 per annum, supersedes and repeals Rev. St. § 2670, on the same subject, including the provision permitting the collector to retain fees to the amount of \$2,000 in addition to his salary.

These are actions by the United States to recover fees collected by defendant James C. Saunders as collector of customs for the district of Puget Sound. On demurrer to answer.

C. E. Claypool, Asst. U. S. Atty.

A. W. Buddress, for defendants.

HANFORD, District Judge. The question argued upon the demurrer to the defendants' answer relates to the right of the collector of customs for the district of Puget Sound to retain, as part of his official compensation, fees to the amount of \$2,000 per annum, in addition to his salary of \$3,500 per annum.

Section 2670, Rev. St., reads as follows:

"The collector for the district of Puget Sound shall receive a salary of one thousand dollars a year, with additional maximum compensation of two thousand dollars a year, when the official emoluments and fees provided by existing laws amount to that sum."

In the year 1890 congress passed an act entitled "An act to reorganize and establish the customs collection district of Puget Sound." The third section of this act is as follows:

"Sec. 3. That the salary of the collector of customs for the district of Puget Sound shall be three thousand five hundred dollars per annum and that of the deputy collector at Tacoma and Seattle each two thousand dollars per annum."

And the fourth section of the act repeals all acts and parts of acts in conflict with its provisions. 26 Stat. 363.

Certainly section 3 of the act of 1890, and section 2670, Rev. St., are in conflict with each other; and the latter is therefore repealed in its entirety, unless its provisions are divisible, so that one part may be retained, and have force as an independent statute. When an attempt is made to divide section 2670, it must be borne in mind that congress has not passed an act to amend that section, but a part, if not the whole, of it has been repealed, and no longer exists for any purpose, even to give aid and support to any part not repealed. Now, if we take a pair of scissors, and cut out of section 2670 the part that is clearly and necessarily inconsistent with the act of 1890, we must necessarily take out all of the section from the beginning of it to the first comma, and the part remaining is so unintelligible as to be ineffective for any purpose. To make my meaning plainer, I hold that the following words found in section 2670, viz.: "The collector for the district of Puget Sound shall receive a salary of one thousand dollars a year,"—are certainly repealed and expunged entirely; and it is obvious that the remaining part of the section is not a complete sentence, and is meaningless. I consider, also, that the title of the act of 1890, as well as the context, shows that congress intended to make a complete revision of the law relating to the organization of the customs district of Puget Sound. Statutes which are clearly intended to be a full and complete declaration of the legislative will on

any particular subject have the effect to repeal all prior statutes covering the same ground which are not incorporated into the new act. U. S. v. Claflin, 97 U. S. 546, 24 L. Ed. 1082. Demurrer sustained.

PROVIDENCE MACH. CO. v. LAURENS COTTON MILLS.

(Circuit Court, D. South Carolina. December 8, 1899.)

SALE—ACTION TO RECOVER PRICE—COUNTERCLAIM.

In an action to recover the price of machinery for a cotton mill, under a written contract, an answer which admits the furnishing of the machinery, and does not deny that it conformed to the specifications of the written contract, but alleges that it was not fit, proper, and efficacious for the designed use, which fact was recognized by the plaintiff, who took measures to remedy the defects, and finally succeeded, and sets up a counterclaim for damages sustained by defendant by reason of such defects, presents an issue of fact as to the scope and meaning of the contract, outside of its written terms, to be determined by parol evidence, and which should be passed on by the jury.

At Law. On motion to set aside a verdict, and to reverse orders sustaining a demurrer to the answer and refusing leave to amend.

Bryan & Bryan, for plaintiff.

Ansel, Cothran & Cothran, for defendant.

SIMONTON, Circuit Judge. At the trial of this case, when the pleadings were read, the plaintiff interposed an oral demurrer to the answer and defense by way of counterclaim, in that it did not state facts sufficient to constitute a defense or counterclaim to the matters complained of in the complaint. The plaintiff is engaged in the manufacture of machinery claimed to be suitable for the manufacturing of cotton goods. On 30th June, 1896, it proposed to the defendant, who is engaged in the manufacture of cotton goods, to furnish it machinery for this purpose, to wit, 4 slubber fly frames, 6 intermediate fly frames, and 20 fine fly frames, at certain fixed prices, which prices included the services of a competent man to set up the machinery. The terms of payment are stated, as well as the time for delivery of the machinery. That portion of the contract relating to the fly frames is as follows:

"20 fine fly frames, 152 spindles each; 5¼" space; 7" traverse; 7x5½" bobbin crucible steel rolls; shell top rolls for front line; Dixon patent saddle; front roll bearings, brass bushed; improved bolster rail; 16" driving pulleys. Price per spindle, \$6.16."

The machinery was delivered, the cash portion of the purchase money paid, and notes given as provided. Certain articles outside of the contract were provided, and not closed by note. No further payments having been made, the plaintiff sues on the note and open account.

The answer admits the execution of the notes and the incurring of the open account, denies that anything is due, and then sets up a counterclaim. This rests on the allegation of defects in machinery furnished and the results from the use thereof. The portion of the answer stating the defects is in these words:

"That on or about December 3, 1896, the plaintiff delivered to the defendant, in pretended compliance with said contract, the number of fly frames stipulated for, but that, instead of equipping them with a standard flyer, the plaintiff furnished a flyer of its own manufacture, which was defective, and wholly unsuitable for the purpose designated by defendant, of which the plaintiff was fully cognizant."

The bill of particulars with the counterclaim is for increased cost of manufacture; loss of profits or diminished products; running extra time for six months, and for coal, oil, and supplies for the same period; increase of waste; and claims for defective goods. The plaintiff having demurred to the counterclaim, argument was heard, and demurrer sustained. The defendant asked leave to amend, and submitted draft of amendment. This was refused, and a verdict for plaintiff on its notes and account. This is a motion to set aside the verdict, to reverse the order refusing amendment, and to also reverse the order sustaining the demurrer.

The motion depends upon the question of error in sustaining the demurrer. The machinery contracted for was delivered. The objection is that this machinery was defective, in that, instead of equipping the fly frames with a standard flyer, the plaintiff furnished a flyer of its own manufacture, which was defective, and wholly unsuitable for the purpose designated by defendant. Four defects are stated: (a) That it was not the Boddin flyer, which is standard, and of English make. (b) The pressure bar is too heavy, and causes the flyer to work too lightly against the bobbin. (c) The finger is too heavy, causing additional friction. (d) The flyer makes uneven and weak roving, and requires the roving frames to be doffed when about two-thirds full, and also causes tangled work, of which plaintiff was fully cognizant. The contract was to furnish to the defendant, who was engaged in the manufacture of cotton goods, machinery suitable for that purpose. "The machinery purchased was specifically designated in the contract. The machinery so designated was delivered, put up, and put in operation." The only implication in regard to it was that it would perform the work the described machine was made to do. *Seitz v. Machine Co.*, 141 U. S. 519, 12 Sup. Ct. 46, 35 L. Ed. 837.

Leaving out of consideration the omission to use the Boddin flyer, no mention of which is made in the contract, the defendant alleges three particulars in which the machinery failed to perform its work. The contention is that the bare description of the 20 fine fly frames indicated, to any expert in the business,—to any one engaged in the manufacture of machinery for cotton mills,—the kind of machinery intended by both purchaser and vendor, and that the machines furnished were defective in the particulars mentioned. The language of the answer is somewhat misleading. It alleges the delivery of the number of fly frames stipulated for, but that, instead of equipping them with a standard flyer, the plaintiff furnished a flyer of its own manufacture, which was defective, and wholly unsuitable for the purpose designated by defendant; the defect being that it was not a Boddin flyer, which is standard and of English make. This seemed to be the gravamen of the complaint, and inasmuch as the contract did not contain a word as to the Boddin flyer, or bind the plaintiff to fur-

nish one patented in a foreign country, the demurrer was sustained. As it now appears, this was not the only defect, and but one among four. The allegations of the counterclaim also show that the defects were recognized by the plaintiff, and that efforts were directed by it to correct them, which ultimately proved successful. If this statement of the defendant be correct, then there is such an ambiguity in the contract as will admit an explanation by parol. A question of fact is thus raised, which should be passed upon by a jury.

A bill of particulars accompanies the answer and counterclaim. From this it would appear that the machinery did work, and that the complaint is that it did not do first-class work in the quickest time. If the machinery manufactured for the particular use of a cotton factory was fit, proper, and efficacious for such use, then there could have been no cause of action solely because the buyer found itself disappointed in respect that its operation did not produce a desired result. 141 U. S. 519, 12 Sup. Ct. 46, 35 L. Ed. 837.

But the allegation is that the machinery was not fit, proper, and efficacious for the designed use, and that plaintiff, recognizing this, endeavored to remedy it, and after a time succeeded. This would entitle the defendant to some relief, if his allegation be correct. Upon the whole, I am of the opinion that the trial judge erred in sustaining the demurrer, and in refusing leave to defendant to amend its answer and counterclaim in some way which would avoid objection. The verdict is set aside, and the judgment vacated. The case will be set down for trial, with leave to plaintiff to reply to the answer and counterclaim.

HAYDEL v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, E. D., Missouri, E. D. October 17, 1899.)

1. LIFE INSURANCE—ASSESSMENT POLICY—WHAT CONSTITUTES.

A life insurance policy in which the premiums to be paid by the insured are not fixed and unalterable, but may be increased, in the discretion of the officers of the company, or to meet increased demands for payment of losses, is, in legal effect, an assessment policy, and is not ultra vires the powers of a company authorized by its charter, and by the statutes under which it is organized, to do business as an assessment company only.

2. SAME—ASSESSMENT COMPANIES—FAILURE TO PAY ASSESSMENTS.

A policy holder in an assessment company is not excused for a failure to pay assessments on the ground alone that the company has engaged in business which is ultra vires its powers, but he must further show that his obligations have thereby been changed to his disadvantage.

3. SAME—POWER OF COMPANY TO INCREASE ASSESSMENTS.

The fact that an assessment company prints on the back of its policies a table, which purports to show the amounts to which one becoming a policy holder at a given age will be subjected, does not prevent the company from increasing such rates, where the policy is expressly subject to the constitution and by-laws of the company, which give its executive committee power to make modifications in the assessments to be levied from time to time.

4. SAME—DEFENSES AGAINST INCREASED ASSESSMENTS.

A provision of a policy in an assessment company that a certain per cent. of the net receipts from assessments shall constitute a reserve fund,

and that such reserve fund above \$100,000 and in excess of outstanding bond obligations shall be applied to the payment of claims in excess of the American Experience Table of Mortality, cannot avail the policy holder as a defense against increased assessments upon a mere allegation that the reserve fund has for a number of years been greatly in excess of \$100,000, and that the company has failed to apply it in accordance with the contract, where it is not alleged that the death claims against the company have been in excess of the American Experience Table, and where the policy is further made subject to the constitution of the company, which authorizes the board of directors to divert such reserve fund to other uses.

5. SAME.

A provision of a policy in an assessment company that, after the expiration of each period of five years, the rate of assessment may be changed to correspond with the actual mortality experience, does not prevent the company from increasing the rate at other times, where such increase is authorized by other provisions and by its constitution.

6. SAME.—FAILURE TO PAY ASSESSMENT—WAIVER OF PROMPT PAYMENT.

The holder of a policy of life insurance in an assessment company died three days after the expiration of the time for payment of an assessment, not having paid such assessment. During the life of the policy some seventy assessments had been made, all of which, with the exception of seven, had been paid within the time limited therefor. Six of the seven were paid on the next day, and one on the second day after the expiration of such time. In three or four of these instances receipts were given conditioned on the insured then being in good physical condition, and stating that the acceptance of the payment should not be regarded as a waiver of prompt payment of future assessments. Others of such payments were made on Monday where the last day allowed for payment fell on Sunday, and the last default was some four years prior to the death of the insured. It was also shown on the part of the company, by uncontradicted testimony, that the insured knew when the time for payment expired, and that on the day before his death he stated to an agent and an officer of the company his dissatisfaction with the insurance, and doubt whether he would make the payment, and ask reinstatement. *Held*, that such evidence was insufficient, as a matter of law, to establish a course of dealing which would sustain a claim of waiver of prompt payment on the part of the company.

This was an action on life insurance policies, tried before a jury. On motion by defendant for direction of a verdict.

E. T. Farish, for plaintiff.

W. C. & J. C. Jones, George Burnham, Jr., and Sewell T. Tyng for defendant.

ADAMS, District Judge (orally). The case stands on a petition charging that the defendant, a mutual life insurance company, executed two policies of life insurance on the assessment plan; that the insured, plaintiff's husband, paid all dues and assessments required of him, and otherwise conformed to the conditions of the policies; that insured died March 6, 1898; and that, therefore, plaintiff is entitled to recover. The answer of the defendant is, in substance and effect, as stated in the petition, that it is a corporation doing business on the assessment plan; that under the terms of the policies (and the constitution and by-laws, which are referred to in, and made part of, the contract of insurance) the insured was required to pay assessments as and when they were made and called by the executive committee or board of directors of defendant company; that an assessment was made, known as "Mortuary Call No. 96," in Feb-

ruary, 1898, calling for a certain amount on each of these two policies; that this assessment was due, according to the terms and provisions of the policies, within 30 days thereafter, to wit, on the 3d day of March; that the insured failed to pay that assessment, and therefore, under the stipulations in the policies, constitution, and by-laws, the plaintiff's rights under these policies ceased, notwithstanding the death of the insured, which occurred March 6, 1898, a few days after the last date allowed to pay the assessment. In brief, the defense in the case is forfeiture for failure to pay assessments.

The replication, after alleging that the assessments (No. 96) were largely increased over what they had formerly been, admits that the assessments were not paid on either of the policies, and presents several separate grounds by way of excuse for the nonpayment of said assessments. The first excuse pleaded in the replication is that the defendant company was a corporation doing business on the assessment plan, and was authorized and empowered by the laws of New York to do business only on that plan; yet, notwithstanding such limitation upon its powers under its charter and the laws of the state of New York, it proceeded, after it had insured the member in this case, to devise a scheme of general insurance on practically what is known as the "old-line" plan of insurance, of certain and fixed premiums for fixed and certain liabilities. It is charged that this character of insurance was ultra vires the corporation, and, being so ultra vires, entailed upon the members of this, an assessment or mutual company, new and different obligations, which were not contracted for by the parties, or contemplated by the laws of the state of New York; and it is specifically alleged that the issuing of this kind of insurance contracts was not only ultra vires the corporation, but thereby money which belonged to the mortuary fund under the original or assessment scheme of insurance was diverted,—that is, that a large amount of money was thus diverted, and used in a business which was ultra vires the corporation, or not within the power of the corporation,—and that, if this money had not been so diverted, there would have been plenty of money to have paid the liabilities matured on the 3d day of March, 1898, and the call for assessment No. 96 would have been unnecessary.

It will be seen from this statement of the first excuse for nonpayment of these assessments that the party pleading realized the legal situation, and understood that, notwithstanding the fact that the particular class of business which he complains of was beyond the power of the corporation, and ultra vires, that fact in itself would be no defense to this action. In other words, he appreciated that the plaintiff in this case could not state, as a full legal excuse for nonpayment of the assessments, the single fact that this defendant had been doing business beyond its corporate powers in some other transactions, and he therefore averred in his reply that, not only was the transaction of this business ultra vires, but that thereby money which, according to the contract, and laws of the state of New York, belonged to what was originally the assessment class, was diverted for the benefit of the so-called "old-line" class, so that it was lost,

and therefore it was the fault of the company, and not the fault of the member, if this assessment was not paid.

There are two questions involved in considering this first excuse for nonpayment of the assessment: First, whether the character of the business known as the "five-year combination option policy" is unwarranted, and beyond the powers of the corporation under the New York statutes. I have given this question all the attention which I have been able to give it during the progress of the trial, have examined the statutes of the state of New York, and especially this contract called the "five-year option policy." In determining whether it is ultra vires, it is important to understand distinctly what is assessment insurance, or insurance on the assessment plan; and a general statement of this proposition is that it is assessment insurance where the benefit to be paid is dependent upon the collection of such assessments as may be necessary for paying the amounts insured. In other words, it is assessment insurance if payments to be made by the insured are not fixed—unalterably fixed—by the contract. On the contrary, an old-line policy is a contract where the amount to be paid by the insured is fixed, the premiums to be paid are unalterable, and the liability incurred by the defendant company is also fixed, definite, and unchangeable. In the light of this distinction,—which no one will dispute,—it becomes important to see whether the five-year combination option policy, which is the form of policy complained of, is a policy that has fixed and unalterable premiums becoming due at certain definite and fixed times, and none other. In determining this it is proper to call attention to two particular phases of it. It is true that the contract, on its face, requires the payment of so many dollars and cents at certain specified dates in each and every year during the continuance of the contract. The contract is made subject, however, to this provision on the back of the policy (clause 5), in which it is provided as follows: "On the dates named on the first page hereof in each year during the continuance of this policy there shall be due from the assured for premiums the amounts mentioned on said first page, or such multiple or ratio thereof as its executive committee may determine;" thereby clearly indicating that it is left to the executive board to determine how much shall be required of the member to pay the losses as they may accrue from time to time in the transaction of the business of the company. In addition to this, a reserve or emergency fund is provided for by this policy, and a particular and definite way is indicated for the distribution of this reserve. The reserve belongs, of course, to the members, and the distribution thereof must vary from year to year and always, as a matter of course, according to the death losses and claims paid during such year. So that, from article 5 and the provisions of this policy as to the treatment of the reserve, it is apparent that this is not a policy of fixed premiums or liabilities on the part of the insured, within the meaning of the general rule which obtains with regard to an old-line policy, but is an assessment policy, within the meaning of that rule and under the laws of the state of New York concerning assessment life insurance; and, in the opinion of the court,

the entering upon this kind of business was not ultra vires the corporate powers.

In the next place, as I have heretofore remarked, proof that the acts of the association were ultra vires is in itself insufficient. Plaintiff must further show that thereby insured's obligations were in some wise changed to his disadvantage. There is no proof that the defendant permitted the money that belonged to the mortuary fund of the association to be diverted or appropriated for the benefit of the five-year combination option policies, or that the mortuary fund applicable to payment of death losses on the 15-year assessment policies was reduced thereby. In my opinion, there is a failure to prove that the 5-year combination policy was unauthorized, or that the insured or plaintiff was affected thereby disadvantageously. For both these reasons the first ground alleged as an excuse for the nonpayment of the assessment is invalid.

The second excuse alleged is that, according to the stipulations of the contract, the amount of the insured's assessments was unalterably fixed for his entire life at \$3.50 per \$1,000 of insurance, and that, Dr. Haydel being then 56 years of age, his assessments were limited to \$35 upon each \$10,000 of insurance on his life. There is provided, by the table on the back of the policy, some such proposition as this, but in many other places in the policy, and in defendant's by-laws and the constitution,—which, I take it, govern this case,—there is a special power conferred upon the board of directors and upon the executive committee of the company to make such changes in the amount of assessment as from time to time may be required; and, as a matter of course, insurance on the mutual plan being different from insurance on the old-line plan, the members of the company are, so to speak, partners; they are each and all interested; and it is necessary, in carrying on this kind of business, that the association should, from time to time, collect by assessments for all deaths as they occur such amount as may be necessary; and ample provision is found in the policy and provisions of the constitution for this purpose. To each one of these provisions I need not call particular attention, but one particularly I will allude to, which gives the executive committee power to make any modifications that are necessary in the way of determining and fixing a just and equitable amount of the premiums or assessments to be levied from time to time when losses occur, and to meet these losses. I refer to section 8 of article 11, which provides that the board of directors shall have authority to fix and determine the amount of assessments for which the members shall be liable, and the rates of assessment, the amount of annual dues, and to adopt such other rules and regulations as they may deem best for the interests of the association. It is to be noted that their powers under this provision are very broad. The policy itself and the table on the back thereof are made subject to the constitution, subject to the by-laws, and subject to any amendments that may be from time to time adopted; and one becoming a member of the mutual insurance company takes his membership subject to the provisions of the constitution and the by-laws, and subject to such changes

as may be made pursuant thereto in the rates and assessments; so that the fact in itself that the insured had a policy with a table on the back fixing the rate of assessment is no excuse for the lapse in this case.

The next excuse is that by provision No. 2 of the policy it was agreed that 25 per cent. of the net receipts from the assessments should constitute a reserve fund for the exclusive benefit of the members of the association. Said reserve above \$100,000 (and in excess of the amount represented by outstanding bond obligations) should be applied to the payment of claims in excess of the American Experience Table of Mortality, and, when any claim by death was due, to make up any deficiency in the death fund. It is alleged in this replication, as a further excuse for the nonpayment of these assessments, that the reserve fund authorized to be raised and maintained, according to the provisions I have just alluded to, for a long period of time, to wit, for 12 years prior to the 1st day of February, 1898, amounted to some \$3,000,000; and that the same, under the provision aforesaid, should have been applied to payment of claims in excess of the American Experience Table of Mortality, or to making up the deficiency in the death fund. The plaintiff avers that, instead of using and applying the reserve fund to making up any deficiency that might have existed in the death fund, the defendant wholly ignored its said contract when it made the assessment in question. It is to be noted, in considering this excuse, that the plaintiff entirely fails to aver that the reserve fund exceeded its bond obligations, or that the mortality experience of the defendant association was in excess of the American Experience Table of Mortality. In other words, in the allegation that there was this large amount of reserve fund the pleader utterly fails to observe that this particular fund could not have been devoted to the payment of death claims unless such claims were in excess of the American Experience Table of Mortality. Entirely apart from this, however, it appears from the different provisions of the constitution and by-laws, and in the subsequent amendments of the constitution, and by the subsequent development of the schemes of business of this company, that the board of directors had the power to devote its reserve fund in any manner they saw fit, provided it be made subject to the general purposes of the corporation and to the business being carried on for the benefit of the members. This clearly appears from the particular amendment to which I have called attention, by which the board of directors and the executive committee are fully empowered to determine each year the disposition that shall be made of the reserve fund; and the fact that they failed to apply the reserve fund or failed to devote this fund to the payment of claims in excess of the American Experience Table of Mortality, would not, in itself, be an excuse for the nonpayment of assessments.

The next excuse is that the defendant diverted the mortuary fund from its proper channel, and used it for the payment of expenses. I do not find, in any statement of any witness, anything to support this charge.

For the next ground of excuse the plaintiff avers that by clause No. 3 in the policy it was provided that, after the expiration of each period of five years, the rate of assessment might be changed to correspond with the actual mortality experience, and that thereby the defendant was limited to this quinquennial period for making changes in the assessments or mortuary calls, and that, whenever any changes in assessments were made at any other than that five-year period, they were null and void. This contention, however, overlooks the fundamental principle of the corporation's business, which, in its very nature, requires that it should collect from its members sufficient to meet the demands that should be made upon it for the payment of death losses, and disregards the provisions for making assessments for that purpose,—not only those in the by-laws, but those contained in this policy also. The various provisions of the policy and the various provisions of the constitution and by-laws and amendments thereto must, of necessity, enter into the construction of this contract; and one of the provisions of both the policy and the constitution is that the company may at any time, when demands for the payment of death losses require it, make assessments upon the members for such amount as shall be necessary to meet the demands therefor.

The next ground of excuse is that, by a course of dealing between the defendant company and the insured in this case, the prompt payment of this assessment was waived. The plaintiff claims that the defendant company had frequently permitted the insured to pay the assessments at a later time than that which was fixed by the calls and provided for and contemplated in the policy itself, and that thereby the insured was led to believe that he could pay call 96 at a later day than March 3, 1898, and, relying on this belief, he deferred payment until a day later than March 3d. The proof is that from 1884 to 1898 some 70-odd assessments were made, and that as to all of these there was no failure by the insured in manner or time of the payment of them, with the exception of 7 only. That is the extent of the claim, and all that could be claimed, under the proof. Now, as to these seven particular instances in which the time for the payment of the assessment was deferred, in each instance the delay was for one day only, though, I believe, on one occasion—one particular instance—there was two days' delay. In two of the instances it appears that the reason for the delay was because the last day for payment, according to the calendar, was Sunday, and payments were made promptly on Monday. As to three or four of them it appears that at the time the payments were made a receipt was given by the company, in which it declared that it received the assessment on condition that the insured was then in good health, and in insurable condition physically, and with the distinct proviso that the receipt of this assessment after it was due should not be regarded as a precedent for releasing the insured from thereafter paying promptly, nor considered a waiver of prompt payment of future assessments. Under this plea the plaintiff must show that by a course of dealing between the company and the insured the insurance company caused the insured to believe that it

did not intend thereafter to exact prompt payments of premiums, and that the insured, relying upon that course of dealing, had tendered payment after the time limited by the contract, and as and when he was permitted to pay by this concession of the company. Now, understanding that waiver is largely a question of intent, did the parties intend, at the time of making and receiving these payments a day or two later, and mean to say to each other, that that provision of the contract was waived, and thereafter that the insured was entitled to a length of time over and above that provided by the policy? There is one payment, and only one, that is not fully explained. This payment was made one day after it matured,—which was in 1894; and it was made after two or three of these conditional receipts had been given, in which the insured had been informed that the postponement of the payment of the premium should not be made a precedent, and that it should not be considered a waiver of the payment by the company. I am not prepared to say that delay in one payment, and that delay for one day only, is sufficient to establish the waiver, especially as after that time (1894) there was no omission to make prompt payment of assessments,—that is, from 1894 to 1897 the assessments were promptly paid; and, in my opinion, that single instance in itself, so far back, is insufficient to entitle plaintiff to go to the jury on the question of waiver. It is simply one instance, throughout a course of conduct running all through the life of this policy, where payment was not strictly made within the time required, except when a distinct contract was entered into by the parties to the effect that the policy had been lapsed, and that if the insured was then in good health and insurable, and provided this should not be construed into a precedent, the company would continue his insurance. So far I have treated this question solely on the evidence of the plaintiff, but, as the case now stands, if it goes to the jury, it will go to them with this other evidence, which has been introduced by the defendant, and which is entirely uncontradicted, namely: That prior to March 3, 1898 (the last day for payment of call 96), the insured had informed some of the officers of the company that he did not know that he should keep up his policy. That on the 5th of March, not having appeared to pay his premium or assessment, although it is conceded he had due notice thereof, and although it is conceded by the bookkeeper that he in fact had actual knowledge that it was due on the 3d day of March, the insured was brought into the office of the defendant company, and had a talk with both the agent and the treasurer of the company. He told them that he had let his policy lapse, and that he was very much in doubt (even after the importunate demands of the agents) whether he had better continue this insurance; and he was told by them at the time that, if he desired any reinstatement, he must proceed in accordance with the terms of the policy, and make application therefor. He said the premiums were too high for him, and that he could probably get insurance cheaper than to reinstate his policy. On being importuned still more by the agents (in their usual diligent manner, no doubt) to go on, and make this payment, and secure the benefits of this

insurance, he replied that his present impressions were that he would not do it. He realized and knew he had not paid the premiums. He realized the obligations of the contract, and the fact of the nonpayment of this assessment, but he said: "I will postpone it for a few days. I want to think this matter over. I don't like this insurance. I believe I can get better." This conversation was on Saturday, and he died on Sunday morning. At the time this effort was being made to induce him to pay his premium (which seemed to be an honest and very anxious one on the part of the agents), and when his attention was called to the uncertainty of life, he boasted that life was not uncertain with him, that he had twenty years of expectancy, and that he belonged to a race of great longevity. Instead of that, it appears he died very suddenly on the following day.

In the light of these facts it would simply be farcical, it seems to me, to submit to the conjecture or caprice of any set of men the possibility of there being an intent on the part of the company to waive the payment of this assessment, and whether that intent was relied upon by the insured and acted upon by him, and by reason thereof that he did not pay promptly. I do not think there is any evidence on which to submit the case, and I shall tell the jury there can be no recovery.

Judgment for defendant accordingly.

GILBERT v. SEATCO MFG. CO. et al.

(Circuit Court, D. Washington, W. D. December 11, 1899.)

1. CORPORATIONS—CONTRACTS.

Two persons contracted for the purchase of all the stock of a lumber corporation. They made a partial payment thereon, and the stock was retained by the sellers as collateral security for the deferred payments; the purchasers taking possession of the property. Subsequently the purchasers borrowed from plaintiff money with which to make payments on such stock; giving their individual notes for a portion, and for the remainder a note purporting to be that of the corporation, signed by them as its officers, although they had not been elected such officers, nor had they at the time become owners of the stock. Plaintiff had knowledge of the purpose for which the sums were borrowed. *Held*, that the obligations for the sums so borrowed did not constitute debts of the corporation.

2. SUBROGATION—RIGHTS OF LENDER OF MONEY.

The fact that the sums borrowed from plaintiff, after being paid by the borrowers on their indebtedness to the original owners of the stock, were used by the latter in paying debts of the corporation contracted before their contract to sell the stock, and the payment of which they had assumed, did not give plaintiff any claim against the corporation for the repayment of such sums; there being no proof that the former stockholders were insolvent.

3. CORPORATIONS—POWERS—ASSUMING LIABILITY FOR DEBTS OF STOCKHOLDER.

Under the statute of Washington (1 Ballinger's Ann. Codes & St. § 4265) forbidding corporations to pay dividends, except from net profits, or to divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, a corporation having no surplus profits has no power to pay, or to assume liability for, the individual debt of a stockholder.

4. SAME—ACTION TO CHARGE UPON CONTRACT.

The burden rests upon one asserting rights against a corporation upon a contract purporting to have been made in its behalf by an officer, and which could in no event have been valid without the assent of all its stockholders and creditors thereto, to prove every fact necessary to its validity; and no presumption in its favor can be indulged.

This was an action against the receiver of defendant corporation to charge the corporation with liability for money loaned by plaintiff to its managers.

In the month of August, 1888, the Seatco Manufacturing Company, a corporation, was the owner of a sawmill and other property, constituting a lumbering plant, and a large stock of manufactured lumber and sawlogs, situated at Bucoda, in Thurston county, Washington Territory; and about that time a written agreement was made and entered into between the owners of the stock of said corporation, as parties of the first part, and J. B. Garland and Francis Rotch, as parties of the second part, whereby the first party agreed to sell to the second party all of said stock, for a price which was fixed upon the basis of the value of all the property owned by the corporation on the 1st day of September, 1888, and which, when the property was inventoried, was ascertained to amount in the aggregate to \$127,000. It was further agreed that the party of the second part should have credit for part of the purchase price, to wit, \$50,000, which was to be paid in three equal installments, in 6, 9, and 18 months, and said first party was to retain all of the stock as collateral security for said deferred payments, with authority, in case there should be a default in making said payments, to sell the stock, or sufficient of it to pay the whole of said purchase price, and to account to the second party for any excess. It was further agreed that said first party should pay all the debts of the corporation, and liabilities existing on the 1st day of September, 1888, and said second party should pay all the expenses of operating the mill, and receive all the profits therefrom, after said date, and should keep the mill and property insured for a specified amount, for the benefit of the first party, until the stock should be fully paid for. Under this agreement, Garland and Rotch took possession and assumed the management of the sawmill, but, being disappointed in their expectations as to the market for lumber during the first six months, they were unable to realize from the sale of lumber any part of the amount of the payment on their contract which came due in March, 1889; and to avoid a forfeiture of their contract, and loss of the large amount which they had paid on account of it, Mr. Rotch appealed to his relatives for a loan of \$17,000 to make that payment. Thirteen thousand dollars of the amount required was advanced by the plaintiff, who is the grandfather of Mr. Rotch; and for said \$13,000 Garland and Rotch gave to the plaintiff two promissory notes,—one for the sum of \$8,000, and the other for \$5,000,—bearing interest at the rate of 6 per cent. per annum. The plaintiff was fully informed as to the purpose for which the money was required, and the terms of the contract above mentioned, before making the loan; and the individual notes of Garland and Rotch were given, pursuant to his directions. The correspondence between Mr. Rotch and the plaintiff, introduced in evidence, shows that the plaintiff was informed of the operations of Garland and Rotch in connection with the sawmill during the summer of 1889; that they were enthusiastic in the expectation of doing a large and profitable business, and were anxious to make large investments in the purchase of timber lands. And, when the second payment on account of said contract for the purchase of the mill company's stock was about due, the plaintiff made a further advance to Garland and Rotch by a draft payable to their order for \$17,500, which Mr. Rotch, in a letter to plaintiff dated October 7, 1889, stated would be applied to make said payment, with accrued interest. A promissory note, signed by the Seatco Manufacturing Company, by Garland as president, and Rotch as secretary of the company, was given to the plaintiff for said \$17,500. There is no evidence tending to prove that the stock had prior to that time been transferred to Garland and Rotch, or that they had been elected president and secretary, respectively, of the company. On the contrary, the evidence shows that the business of the company was conducted in an

irregular manner. No corporate meetings were ever held, and no records were kept. Garland and Rotch merely assumed the full control and management of the company's business, and acted as president and secretary and managers, until the year 1894, when Mr. Garland died; and from that time Mr. Rotch assumed the office of president and sole manager, and controlled the business of the company. The whole of the \$30,500 advanced by the plaintiff was actually used by Garland and Rotch to meet the payments due for the stock of the company under their contract for its purchase, and the vendors of the stock used the money which was paid to them by Garland and Rotch in paying up the debts of the corporation which existed prior to September 1, 1888. The interest on the three promissory notes above mentioned was paid to the plaintiff up to some time in the year 1893. In February, 1894, a promissory note for \$780, signed by the Seatco Manufacturing Company, per Francis Rotch, secretary, was given to the plaintiff on account of accrued interest on the two notes for \$8,000 and \$5,000; and on October 15, 1894, a note for \$1,050, signed in the same manner, was given to the plaintiff on account of accrued interest on the note for \$17,500. No payments have ever been made on account of the principal. During all the time of the transactions involved in this suit, the plaintiff has resided at Gilbertsville, in the state of New York; and in the fall of 1894 he received a visit at his home from Mr. Rotch, who was then on a mission to raise a large sum of money by an issue of bonds of the defendant corporation; and upon representations then made by Mr. Rotch that the company was in urgent need of money, and upon assurance given by Mr. Rotch that, if successful in his scheme of floating bonds of the company, the entire amount of money which had been theretofore loaned by the plaintiff in the manner aforesaid, with accrued interest, would be repaid out of the money received from such issue of bonds, and that, if unsuccessful in raising money in that manner, the defendant corporation would nevertheless repay the said loans within a short time, and would give the plaintiff security therefor, the plaintiff was induced to, and did, make further advances to Mr. Rotch of various sums, amounting in the aggregate to \$6,200. The defendant company, having become insolvent, was placed in the hands of a receiver by an order of the superior court of the state of Washington for the county of Thurston. Thereafter the plaintiff presented to the receiver his claim as a creditor of the defendant corporation for the entire amount, with accrued interest, due upon the four promissory notes above mentioned, and also for the several amounts advanced in the year 1894, which claim was allowed by the receiver for the money loaned in the year 1894, but was rejected, and the liability of the defendant corporation was denied, as to all the indebtedness upon said four promissory notes; and this suit was thereupon brought against the defendant corporation and its receiver to recover the several amounts due upon said notes. The evidence shows that the plaintiff was not credited upon the books of the company with any part of the money which he advanced on the several notes, and there is no evidence tending to prove that the company, by any corporate act, ever assumed an obligation to pay said notes, other than the oral testimony to the effect that Mr. Rotch assumed authority to make the promises above mentioned, and that the company received the \$6,200 advanced upon the faith of said promises. In December, 1894, a paper purporting to be a statement of account between the plaintiff and the defendant company, showing credits for loans of \$17,500 and \$13,000 in favor of the plaintiff, was sent to the plaintiff in response to a request which he made to Mr. Rotch for a statement of his account with the company. But this paper is unsigned. It is shown by the testimony that it was not made up from the books of the company, but was made by the book-keeper, pursuant to directions given by Mr. Rotch.

H. S. Griggs, for plaintiff.

J. W. Robinson and W. I. Agnew, for defendants.

HANFORD, District Judge (after stating the facts). In order to decide the questions raised by the arguments which have been made, it is necessary to consider the rights of the parties under the law as they existed at the time of each of the principal transactions.

It is insisted that the defendant corporation is bound to the same extent as it would be if the evidence showed that Garland and Rotch had acted for and in the name of the company, with full authority lawfully conferred, because they, being owners of all the stock, assumed to act for the company, and did continue to exercise full control and management of its affairs for such a length of time that the knowledge and assent of all the stockholders must be presumed; or, expressed in other words, that, in their dealings with the plaintiff, Garland and Rotch were the company. But, when the loan of \$13,000 was made, the plaintiff knew very well that Garland and Rotch were unable to raise money by pledging the stock of the company, because the stock had not then been transferred to them, and it was already held as collateral security for the unpaid installments of the purchase money. The \$13,000 was loaned for the express purpose of enabling them to fulfill the conditions of their contract by which they were to acquire the title to the stock. The physical property which the corporation owned was at that time under their control and management, but the corporation itself was not. They were not even qualified to become directors. They could not at that time bind the corporation to pay their debt for the money loaned to pay for their stock, without divesting the vendors of the security which they stipulated for, because the creation of such a debt would certainly impair the value of the stock. The situation was practically the same in October, 1889, when the loan of \$17,500 was made. The plaintiff then knew that the stock had not been paid for, and that Garland and Rotch had no right to borrow money for their own purposes upon the credit of the corporation. The money did not go into the treasury of the corporation, and it was not loaned for the use or benefit of the corporation. Therefore, in giving the company's note, Garland and Rotch were not acting within the scope of the ordinary powers of officers or agents of the corporation, nor transacting business for it pursuant to any custom or practice which may be presumed to have been known to the persons who then held the company's stock. If the giving of the company's note for \$17,500 may be considered as an act of the corporation, or a contract which the corporation assumed to make, it must be regarded as an assumption of liability for the mere accommodation of Garland and Rotch, to whom the money was advanced, and who applied it in payment of their individual indebtedness, to relieve themselves from personal liability to the vendors of the stock. Such contracts, when made with all the formalities required for the due execution of corporate powers, are *ultra vires* and void. Green's *Brice, Ultra Vires*, p. 252; 7 *Am. & Eng. Enc. Law* (2d Ed.) p. 793. Against this it is argued that a new doctrine has grown up in the law of corporations, and that now a corporation may assume obligations for the accommodation of its members, if done with the consent of all the stockholders, provided there are no creditors of the corporation to be prejudiced. This doctrine, however, cannot avail the plaintiff. We are now considering his rights as they were fixed at the time of making the loan, and at that time Garland and Rotch were not the only stockhold-

ers. On the contrary, they were bound by a contract, an essential condition of which was that they should make final payment of the stock before they could have it, and such payment had not been made at the time referred to. I deny, however, that any such proposition can be maintained as law in this state, so long as existing statutes continue in force. For many years we have had a statute forbidding corporations to pay dividends, except from net profits, or to divide, withdraw, or in any way pay to stockholders, or any of them, any part of the capital stock of the company. 1 Ballinger's Ann. Codes & St. Wash. § 4265. It would be just as much a violation of this statute to pay the individual debt of a stockholder out of corporate funds, when there are no surplus profits on hand, as to pay the money to a stockholder directly. Hence any unconditional promise by a corporation to pay the debt of a stockholder is a promise to violate the organic law under which corporations of this state are created.

Another argument in behalf of the plaintiff is that he is entitled to hold the corporation liable as his debtor for the money which he advanced, for the reason that the corporation was benefited by the loan, because the money, when paid by Garland and Rotch to the vendors of the stock, was used by the latter to pay the debts of the corporation existing prior to September 1, 1888; and it was said in the argument that, if the loan had not been made, the corporation would have remained obligated for its old debts. I can find nothing in the testimony to justify such a conclusion. The vendors of the stock by their contract with Garland and Rotch bound themselves absolutely to pay the company's debts, and it was for their interest to do so, in order to keep the value of their security unimpaired. If they had neglected to pay the debts, the property of the corporation might have been levied upon under writs of attachment or executions, the business of the corporation would have been interrupted thereby, and the stock which they held as security rendered worthless. There is no evidence that they were insolvent, nor is there any reason to suppose that, if they had not received the money due from Garland and Rotch, they would have failed to fulfill the obligation which they assumed by their contract. At any rate, the money was loaned to Garland and Rotch, and they used it to pay their individual debts before any of it was available in the hands of the vendors of the stock to pay debts of the corporation.

Passing now to a view of the situation, as disclosed by the evidence, in the fall of 1894, when it is claimed that the defendant corporation, in consideration of the new loans then made to it by the plaintiff, assumed liability for the loans theretofore made to Garland and Rotch, I cannot find any such change in the apparent or real position of either of the parties as would affect the rights of any one with respect to the validity of the assumption by the corporation of said debts. The new loans were made in November and December, 1894. At that time Mr. Garland was dead, and Mr. Rotch was the sole actor assuming to represent the defendant corporation. Whether Mr. Garland's stock had been sold or transferred, or was held by his personal representatives or heirs, does

not appear from any testimony in the case. Neither does it appear that any authority was given to Mr. Rotch, in a regular or irregular manner, by a vote of the directors of the corporation or the stockholders at any corporate meeting, or that he was ever elected to the office of president, in which capacity he assumed to act, or that the powers which he exercised were conferred in any manner, except by his own assumption. Therefore, if we consider only stockholders, the evidence fails to bring the case within the rule invoked, that a corporation may, with the consent of all its stockholders, become liable for debts of others. It is said that the evidence does not show that there were any creditors to become prejudiced; but I consider that it is a necessary inference from the facts shown in the evidence that the company at that time must have had creditors other than the plaintiff. The corporation was carrying on a manufacturing establishment, with a large amount of current expenses for wages and other necessary incidentals; and that it was struggling with financial difficulties is shown by the correspondence introduced in evidence, and by the fact that the plaintiff at that time yielded to the importunities of Mr. Rotch so far as to loan the company money in amounts ranging from \$50 to \$4,000, and Mr. Rotch was at that time endeavoring to raise money for the relief of the corporation by a large issue of bonds. The corporation certainly became insolvent and was placed in the hands of a receiver prior to the commencement of this action; and, in the absence of proof other than as above mentioned, the court certainly cannot presume that there were no creditors, or that any creditors consented to the assumption of debts amounting to over \$30,000, with accrued interest thereon, in consideration of a new loan amounting to only \$6,200. The transaction is so extraordinary that the court will not indulge in any presumption in regard to it. I hold that the burden rests upon the parties affirming that such a contract was made to prove it, and to prove all the facts necessary to establish its validity. In so far as the authority of Mr. Rotch to bind the corporation depends upon the consent of the stockholders or creditors, the case must fail, in the absence of a showing as to who were at that time all the stockholders, and all the creditors, and their consent to the action, or knowledge and acquiescence on their part.

The decision of the circuit court of appeals for the Ninth circuit in the case of *G. V. B. Min. Co. v. First Nat. Bank of Hailey*, 36 C. C. A. 633, 95 Fed. 23, cited by counsel for the plaintiff, does not, in my opinion, sustain the position which he has taken in this case. Judge Hawley was careful to say, in the opinion of the court in that case, that the general expressions in the opinion should be interpreted in the light of the peculiar facts which the court had to consider in deciding the case; and, when the important differences in the facts which distinguish this case from that are taken into account, the decision might well be laid aside without further comment than to say that the case is not in point. I can say, however, after an examination of the opinion, that the circuit court of appeals has not attempted to make any radical decision uprooting the settled principles of the law of corporations, but, on the con-

trary, the number of authorities cited in the opinion shows that the court intended to keep in line with the rules recognized by the courts of this country generally. It was not pretended in that case that the debt which the corporation defendant was endeavoring to repudiate was a debt of any person other than the corporation itself. The case referred to was a suit to foreclose a mortgage upon mining property owned by a corporation, which mortgage was given to secure a loan made to, and received by, the corporation. In the opinion, Judge Hawley lays particular emphasis upon the fact that:

"The corporation for several years had the benefit of money drawn from the bank, and upon divers notes which were renewed by the notes which the mortgage was given to secure."

And again, in the opinion, he makes the following strong declaration:

"The corporation, as we have already shown, had the unquestioned authority and power, under the law, to execute the notes and mortgage in question."

The case in hand is widely different. The plaintiff at the time of making the loans did not rely upon the credit of the corporation. The corporation did not receive his money, and it had no authority under the law to assume an obligation for the individual debts of Garland and Rotch. The following paragraph found in the opinion is applicable here:

"A contract of a corporation which is ultra vires is something outside the object of its creation, as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature. Such a contract is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side could give the unlawful contract any validity, or be the foundation of any right of action upon it. But, when a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. The doctrine of ultra vires has been often said to rest upon three distinct grounds: (1) The obligation of persons dealing with a corporation to take notice of the legal limits of its powers; (2) the interest of the stockholders not to be subjected to risks which they have never undertaken; and (3) the interest of the public that the corporation shall not transcend the powers conferred upon it by law. The authorities bearing upon these general principles are well settled, and are clearly stated in *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24-59, 11 Sup. Ct. 478, 35 L. Ed. 55, and *Bank v. Kennedy*, 167 U. S. 362-368, 17 Sup. Ct. 831, 42 L. Ed. 198, and in the numerous authorities there cited."

Independently of the question whether Garland and Rotch were authorized by the corporation to act as they did in signing the name of the corporation to the note for \$17,500, and whether Rotch was authorized by the corporation to execute in its name the two notes given for accrued interest, or to make a verbal promise in behalf of the corporation to pay the indebtedness upon any of said notes, I consider that the plaintiff must fail in this case for the reason that the corporation itself had not the power at any time to bind itself to pay said notes, or either of them. I direct that findings shall be

prepared, for my signature, in accordance with this opinion, and a judgment be entered thereon that the plaintiff take nothing, and that the defendants recover costs.

STEELE COUNTY v. ERSKINE et al.

(Circuit Court of Appeals, Eighth Circuit. November 20, 1899.)

No. 1,182.

1. MUNICIPAL CORPORATIONS—ACT IN EXCESS OF POWERS—CURATIVE STATUTE.

The act of a municipality done without authority previously conferred may be confirmed and legalized by subsequent legislative enactment, when legislation of that character is not prohibited by the constitution, and when the act done would have been legal had it been done under legislative sanction previously given.

2. SAME—VALIDITY OF CURATIVE STATUTE.

A retroactive legislative act confirming and legalizing a contract made by a county which had been adjudged invalid by the courts, in an action thereon, for want of authority in the county to make it, is not void, as an exercise of judicial power by the legislature, since it does not attempt to annul or affect the judgment of the court, but recognizes its validity by supplying the element which the court held lacking to render the contract valid.

3. SAME.

A municipal corporation has no vested right of property in a defense of ultra vires to a contract it has entered into, nor is it given such right by a judgment in an action against it on the contract sustaining and establishing such defense. Hence a retroactive statute conferring upon it the power which it lacked, and legalizing its action in making such contract, cannot be assailed on the ground that it deprives the corporation of its property without due process of law. Such act is the lawful exercise of the power of the legislature over subordinate public corporations.

4. SAME.

Section 185 of the constitution of North Dakota, which forbids the state or any county to make donations to or in aid of any individual, association, or corporation, does not deprive the legislature of power to legalize a contract made by a county without authority, but under which it has received the benefit of services for which it ought, in common honesty, to pay, and where such contract was for a legitimate public purpose, and might properly have been authorized by the legislature in the first instance.

5. JUDGMENT AS ADJUDICATION—MATTERS CONCLUDED—NEW ISSUES.

A judgment, in an action against a county on a contract, adjudging the contract invalid for want of authority in the county to make it, is not a bar to a subsequent suit on the same contract after it has been legalized by a curative act of the legislature.

6. STATUTE—TITLE OF ACT.

Under section 61 of the constitution of North Dakota, providing that no bill shall embrace more than one subject, which shall be expressed in its title, an act entitled "An act to amend section ten of chapter 38, Laws of 1887, being section 545 of the Compiled Laws," is valid, where the subject-matter of the amendment is germane to the original section.

In Error to the Circuit Court of the United States for the District of North Dakota.

F. W. Ames (George Murray, on the brief), for plaintiff in error.

Seth Newman, Burleigh F. Spalding, and Winfield S. Stambaugh, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was tried by the court without a jury. The opinion of the learned trial judge, which we find in the record, contains an accurate statement of the facts of the case, and an extended discussion of the legal questions involved. 87 Fed. 630. The opinion is as follows:

"This action is submitted to the court without a jury upon an agreed statement of facts, which may be summarized as follows: The defendant, Steele county, was organized on the 23d day of June, 1883, out of territory which had been previously embraced in the counties of Traill and Griggs. Thereafter its board of commissioners employed one E. J. McMahon to transcribe the records in the office of the registers of deeds of the old counties affecting the title to real property situated in the new. The work was prepared by him pursuant to the contract, and on the 19th day of November, 1883, the defendant's board of commissioners audited and allowed his claim at the sum of \$2,010, and caused a county warrant to be issued to him for the amount of \$2,680; the excess over the amount of the claim being for the purpose of making good the discount at which the warrants of the county were selling at that time. McMahon transferred the warrant to Masena B. Erskine, who thereafter brought an action upon it against the county, in which he recovered a judgment in the trial court; but the supreme court of the state on appeal reversed this judgment, and directed the lower court to dismiss the complaint, with costs. Judgment was entered accordingly in the trial court, and that portion of it relating to costs was paid by the plaintiffs, who had been substituted in the action upon the death of the original plaintiff. The decision of the supreme court was based wholly upon the following grounds: First, that at the time the contract was made with McMahon the county commissioners had no power or authority under the law to make the same; and, second, that they had no power or authority to issue any warrant for a greater sum than the amount that was agreed to be paid for the services rendered. This decision will be found in 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645. In the course of the opinion the court uses the following language: 'Whether the transcription made by McMahon would or would not possess any legal validity as notice or otherwise is unnecessary to decide in this case; but, to say the least, there is grave reason to doubt the legal value of such transcribed records.' This decision was rendered in November, 1894. For the apparent purpose of meeting the objections thus raised, at the next session of the legislature of the state, which convened in January, 1895, an act was passed which provided as follows: 'When a new county is organized in whole or in part from an organized county, or from territory attached to such organized county for judicial purposes, it shall be the duty of the commissioners of such new county to cause to be transcribed in the proper books all the records of deeds, or other instruments relating to real property in such new county, and all the contracts heretofore made by any board of county commissioners for the transcribing of any such records are hereby made valid, and all records transcribed thereunder, or under the provisions of this act, shall have the same effect in all respects as original records, and any person authorized by such boards of county commissioners to transcribe such records shall have free access at all reasonable times to such original records for the purpose of transcribing the same.' Acts 1895, p. 43. Thereafter the plaintiffs obtained an assignment from McMahon of his claim against the county for transcribing the records, and this action is brought to enforce its payment. Several objections to plaintiffs' right of recovery are urged in the brief of defendant, but it seems necessary to consider only the following in this opinion: (1) That the act of 1895 is unconstitutional for the reason that it is an exercise of judicial power; (2) that it is unconstitutional because it deprives the county of its property without due process of law; (3) that it violates section 185 of the constitution of North Dakota, which forbids the state or any county * * * to make donations to or in aid of any individual, association, or corporation; (4) that this action is barred by the judgment in the former action.

"An examination of the statutes of the territory of North Dakota shows that newly-organized counties were usually empowered to have the records

affecting real property embraced within their limits transcribed. Steele county is the only exception found. The maintenance of such a system of records is certainly one of the usual duties of this class of corporations, and is a public, as distinguished from what is sometimes spoken of as a private, function. From this it follows that the legislature could retroactively legalize the contract, unless such action would be an infringement upon the judicial power. The act of a municipality, done without authority previously conferred, may be confirmed and legalized by subsequent legislative enactment, when legislation of that character is not prohibited by the constitution, and when that which was done would have been legal had it been done under legislative sanction previously given. *Granada Co. v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125, 28 L. Ed. 704; *Bolles v. Brimfield*, 120 U. S. 760, 7 Sup. Ct. 736, 30 L. Ed. 786; *Springfield Safe-Deposit & Trust Co. v. City of Attica*, 29 C. C. A. 214, 85 Fed. 387. The objection that the act in question was judicial legislation wholly misconceives the nature of the act. The legislature did not declare the contract valid which the court had adjudged invalid, but made it valid by imparting to it the legislative sanction which the court had declared was the only element wanting to its validity. The act did not construe, but completed, the imperfect contract which the county had made. Seizing upon the duty that in good conscience rested upon the county, to pay for the service which it had received, the legislature, by virtue of its authority over the municipality as a public agency of the state, ratified its act, and thereby changed its moral duty into a legal obligation. Its act was formative, not judicial. The want of power in a municipal corporation to enter into a contract is usually disclosed for the first time by an adverse decision in the courts, and, if it should be held that such a decision precludes the legislature from curing the defect, retroactive legislation would be defeated in those cases in which it has heretofore been most frequently used, and in which it has its highest justification. Such is not the law.

The leading authority upon this subject is *Town of Guilford v. Cornell*, 18 Barb. 615, 13 N. Y. 143. In that case Cornell and Clark, as commissioners of highways, prosecuted an action on behalf of the town by direction of the town meeting, and, having been defeated, were compelled to pay \$657.22 as costs of the litigation. They presented a claim for that amount to the town board, which was rejected, and thereupon they brought suit for its recovery. They succeeded before the referee, but the court set aside the judgment, and dismissed the complaint, with costs, upon the sole ground that there was no authority in law for the prosecution of the original action in which the costs accrued; and this decision was affirmed on appeal by the court for the correction of errors. The legislature thereupon passed a law legalizing the claim, and directing the levy of a tax upon the town for its payment. The case above referred to, reported in 18 Barb. 615, 13 N. Y. 143, was brought by the town to restrain the imposition of this tax, and one of the main contentions in support of the action was that the act legalizing the claim was void, as judicial legislation. See 18 Barb. 623, 629, 641. The court held this position unsound, the writer of the opinion saying: 'I am unable to see in what respect this act comes in conflict with any power which the judiciary has exercised, or which it deems itself authorized to exercise. The equity of the claim of Cornell and Clark was not considered by the court, and for the reason that the question presented was one of strict law, depending entirely upon whether authority to sue had been conferred upon them by statute; and the court held that it was not, and here its functions ended. The judgment of the court has not been interfered with, or their jurisdiction assumed. All that has been done is to afford relief where the court, if they would, could not.' This decision is cited and approved in *Wrought-Iron Bridge Co. v. Town of Attica*, 119 N. Y. 204, 23 N. E. 542. In that case the plaintiff had constructed a bridge for the defendant. Its claim for payment of the contract price having been rejected, suit was brought. Plaintiff obtained a verdict, but upon motion for a new trial the judge presiding at the circuit set aside the verdict; holding 'that the contract with the plaintiff for the construction of the new bridge was without authority, that all the proceedings were unauthorized and ineffectual to bind the town, and that the plaintiff could not recover.' Nothing was done to review this judgment, but the plaintiff had recourse to the legislature for re-

Hef. An act was passed by which the proceedings of the town were legalized, and the contract made binding upon it. After the passage of this act a new action was brought by the plaintiff, which was resisted upon the ground 'that the legislature had no power to legalize and validate a claim against the town which had already been declared invalid by the judicial tribunals.' Upon a review of the authorities, the court of appeals declared this position untenable, and sustained a judgment in favor of the plaintiff.

Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421, 15 L. Ed. 453, is a striking illustration of the power of the legislature to render lawful that which has been declared unlawful by the courts. In that case the supreme court adjudged a bridge which had been constructed across the Ohio river at Wheeling under an act of the legislature of Virginia to be an obstruction to navigation, and a common nuisance, and ordered it to be so changed as not to interfere with vessels in use upon the river. The ground upon which the decision rested was that the bridge had been constructed over a navigable stream without authority of congress, and in violation of rights secured by congressional legislation. Thereafter congress passed an act which was in direct contravention of the decree. It declared the bridge which the court had adjudged to be a nuisance to be a lawful structure, and, instead of requiring the bridge to be accommodated to the vessels, it required the vessels to be so operated as not to interfere with the bridge. This act was assailed as in effect annulling the judgment of the court already rendered, and the rights determined thereby in favor of the plaintiff. But the act was sustained by the court, which held that the want of congressional authority was all that rendered the bridge an unlawful structure, and, the authority having been conferred, its character was changed. The act did not change the decree, but the subject-matter upon which the decree operated. So in this case the curative act of 1895 did not undertake to annul the judgment rendered in the first action. On the contrary, it assumed its validity, and changed, not the judgment of the court, but the contract in respect to which the judgment was rendered.

'The question as to when a curative act of the legislature is an infringement upon the judicial power is ably considered in *Howell v. City of Buffalo*, 37 N. Y. 271, 273; *State v. City of Newark*, 34 N. J. Law, 236, 240; *Mills v. Charleston*, 29 Wis. 400, 416; *City of Emporia v. Bates*, 16 Kan. 495 (opinion by Brewer, J.); *Donnelly v. City of Pittsburgh* (Pa. Sup.) 23 Atl. 394. These were all cases involving the validity of acts authorizing the reassessment of special assessments which had been adjudged void, and the collection thereof enjoined. The legislation was assailed upon the constitutional ground which we are now considering, and was in each case sustained by the court. It has not escaped notice that the opinions are careful to point out that the acts in question did not attempt to legalize or enforce the assessments which had been adjudged illegal by the court, but simply authorized a reassessment against the property benefited. This distinction, however, grows out of the nature of taxation. The legislature has no power to impose a specific tax upon particular property. An assessment and an opportunity to be heard are essential to a valid tax. No such limitation exists, however, when the legislature is dealing directly with a municipality which has no right to a hearing before obligations are imposed upon it by the state.

'A consideration of the nature of the defendant corporation, and the tenure by which it holds all its property and rights, will afford a complete answer to the contention that it had a vested right under the judgment in the former action, of which it could not be deprived by the legislature. The defendant is a public quasi corporation, created solely for governmental purposes. It holds all its property and rights, not as a private proprietor, but for the performance of those public duties with which it is charged by law. Being a mere instrumentality of the state for the convenient administration of government, it is at all times, both as to its powers and its rights, subject to legislative control. While it is, no doubt, true that the legislature has not such transcendent and absolute power over these bodies that it can apply property held by them to private purposes, or to public purposes wholly disconnected with the community embraced within their limits, still it is likewise true that a purely public corporation like a county cannot acquire any vested interest which will preclude the legislature from directing the application of all its property and rights to

the performance of those governmental functions which pertain to the community embraced within the corporation, and for the performance of which the corporation was created. If it were otherwise, counties, instead of being agencies of the state for administering the government, would be petty sovereignties to impede and defeat the state with claims of local interest and authority. *Maryland v. Baltimore & O. R. Co.*, 3 How. 534, 11 L. Ed. 714; *Town of East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 L. Ed. 518; *Commissioners v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *Board v. Skinkle*, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446; *City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 88, 12 Sup. Ct. 142, 35 L. Ed. 943; *Creighton v. San Francisco*, 42 Cal. 446; *Dill. Mun. Corp.* (4th Ed.) § 61 et seq. If it be the law that these public quasi corporations cannot acquire a vested right in property or contract which can limit the power of the legislature in applying the same to the public purposes of the corporation, much less can the defendant in this case claim, as against the legislature, a vested right in a judgment simply declaring in its favor the defense of ultra vires. If the judgment had not been rendered, the legislature might have legalized the acts of the defendant, and commanded it to apply funds in its treasury to the payment of the plaintiffs' claim. The most that can be said of the judgment is that it is property like the funds in the county treasury, and, if the one could be controlled and applied by legislative act, the other could also. A further answer to this objection is found in the nature of the judgment rendered in the first action. That judgment entitled the county to recover neither money nor property, but merely declared a defense, and it is difficult to see how such a judgment can create any higher right than the antecedent right whose existence it declares. The obligations of private parties must be determined by the law in force at the time of the transactions out of which they accrue. But, as we have already seen, this principle does not apply in case of public corporations, so as to preclude the passage of curative acts. It being conceded that the defendant had no vested right, as against the legislature, in the defense of ultra vires, how can a judgment which simply declares the existence of that defense create a better right than the defense itself?

"The contention that the act in question is in violation of section 185 of the constitution of North Dakota, which forbids the state or any county to make donations to or in aid of any individual, association, or corporation, is based upon *Conlin v. Board* (Cal.) 33 Pac. 753, 33 L. R. A. 752; *Id.*, 46 Pac. 279. Both these decisions involve the validity of an act whereby the legislature of the state of California attempted to impose upon the city of San Francisco the duty of paying for grading a street, a special assessment levied for that purpose having been declared invalid. The court held the act void under the constitution of California, which in its general features is similar to section 185 of the constitution of North Dakota. The gist of the decision is contained in the following language: 'The power of the legislature to appropriate any of the public moneys in the state treasury, or to direct the appropriation of the public moneys of a municipality, in cases like the foregoing, was taken away by the present constitution, and it can now make no appropriation of public moneys for which there is no enforceable claim, or upon a claim which exists merely by reason of some moral or equitable obligation, which the mind of a generous, or even just, individual, dealing with his own moneys, might prompt him to recognize as worthy of some reward.' Constitutional provisions similar to those of California and North Dakota have existed in most of the states of the Union for many years. They were adopted to correct the abuse by which municipalities, particularly in the West, were overwhelmed with debt through gratuitous donations to aid in the construction of railroads, and other like enterprises of internal improvement. With the exception of the California case above referred to, such limitations have never been held to forbid legislation validating the acts of municipal corporations which were void for want of authority which the legislature might have originally conferred. A construction of a constitutional provision which would compel the state to be less just than honorable men, and would make the public agencies of the state repositories to keep without payment whatever could be got without authority, certainly should not be adopted, except in obedience to the most imperative and unequivocal language. The provision under consideration im-

poses no such necessity. The state, as the source of justice, bought itself to be just, and should have authority to compel its public agencies to do justice; and it ought not to be determined by a forced construction that a people have ordained for their government by solemn constitutional provision a standard of honesty which would be condemned by all honorable men in the transaction of private business. To discharge an obligation which rests upon full value received is neither a 'gift' nor a 'donation.' Failure to discharge such obligations is aptly characterized by Judge Caldwell as 'that vulgar type of dishonesty which consists in obtaining goods on credit, and then refusing to pay for them.' *American Nat. Bank v. National Wall-Paper Co.*, 23 C. C. A. 33, 77 Fed. 92. The restriction was originally directed against mere gratuities in aid of private enterprises, and there is nothing in the language of the constitution of North Dakota to indicate a change in this original purpose. The practice of validating the acts and contracts of municipalities which were void for want of authority has existed since the establishment of the government, and has been quite as frequent since the constitutional restrictions against making donations of public money as before; and, with the exception of the case of *Conlin v. Board*, such legislation has never been held unconstitutional. *Dill. Mun. Corp.* (4th Ed.) § 75. On the contrary, it has met with general approval. *City of New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521; *Erskine v. Nelson Co.*, 4 N. D. 66, 58 N. W. 348, 27 L. R. A. 696; *Trustees v. Roome*, 93 N. Y. 313, 325; *Cole v. State*, 102 N. Y. 43, 53; *Wrought-Iron Bridge Co. v. Town of Attica*, 119 N. Y. 211, 23 N. E. 542; *Mayor, etc., of New York v. Tenth Nat. Bank*, 111 N. Y. 446, 459. Sections 10 and 11 of article 7 of the New York constitution are nearly identical in language with section 185 of the constitution of North Dakota.

"The contention that the former judgment is a bar to this action is equally untenable. The conclusive character of a judgment extends only to identical issues, and they must be such, not merely in name, but in fact and in substance. If the vital issue of the later litigation has been in truth already determined by an earlier judgment, it may not be again contested; but, if it has not,—if it is intrinsically and substantially an entirely different issue, even though capable of being described in similar language, or by a common form of expression,—then the truth is not excluded, and the judgment no answer to the different issue." *Palmer v. Hussey*, 87 N. Y. 303, 306. The former judgment between these parties simply declared the contract unenforceable because it was made without legislative authority. How can such a judgment be a bar to an action upon the same contract after it has received the legislative sanction? Judgments declare the rights of parties at the time they are pronounced, but do not preclude the assertion of rights subsequently acquired. In reply to an objection identical with that which we are now considering, the supreme court said: 'It surely cannot be seriously urged that the legislature is stripped of its power to authorize a contract to have effect in the future by judicial interpretation of the contract, and which at the time had reference to the present and the past only. A very large proportion of the legislation in all the states is prompted by the decisions of the courts, and is intended to remedy some mischief pointed out or resulting from the utterances of the courts of the country.' *City of New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 92, 12 Sup. Ct. 142, 35 L. Ed. 943. The present action comes within the principle of a second suit to recover real property based upon a newly-acquired title. Such an action is never barred by an adverse judgment in respect to the same property, which was rendered before the new title was acquired. *Railroad Co. v. Smith*, 16 C. C. A. 336, 69 Fed. 579."

We are satisfied with the conclusions reached by Judge AMIDON in his opinion. The opinion answers in a satisfactory manner all the assignments of error made in this court, save one, namely, that the act which authorized the payment of the plaintiffs' claim is in contravention of section 61 of the constitution of North Dakota, because its "title does not express its subject." The section of the constitution referred to reads as follows: "Sec. 61. No bill shall embrace more than one subject, which shall be expressed in its title,

but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." The title of the act is, "An act to amend section ten of chapter 38, Laws of 1887, being section 545 of the Compiled Laws." The section, as amended, reads as it is set out in the opinion of the trial judge. The section, as it originally read, contemplated the county should pay for the transcription of records made after the passage of the act; as amended, it requires payment to be made for records transcribed by the county before as well as after the passage of the act. The amendment was strictly germane to the subject of the original section. The subject of the act was the amendment of that section which was accurately and appropriately designated, and the section as amended was set out in full in the act. The title sufficiently designated the subject of the act. It plainly indicated the object and purpose of the act, which is all the constitution requires. The subject of a statute is one thing, and its detailed provisions quite another; one is the topic, the other its treatment; one is required to be stated in the title, the other not. The provision of the North Dakota constitution on the subject is identical with that of Nebraska, and the supreme court of that state has uniformly held that acts with titles like this, "An act to amend section 4 of chapter 55 of the Compiled Statutes of Nebraska," are valid, and that such a title is a sufficient compliance with the requirement of the constitution. *Dogge v. State*, 17 Neb. 140, 22 N. W. 348; *Muldoon v. Levi*, 25 Neb. 457, 41 N. W. 280. This is the general holding of the courts on the subject. *City of Omaha v. Union Pac. Ry. Co.*, 36 U. S. App. 615, 20 C. C. A. 219, 73 Fed. 1013; *Swartwout v. Railroad Co.*, 24 Mich. 389; *People v. Pritchard*, 21 Mich. 236; *People v. Kirsch*, 67 Mich. 539, 35 N. W. 157; *State v. Reid*, 49 La. Ann. 1535, 22 South. 193; *State v. Stewart*, 52 Neb. 243, 71 N. W. 998. The supreme court of the state of Washington placed the same construction upon a like provision in the constitution of that state. The court say:

"If it is competent for the legislature to enact this entire body of laws under a single title, it must follow that an act to revise or re-enact the same would, upon familiar principles, be likewise valid; and, if the whole act can be revised or re-enacted under one title, the same can be revised or re-enacted in part by way of amendments, provided the parts to be amended are specified in the title." *Marston v. Humes*, 28 Pac. 520, 524.

The case of *Harland v. Territory* (Wash. T.) 13 Pac. 453, cited by the plaintiff in error, and which held a different doctrine, was expressly overruled in *Marston v. Humes*, *supra*.

"The legislature," says Judge Cooley, "must determine for itself how broad and comprehensive shall be the subject of a statute, and how much particularity shall be employed in the title defining it." Cooley, *Const. Lim.* 144. Statutes with titles similar to the one here assailed are common in states having a constitutional provision like that in North Dakota. It is the usual and customary title where the state has a code of laws with sections numbered consecutively. The judgment of the circuit court is affirmed.

MERCHANTS' INS. CO. OF NEWARK, N. J., v. BUCKNER et al.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 703.

1. **BILLS OF EXCEPTIONS—ALLOWANCE AT SUBSEQUENT TERM.**

Where a motion for a new trial is duly filed, but not acted upon, at the trial term, but the court, by its order staying execution, manifests its purpose to keep control of the judgment until the motion is determined, a bill of exceptions may be settled and filed at a succeeding term, at which the motion is disposed of, or within such time as the court may then allow.

2. **LIBEL AND SLANDER—DISTINCTION BETWEEN—ACTIONABLE LIBEL.**

Entirely different rules govern actions for libel and slander, and words which do not technically charge a criminal offense, and, if spoken, would not be actionable without allegation and proof of special damages, are libelous and actionable per se when written or printed and published, where they seriously reflect upon the character and integrity of the person of whom they are written, and tend to subject him to loss of public confidence and respect.

3. **SAME—WORDS LIBELOUS PER SE.**

A letter, written and mailed, on behalf of defendant, a corporation, by one of its managing officers, and published by the recipient, stating that "we feel that the firm of [plaintiffs] are withholding money collected for and belonging to this company, and that the criminal laws provide for their action," and that the company has demanded the payment by plaintiffs of the "amount they robbed of company funds in their possession," constitutes a libel, and is actionable per se.

4. **SAME—LETTER CONTAINING LIBELOUS MATTER—LIABILITY OF WRITER FOR PUBLICATION.**

One who writes and mails a letter containing libelous matter is responsible for such subsequent publication of the libel as is the natural and probable consequence of his own act in putting the letter in circulation.

5. **SAME—PRIVILEGED COMMUNICATION—BUSINESS LETTERS.**

A letter written by defendant on a matter of business in which defendant was interested, and in reply to a communication from the person to whom it was addressed, is not a privileged communication, so far as relates to charges therein made derogatory to the character of third persons, which charges were not necessary to a statement of defendant's position in regard to the business to which the correspondence related.

6. **SAME—ACTION FOR LIBEL—INSTRUCTION AS TO DAMAGES.**

In an action to recover damages for a libel contained in a letter, the jury should be confined by the instructions, in estimating damages, to the effect of such circulation of the libel as they shall find to have been the natural consequence of the act of the defendant in sending the letter to the person to whom it was addressed.

In Error to the Circuit Court of the United States for the District of Kentucky.

George S. Steere, for plaintiff in error.

Reuben A. Miller and George W. Jolly (John Feland, of counsel), for defendants in error.

Before TAFT, LURTON, and DAY, Circuit Judges.

DAY, Circuit Judge. This cause was begun in the circuit court of the United States for the district of Kentucky by the plaintiffs, Buckner & Co., to recover damages from the defendant insurance company for alleged libel. The company, organized under the laws of the state of New Jersey, was engaged in carrying on the business of

fire insurance in the state of Kentucky. Its manager was one R. H. Garrigue, whose residence was in Chicago. In 1895 Buckner & Co., it is alleged, were regularly appointed agents for the company, with full authority to solicit and write fire insurance for it in Hopkinsville, Ky., and vicinity, with the assurance and promise of defendant, through its agent, that they were to be sole agents of said company in said locality; that defendant would not write policies of insurance in that territory, except through them; and that plaintiffs were to receive commissions on all policies so written. The defendant denied that this was the contract, and claimed that its agent who made the contract notified Buckner & Co. that he had no authority to grant them the exclusive privilege of writing business at Hopkinsville, but that the company protected its agents in the matter of overhead writing. The company claimed that Garrigue, the manager, having discovered that a policy covering property at Hopkinsville had been written in New York, notified Buckner & Co. thereof, and thereupon canceled the same and returned the premium to the insured. Buckner & Co. claimed that they were entitled to a commission on this policy, the same as if written by themselves. This claim was disputed. Buckner & Co. retained \$22.50 of money of the company which was in their hands. There was at this time a local board composed of the respective agents of the companies doing business in the town. This board regulated the rates of insurance in their territory. It was subordinate to the Kentucky & Tennessee Association, which association regulated the rates of the board. The local board excluded plaintiff in error because of its alleged misconduct in the matter of Buckner & Co., and imposed a fine upon Mercer & Mercer, who had been appointed local agents of the company in the place of Buckner & Co. After considerable correspondence, a letter was written by the company in response to one from the secretary of the local board. This letter is the basis of the action, and is as follows:

"Chicago, Ill., June 6, 1896.

"Mr. J. S. Moore, Secretary, Hopkinsville, Ky.—Dear Sir: We have asked our agents, Messrs. Mercer & Mercer, to return to you the inclosed voucher and this letter. In order that there may be no mistake as to the position of the Merchants' Insurance Company of Newark, beg to advise that this company will never join the Hopkinsville board, as now constituted, until full reparation has been made for the outrages committed against us by the official acts of that body. The notice of Secretary Ashbrook, of the Kentucky and Tennessee Association, that the 'disabilities imposed' against this company by your board had been removed, does not suffice. We have made our demand, and will insist upon full compliance before associating ourselves with the board again; and we desire to give notice to the Hopkinsville board that we will hold any or all of them to the full extent of the Kentucky laws, for whose protection and under which we transact our business in your state, should any attempt be made to molest our property. We do not waive any claim for damages we may have for previous actions by the board or its individual members in endeavoring to force this company from your city, neither do we make any threats as to our future course. We feel that the firm of Buckner & Co. are withholding money they collected, belonging to this company, and that the criminal laws provide for their action. We are advised that the board collected a fine from Mercer & Mercer for taking the agency of this company. We know that the board, while in session, refused to meet our representative. We know that fines were imposed against this company without notice, trial, or hearing. We are advised that such unpaid fines have been rescinded as to the company. We are

advised that the collected fine against our agents has not been remitted. We know that our agency supplies were sent, by the official action of the board, to this office, without our consent, and that we were put to the expense of paying the express charges both ways on the package, as well as the additional expense of sending a representative to Hopkinsville to replace the package in the office that your board forcibly caused to surrender them. We have demanded for these outrages a full and complete apology; a remission and repayment of all fines collected or imposed for any act of this company or its representatives; the payment by Buckner & Co. of \$22.50, the amount they robbed from company funds in their possession, on a false claim for commissions on business that they did not transact; and an unanimous invitation to join the board. Until the foregoing demands have been fully complied with, we positively decline to contribute one cent, or allow the name of the company on its roll of membership.

Yours, truly, R. H. Garrigue, Manager."

Upon the trial, verdict and judgment were rendered in favor of Buckner & Co.

1. A preliminary question is made by the defendant in error as to the allowance of the bill of exceptions. It appears that a judgment of \$3,500 in favor of Buckner & Co. was rendered on January 28, 1898. On the same day, plaintiff in error filed a motion for a new trial, and in reference thereto the following order was made by the court:

"This day came again the parties, and defendant filed a motion for a new trial herein; and it is ordered that execution do not issue upon the judgment in this case until the further order of this court, and, on motion of defendant, it is allowed sixty days in which to tender and file a bill of exceptions herein."

The motion for a new trial was not disposed of until the following June term of the court. On the 9th day of June the court, having considered the motion of the defendant for a new trial, found the verdict of the jury in favor of the plaintiffs to be excessive, and ordered that a new trial be granted unless the plaintiffs, by a proper writing, remit \$1,500 thereof. On the same day defendant was allowed 60 days in which to file a bill of exceptions, to which order plaintiffs excepted. It is urged that, in the absence of any rule to the contrary, a bill of exceptions must be filed during the term at which the trial was had. The defendant, having failed to file the bill within the time limited, is not, it is claimed, within the rule which permits the filing thereof where the motion for a new trial has been continued to a subsequent term. The general rule as to the allowance of bills of exceptions is thus stated by Mr. Justice Gray (*Bank v. Eldred*, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162):

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or to amend a bill of exceptions already allowed and filed, is at an end. *U. S. v. Breitling*, 20 How. 252, 15 L. Ed. 900; *Muller v. Ehlers*, 91 U. S. 249, 23 L. Ed. 319; *Jones v. Machine Co.*, 131 U. S. Append. 150, 24 L. Ed. 925; *Hunnicut v. Pet- yon*, 102 U. S. 333, 26 L. Ed. 113; *Davis v. Patrick*, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090; *Chateaugay Ore & Iron Co.*, Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508."

In cases where a motion for a new trial is regularly filed, and not acted upon, there seems to be no necessity for a presentation of the bill, as the granting of the motion will render it entirely unnecessary so to do. It has been the practice in this circuit to permit the bill to be filed after the motion has been overruled, although such action be had at a subsequent term of court, and we see no reason to depart from this practice in this case. When the motion for a new trial was filed, it was ordered that defendant be granted "sixty days in which to tender and file a bill of exceptions," but the purpose of the court to reserve control of the judgment until the motion for a new trial should be acted upon is shown in the order withholding execution until further order of the court. At the June term, when the court passed upon the motion, a further time of 60 days was granted to the plaintiff in error within which to file a bill of exceptions. The bill was presented within this time, and we are of the opinion that it was in time, and properly allowed.

2. Did the court err in overruling the demurrer to the amended petition? This pleading sets forth, in substance, that during the year 1895 the plaintiffs were co-partners engaged in carrying on business as agents for various fire insurance companies in Hopkinsville, Ky.; that defendant, the Merchants' Insurance Company of Newark, N. J., was during said year, and prior thereto, an insurance company chartered to transact business in the United States, and to sue and be sued as such corporation; that the home office of said company was at Newark, N. J., with a branch office in Chicago, from which it carried on business in the Southern and Western states, under the control and management of R. H. Garrigue, the duly-authorized manager of the company. The plaintiffs aver that in March, 1895, they were the duly-appointed agents of said company, with authority to solicit and write policies of fire insurance in the city of Hopkinsville, Ky., and vicinity. Plaintiffs allege the promise of the defendant that they were to be the sole agents of the company in said locality; that said company would not write policies of insurance in their territory, except through the agency of the plaintiffs; that it would not cut rates in said locality, but that rates should be fixed and uniform; plaintiffs to receive a commission of 15 per cent. on all business done for defendant in said locality or territory. It is further stated that many other fire insurance companies were doing business in the city of Hopkinsville; that the agents of said companies, including plaintiffs, were organized, with the knowledge and consent of their respective companies, as a local board, to regulate and render uniform the business of fire insurance in said locality, with certain rules and regulations for the transaction of business; that one Jack S. Moore was secretary of said local board. They further state that in the year 1895, while plaintiffs were acting as the authorized agents of defendant in the city of Hopkinsville, Ky., said company, without plaintiffs' knowledge or consent, wrote and delivered a policy on the Hotel Latham, in said city, at a less rate than the regular charges the plaintiffs were authorized to charge for said insurance, and less than the regular rates charged, which was in bad faith, and viola-

tion of the promise and assurance of the defendant to the plaintiffs, and of the custom of insurance agents in that locality; that some time thereafter the plaintiffs ascertained said facts, whereupon they insisted upon said defendant's paying them the commission, and notified the company that they would claim \$22.50, the regular commission on the premium which should have been paid on said policy, which commission defendant refused to allow, wherefore plaintiffs, in settlement with defendant, retained \$22.50 from defendant's money, which retention was the result of considerable correspondence between plaintiffs and defendant, resulting in no agreement as to plaintiffs' right to retain said money; that said local board of underwriters imposed certain "disabilities" upon defendant on account of the cutting of rates in that locality without the knowledge of said agents, and without allowing its agents the regular commission on said business; that said board also imposed a fine upon Mercer & Mercer for taking the agency after the action of the company had been condemned; that R. H. Garrigue, defendant's authorized and acting manager, in the regular course of his official business wrote a letter, dated Chicago, Ill., June 6, 1896, directed to Jack S. Moore, secretary, which letter was mailed to him, and duly received by him, at Hopkinsville, Ky.; that said letter contained remonstrances against said local board, and set forth various grievances against said board; that said letter contained the following false, malicious, and libelous statements of and concerning the plaintiffs, namely, "We feel that the firm of Buckner & Co. are withholding money collected for and belonging to this company, and that the criminal laws provide for their action,"—thereby meaning falsely and maliciously to charge the plaintiffs with a violation of the criminal laws of Kentucky. It is further stated in said letter: "We have demanded for these outrages a full and complete apology; a remission and payment of all fines collected or imposed for any act of this company or its representatives; the payment by Buckner & Co. of \$22.50, the amount they robbed of company funds in their possession, on a false claim for commissions on business they did not transact; and an unanimous invitation to join the board,"—meaning thereby to charge the plaintiffs with the offense of robbing, and with dishonest and criminal conduct. A copy of the letter is attached. Plaintiffs further aver: That they were the successors to Buckner & Hays, former agents of defendant, and assumed all liabilities of said firm, and were entitled to all uncollected fees and commissions due said firm. That prior to said letter plaintiffs were esteemed as good and honest men, and reliable insurance agents. The chief officers of said company, by authority of said company, falsely and maliciously wrote of and published of and concerning plaintiffs the false and libelous statements contained in said letter. Said letter was received by said Moore, and its contents were made known and published by said Moore, as was intended by said defendant, in the city of Hopkinsville, whereby they were greatly mortified and damaged in the sum of \$25,000. Defendant caused proceedings to be entered against plaintiffs for the recovery of said sum of \$22.50, and the court found for plaintiffs. The petition concludes with prayer for judgment.

In the consideration of this assignment of error, it must be remembered that this is an action for libel, not for slander, and that entirely different rules apply to the two classes of actions. It may be admitted to be the rule in slander, where the words are merely spoken, that, to be actionable, in the absence of special damage, the utterances complained of must, in cases like the present, impute to the complainant the commission of a criminal offense. The rule is different in actions for libel. In *State v. Smiley*, 37 Ohio St. 30, Chief Justice Boynton, in discussing the difference between the rules applicable to words spoken, which constitute slander, and written defamation, which constitutes libel, cites the cases and states the general rule upon the subject in the following language:

"In *Watson v. Trask*, 6 Ohio, 531, it was said that 'a libel in reference to individual injury may be defined to be a false and malicious publication against an individual, either in print or writing, or by pictures, with intent to injure his reputation, and to expose him to public hatred, contempt, or ridicule.' Words of ridicule only, or of contempt, which merely tend to lessen a man in public esteem or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form, of the increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the public peace. In *Tappan v. Wilson*, 7 Ohio, 190, it was further said that if the 'tendency of the publication,' being malicious, 'is to degrade and lessen the standing' of the person concerning whom the publication is made, it is a libel. The general current of authority is to the same effect; holding that although the matter published might not, without averment and proof of special damage, be actionable if only spoken, yet, if published, and it be of a character which, if believed, would naturally tend to expose the person concerning whom the same was published to public hatred, contempt, or ridicule, or deprive him of the benefits of public confidence or social intercourse, such publication is a libel, and an action would lie therefor, although no special damage is alleged. *Tillson v. Robbins*, 68 Me. 295; *Dexter v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,867; *Smart v. Blanchard*, 42 N. H. 151; *Adams v. Lawson*, 17 Grat. 250; *McGregor v. Thwaites*, 4 Dowl. & R. 695; *Thorley v. Kerry*, 4 Taunt. 355; *Villers v. Monsley*, 2 Wils. 403; *Starkie, Sland. & L.* § 153; *Rosc. N. P. Ev.* 791; 2 Whart. Cr. Law, § 1598. In *Cropp v. Tilney*, 3 Salk. 226. Lord Holt said: 'Scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible or ridiculous.' In *Shipley v. Todhunter*, 7 Car. & P. 680, Tindal, C. J., said that 'any written communication that bears on the face of it any charge, or which tends to villify another, is a libel.' In *Woodward v. Dowsing*, 2 Man. & R. 74, it was said that 'any written publication which tends to disgrace is actionable.' And in *Dexter v. Spear*, supra, it was said by Judge Story that 'any publication, the tendency of which is to degrade or injure another person, or bring him into hatred, ridicule, or contempt, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society, is a libel.' In *Bell v. Stone*, 1 Bos. & P. 331, the action was publishing of the plaintiff that he was a 'villain.' The plaintiff failing to prove a special damage, the court directed a verdict for the defendant. Counsel, however, contending that, inasmuch as the charge was in writing, it was actionable without proof of special damage, the court asked the jury what damages they would give, supposing the plaintiff entitled to recover in point of law. They answered, 'One shilling.' Subsequently a rule was granted on the defendant to show cause why the verdict in his favor should not be set aside, and a verdict entered for the plaintiff; and upon the hearing the court expressed themselves 'clearly of the opinion that any words written or published, throwing contumely on the party, were actionable,' and ordered the rule to be made absolute. These authorities abundantly show that in many instances a marked distinction exists between words spoken and the same words written and published; and that words written or printed, and published, imputing to another

any act, the tendency of which is to disgrace him, or to deprive him of the confidence and good will of society, or lessen its esteem for him, are actionable per se, and consequently lay the foundation for an indictment under the statute."

Applying these principles to the language used in the letter under consideration, we find the charge that plaintiffs are withholding money, collected by them, belonging to the company, and that the criminal laws provide for their action; and the company, by its agent, says:

"We have demanded payment by Buckner & Co. [plaintiffs] of \$22.50, the amount they robbed of company funds on a false claim for commission on business which they did not transact."

It seems clear that this language is sufficient to constitute a libel. It may be true that a crime is not charged in technical language, or with sufficient certainty to support an indictment. It is, however, directly charged that the plaintiffs have been guilty of conduct for which the criminal laws provide, and are withholding money, collected by them, belonging to the insurance company, under a false claim for commissions on business they did not transact. Here is an expression of the writer's opinion that the plaintiffs' conduct came within the reach of the criminal law, and that they wrongfully appropriated moneys intrusted to their care, under the pretense of a claim for commissions upon business which they never transacted. These charges certainly reflect in the most serious manner upon the integrity, character, and business standing of the plaintiffs. Such conduct would show them wholly unfit to be intrusted with any business, and meriting the aversion of honorable men. Men guilty of such conduct would be unworthy of the confidence and good will of society. The circulation of charges of so serious a nature tends to destroy that reputation and confidence to which all honorable men are entitled in the community. Such dishonest conduct, though technically not criminal, would lessen the esteem of society, and tend to deprive plaintiffs of their social standing. The petition contains all that is necessary to the statement of a cause of action, and, for the reasons stated, the words charged are libelous per se, from which the jury might imply malice, and are actionable without averment of special damage. The other averments are sufficient to warrant the overruling of the demurrer, and there was no error in the action of the court in that behalf.

3. The court below sustained the demurrer to the 9th defense, which is as follows:

"Ninth. Defendant, further answering, states that the said letter was written by said Garrigue to said Jack S. Moore as secretary of said local board at Hopkinsville, and that said Jack S. Moore and each and every member of said board were all familiar with the facts referred to in said letter, and that said Jack S. Moore and each and every member of said board knew that said letter did not charge a violation of the criminal laws of the state of Kentucky, or the crime of robbery, or any dishonest or criminal conduct, and did not understand said letter to charge the plaintiffs with being guilty of the crime of robbery or any crime whatever, or any dishonest or criminal conduct; and said Moore and each and every member of said board knew that said letter referred to the transactions hereinbefore set forth, and so understood said letter. Defendant further states that said letter was written to said Moore as secretary of

said local board, and that said local board consisted of the agents of the various insurance companies doing business in the city of Hopkinsville, Kentucky, and its vicinity, and that said letter was written in regard to transactions upon which the board had acted and was acting, and which directly concerned the defendant, and in which the defendant was directly interested, and that said letter was a privileged communication, and that it was written without any malice or ill will on the part of the defendant or any of its agents, and in an honest belief that the statements therein contained were true, and without any motive or intention to injure the plaintiffs."

And the amendment relating thereto is:

"And for amendment, in addition to the allegations contained in the ninth paragraph, defendant says that said local board at Hopkinsville was maintained and supported by the various insurance companies doing business in that city, and that defendant contributed and paid its proportion of all the sums necessary to support and maintain said board. Defendant says that said local board claimed and exercised the authority and power to fix and establish the rates of insurance and the premiums to be charged by the defendant and other companies for business done in said city; to superintend and oversee the local recording agent of the defendant as to the amount of premiums he should receive for defendant; to furnish to defendant's said agent the tariff rates for all business that might be secured by defendant in said Hopkinsville agency. Defendant says that said board claimed and exercised the further right to fine or expel the local agents of the companies belonging thereto, and deprive them of the privileges of membership in said organization, and further to declare that no member should do business with any company refusing to adhere to its rules; and defendant says that the membership in said board is absolutely necessary and essential to the proper conduct of its business, and that it could not transact the same without the privileges of membership in said organization. Defendant further says that said local board is a subordinate branch of an organization known as the Kentucky & Tennessee Board of Fire Underwriters, and is under the control and supervision of the Kentucky & Tennessee Board, and that it protested against said local board's treatment of this defendant, and demanded a rescission of the sentence imposed by said local board upon defendant."

This answer is twofold in its character. In the first place, it alleges that those to whom the letter was addressed (the secretary and local board) fully understood the alleged libelous statements, and knew the nature and character thereof, and that the said letter did not charge any violation of the criminal laws of the state of Kentucky, or any crime of robbery, or any dishonest or criminal conduct, and they did not understand the letter to charge the plaintiffs with being guilty of the crime of robbery, or any crime whatever, or any dishonest or criminal conduct, and said Moore and each and every member of said board knew that said letter referred to the transaction set out in the answer. In support of this ground of defense, authorities are cited holding, in effect, that where persons, in whose hearing slanderous words are uttered, understand the words to refer to innocent transactions, or those not criminal, no action for slander can be maintained. Examples of this class of cases are found in *Hayes v. Ball*, 72 N. Y. 418, and *Carmichael v. Shiel*, 21 Ind. 66. In the former case the words imputed were, "When he [the plaintiff] was highway commissioner, he stole \$1,000 from the town." Defendant attempted to show that, when he held the office of highway commissioner, he failed to procure vouchers for \$1,000 which came into his hands. Chief Justice Church, in speaking of the ruling of the court below, said:

"If it had appeared that when the words were spoken they were accompanied with such an explanation as would make it clear that they referred to an innocent transaction, or to a transaction which, in law, could not have constituted larceny, the motion for a nonsuit should have been granted. So if it had appeared that all of the persons who were present understood from the facts which they knew, or had otherwise learned, that the words referred to a transaction which could not, in law, constitute larceny, the same result would follow."

In the Indiana case, plaintiff sued to recover from defendant for language charging her with stealing. Plaintiff was in the service of defendant, who was a landlord in a hotel in Indianapolis, and while in such service she broke dishes belonging to the house. The landlord deducted the value of the dishes from her wages. The plaintiff then carried away the fragments of the dishes, openly claiming them as her property. Defendant then went before the justice, and instituted proceedings against her. Upon the trial the plaintiff was discharged. Immediately after the discharge, and while the parties were still in the court room, defendant advanced towards plaintiff and said, "Now, I want you to bring back the dishes you stole from my house." The court held that, these words being spoken in the presence of those who heard the evidence of the late trial, and who knew that the transaction referred to was not criminal, but innocent, or a trespass, at most, the action for slander could not be maintained. The knowledge of the witnesses was such that no charge of crime was conveyed to them in the utterance of the defendant. These and similar cases are cited in support of the contention of the plaintiff in error. We are at a loss to perceive their application to the facts in this case. In cases of libel, where the writing is put into circulation, it may, as a natural and probable consequence of publication, reach persons for whom it was not intended. The petition in this case charges that said letter was received by said Moore, and its contents published and made known by him, as was intended by said defendant, in the city of Hopkinsville, where the plaintiffs reside. This allegation is not denied in this ground of defense. No other allegation of the answer is incorporated, by reference, into this ground of defense; but, looking at the eleventh paragraph of the answer, which covers this matter of publication by defendant, we find it stated:

"Eleventh. States that the only publication of said letter by this defendant was the writing and mailing thereof to said Jack S. Moore, and the reading of the same by the said Moore as secretary of the said board, and that said Moore was not authorized to make the contents of said letter known to any one else, and that this defendant is not responsible for any damages which plaintiffs may have sustained by the acts of the said Moore; and denies that said plaintiffs have sustained any damages whatever."

The latter part of this paragraph is mere conclusion, and it may be true that the defendant gave no direct authority to Moore, secretary of the local board, to publish the alleged libel. Still, it would be liable in law for such publication as is the natural consequence of putting the letter in circulation. If the publication by Moore, referred to in this petition, was found by the jury to have been the natural and probable consequence of defendant's publication, then the defendant would be responsible for the same. This rule is rec-

ognized in Townsh. Sland. & L. § 158. In *Miller v. Butler*, 6 Cush. 71, where the suit was brought for circulation of an alleged libelous letter, it is said in the syllabus:

"The responsibility of the writer of a private letter for the publication of a libel contained therein is not limited to the consequences of a communication of it to the person to whom the letter is addressed, but extends to the probable consequences of thus putting it in circulation."

To the same effect is the language of Chief Justice Gilfillan, of the supreme court of Minnesota, in *Zier v. Hofflin*, 33 Minn. 66-68, 21 N. W. 862:

"Now, although one who publishes a libel is not to be held responsible for an independent wrong done by a third person, though connected with the libel, he is responsible for the natural consequences of his own wrong act, although the wrongful act of a third person may concur in bringing about such consequences. If it were a natural consequence of defendant's publication through the newspaper that some evil-disposed person should send a copy of the paper, or the item cut from the paper, to some one whom defendant had not thought of its reaching, he would be liable for it, as the consequences of his own wrong. Townsh. Sland. & L. § 158; *Miller v. Butler*, 6 Cush. 71. It was for the jury to say whether sending the postal card by a third person was a natural consequence of defendant's publication in the newspaper."

It was therefore a question for the jury to determine whether such publications as the plaintiffs might properly prove under the statements of the petition were the natural consequences of sending the letter to Moore, and thus putting it in circulation. We are therefore of the opinion that the court did not err in sustaining the demurrer to this branch of the defense.

There is the further undertaking to plead in this paragraph of the answer that the communication in question was of a privileged character. It is alleged that the letter was written to Moore as secretary of said local board; that said board consisted of the agents of the various insurance companies doing business in Hopkinsville, Ky.; that said letter was written in regard to certain transactions concerning which the board had acted and was acting, and which directly concerned the defendant, in which it was interested, and was written without malice or ill will on the part of the defendant or its agents, and in the belief that the statements were true, without any desire to injure the plaintiffs. It is not claimed that this communication comes within the class known as "absolutely privileged," but that it is, rather, entitled to a qualified privilege. Privileged communications of this character may be said to comprehend all bona fide statements in performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. Townsh. Sland. & L. § 209; *Taft, C. J.*, in *Publishing Co. v. Hallam*, 8 C. C. A. 201, 59 Fed. 540. The question of qualified privilege was discussed in the supreme court of the United States in the case of *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591. Mr. Justice Daniel sums up his conclusions as follows:

"The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto: (1) That every publication, either by writing, printing or pictures, which charges upon or imputes to any person that

which renders him liable to punishment, or which is calculated to make him infamous or odious or ridiculous, is *prima facie* a libel; and implies malice in the author or publisher towards the person to whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining, beyond the proof of the publication itself. Justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. (2) That the description of cases recognized as privileged communications must be understood as exceptions to this rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence as to such cases is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude, then, that malice may be proved, though alleged to have existed in the proceedings before a court or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal may have been the appropriate authority for redressing the grievance presented to it, and that proof of express malice in any written publication, petition, or proceeding addressed to such tribunal will render that publication, petition, or proceeding libelous in its character, and actionable, and will subject the author and publisher thereof to all consequences of libel. And we think that, in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice."

Applying the principles thus stated to the uncontroverted statements of the pleadings, and the statements of the letter which were the basis of this action, it is apparent that the controversy between the insurance company and Buckner & Co. had led the local board to impose certain "disabilities" upon the company, as well as a fine upon the firm of Mercer & Mercer, who had succeeded to the company's agency in Hopkinsville. The letter of the defendant was evidently written in response to a communication from Moore, secretary of the board, advising the company of the action of the Kentucky & Tennessee Board of Underwriters in removing the disabilities imposed by the board, and extending it an invitation to join the board. In response to this invitation, it was the right of the company to decline it, and, in declining, to give its reasons therefor. We do not think it came within the scope of the company's duty, to itself or to the board, to go beyond the proper requirements of an answer to the letter from the local board, to make charges of the character it contains against third persons. It is true that the controversy with Buckner & Co. led up to the correspondence between it and the local board. It had also had correspondence and litigation with Buckner & Co. It was not essential to a statement of its position, or necessary to a presentation of the reasons which actuated it in declining to join the board, to make charges of a most derogatory character against Buckner & Co., who were only indirectly involved in the correspondence. The company had a right to make any statement that was necessary with a view to fair and reasonable self-protection, or in justification of the position it took in relation to the local board. It was not essential to its rights or interests to make charges against the plaintiffs, involv-

ing their character and standing, and to put it into the power of the receiver of the letter to circulate these charges in a community where the plaintiffs lived. As was said by Judge Taft in *Publishing Co. v. Hallam*, cited above:

"The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed."

We have carefully examined the cases cited by counsel for plaintiff in error, and do not find any of them going to the extent which would be required in holding this letter within the class of communications which are considered as privileged. We are of opinion that the circuit court properly overruled the demurrer to the petition, and was right in sustaining the plaintiff's demurrer to the ninth paragraph of the answer. These conclusions make it unnecessary to further consider like questions raised during the trial upon the charge of the court directing the jury to consider the parts of the letter complained of as libelous *per se*, and in refusing to charge that the letter was a privileged communication.

4. There was testimony in the case, admitted over the objections of plaintiff in error, tending to show that the letter was talked about in Hopkinsville, outside of the board, and one witness testified that he heard it discussed a long time before the suit was brought. Another witness stated that copies of the letter were sent to all of the officers of the various insurance companies represented in Hopkinsville, and, when asked if the contents of the letter were generally known in Hopkinsville, said: "Yes. It was a matter of common occurrence for people to speak to me about it on the street. It was generally known." In charging the jury concerning the liability of the defendant for publication of the letter, and as to the measure of damages to be awarded, the learned judge said:

"Now, as to the question of how far the defendant is liable for the subsequent publication of this letter, it seems to have been intended to be read and presented to the local board. This letter was not a privileged communication, nor is there any right in the defendant to use the language that was used in the letter in regard to the plaintiff; but you can properly consider the knowledge, the circumstances under which the letter was read to the board, in considering the question of damages. The communication which was subsequently made to the superior board at Louisville, Ky., by order of the local board, should be considered in the question of damages, because the proof shows that it was the duty of the secretary to thus communicate this letter. And now, on the question of damages, you should also consider the circulation which was given to these libelous words by members of the board or others. But, in thus considering, you should not consider or estimate any damage which might arise to the plaintiff from the letter being circulated by him or communicated by him, or by his direction or by his consent."

Exception was taken to the court's saying that "you should also consider the circulation by others." Applying the charge to the testimony admitted, showing the general circulation of the libelous charges contained in the letter in Hopkinsville, it is apparent that the jury was directed to consider the general circulation by others of the charges in the community where Buckner & Co. resided. We

have already had occasion to consider the extent of the liability incurred in writing and publishing a letter containing libelous charges. A recovery may be had for such publication of the libel as is a natural consequence of putting the letter into circulation. It is a question of fact for the jury to say how far the circulation proven of the charges in question is a natural consequence of the sending of the letter by the manager of the insurance company to the secretary of the local board. The learned judge who presided, as we have seen, directed the jury to consider the circulation of the libelous words by members of the board or others, without requiring the jury to find that such circulation was a natural consequence of the act of sending the letter containing the libelous matter to the secretary. We are of the opinion that this was substantial error. It gave the jury a wrong basis upon which to award damages, which might be quite prejudicial to the plaintiff in error. For error in the charge in this respect, the judgment below is reversed and the case is remanded for a new trial.

FALES v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1899.)

No. 748.

REVIEW ON APPEAL—CASE TRIED TO COURT—SPECIAL FINDINGS OF FACT.

Special findings of fact made by a circuit court in an action tried without a jury, by written stipulation, according to Rev. St. § 649, are conclusive on the circuit court of appeals, where the record does not contain all the evidence, so as to enable that court to determine that they are not supported by any evidence; and in such case the review is limited by section 700 to the rulings of the court in the progress of the trial, duly excepted to, and a determination of the sufficiency of the facts found to support the judgment.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

George W. Radford, for plaintiff in error.

Herbert L. Baker, for defendant in error.

Before TAFT and DAY, Circuit Judges.

DAY, Circuit Judge. This action was brought against the insurance company to recover certain moneys alleged to have been paid to the company, upon two grounds, set forth in the plaintiff's declaration filed in the circuit court. The first is in substance: That the defendant company, on or about the 8th day of May, 1889, solicited and obtained from the plaintiff his written application for two policies of life insurance to be issued upon the life of the plaintiff for the sum of \$25,000 each, the annual premium to be paid on the policies being \$1,230 each, or for the two the sum of \$2,460. The defendant, it is averred, at the time of obtaining the application, as a part thereof, and as a special inducement for obtaining the same, orally agreed that after the policy was issued, and after the expiration of the first year, it would allow the plaintiff a reduction on the annual payment

of said premium on said policies of an amount equal to one-tenth of 1 per cent. of the annual premiums paid on the new insurance written by the defendant in the state of Michigan during the year ending December 31, 1889; and the defendant, at the same time, orally agreed with plaintiff that said one-tenth of 1 per cent. should equal or exceed one-half of said annual premiums of \$2,460 as provided in said policies to be paid as aforesaid, and that, in consequence of said reduction in said premium on said two policies which the plaintiff would have to pay to keep the policies in force, the second and all succeeding premiums should not exceed one-half the premium provided in such policies; and the defendant also agreed with the plaintiff that, in case the policies were issued, it would deliver to the plaintiff, in addition to and separate from the agreement provided in its policies, the written agreement of the defendant, duly executed, containing the special agreements providing for the special reduction on annual premiums as above set forth. That, in consequence of said agreement, plaintiff, at the time of signing said application, to wit, on or about the 8th day of May, 1889, paid in advance to said defendant, at the defendant's request, the sum of \$2,460, being the first annual premium on said policies. That thereafter, on or about the 25th of May, 1889, the plaintiff received from defendant two certain policies of insurance, containing substantially the terms agreed upon named in the application, said policies showing on their face an annual premium of \$2,460, without reduction, but said defendant did not deliver to said plaintiff the special written agreement containing the conditions and agreements agreed upon as aforesaid regarding the second and succeeding annual premiums on said policies, and, because said special agreement was not so delivered to the said plaintiff with said policies, the plaintiff refused to accept said policies, and so notified said defendant, and at the same time requested the delivery of said agreement, and that said defendant refused to deliver said agreement to plaintiff. Because of the refusal to deliver said special agreement, plaintiff has not accepted said policies, and on or about the 9th day of July, 1889, returned the policies to the defendant, and thereupon demanded of the defendant payment of the sum of \$2,460, which sum the defendant refused to pay. As a further ground of recovery, it is set up that, because of said failure of defendant to deliver said agreement as above set forth, this plaintiff did, on or about the 9th day of July, 1889, return said policies to said defendant, and demanded repayment of said sum of \$2,460, and at the same time giving notice that, if this sum of money was not repaid to plaintiff on or before July 15, 1889, this plaintiff would bring suit. That thereafter, on or about the said 15th day of July, 1889, the defendant requested plaintiff to delay the bringing of said suit until the 25th day of July, 1889, and that in consideration of the granting of said delay by plaintiff the defendant would pay, or cause to be paid, to plaintiff, on or before July 25, 1889, the sum of \$2,460; and that plaintiff agreed not to bring suit before July 25, 1889, and plaintiff did not bring suit before said time. Although the 25th day of July has long since passed, the defendant has failed to pay said sum, though often requested so to do. The insurance company pleaded the gen-

eral issue, and the case went to trial without the intervention of a jury, the same being waived by written stipulation of record, and the issues were submitted to the court. The court found for the defendant, and entered judgment accordingly. The court also found its conclusions of law and fact, as requested by the parties.

Section 649 of the Revised Statutes provides that a jury may be waived, and the issues of fact tried by the court upon written stipulation. Section 700, *Id.*, provides for the reviewing of the judgment so rendered. This section is as follows:

"When an issue of fact in any civil cause in a circuit court is tried and determined without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon an appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

An examination of the findings of the court discloses that the issues were found against the plaintiff on both of his alleged causes of action. The court found that the agreement was not as claimed in the first ground of complaint, but that at the time the insurance policies were delivered to the plaintiff, which the court finds the plaintiff accepted, the separate written agreement, in accordance with the company's contract through its representative, was delivered, agreeing to allow plaintiff, in the reduction of the second and succeeding annual premiums, an amount equal to one-tenth of 1 per cent. of the annual premiums paid on the new insurance written by the company in the state of Michigan for the year ending December 31, 1889. The court finds that this written agreement, and not the agreement set forth in the declaration, was in accordance with the preceding oral agreement of the parties, and that it gave to the plaintiff all the rights that had been stipulated for, and the court finds:

"I find that the plaintiff intended to and did accept the said policies unconditionally on the 25th day of May, 1889. And I find, as a matter of law, that the plaintiff thereupon became insured under said policies, and the defendant became liable to plaintiff for the amount of the insurance in case of his death during the continuance of the policies; that the plaintiff, having thus received the benefit of a part of the consideration for which the premiums were paid, could not afterwards recover back the premiums from the defendant. In view of the foregoing findings, it becomes unnecessary for the decision of this case to consider the questions relating to the separate agreement by which an allowance was to be made to the plaintiff in reduction of his annual premiums after the first year. Whether that agreement was what the plaintiff claims it to have been is immaterial in this case; for, in either event, it could not enable the plaintiff to recover the premiums paid, which is all that is sought in this case. The terms of that agreement could become material only in a suit to recover damages for breach of the agreement after the defendant had failed to perform it. At the time of the commencement of this suit there had been no breach of that agreement, and, in fact, there could be no such breach until after the expiration of the first year of insurance, which would be several months after the commencement of this suit. There is now no pretense or claim that the plaintiff, after the first year of insurance, sought to avail himself of the special agreement, or that the defendant was guilty of any breach of it."

The court makes further special findings as to certain details connected with this first ground of complaint, not necessary to be herein

repeated, as the findings cited are conclusive upon the questions of fact as to the right of plaintiff to recover on this cause of action. With regard to plaintiff's claim on the second count, the court finds, among other things, that the defendant had not promised to return the premiums as claimed by plaintiff, and that the agent Perkins, who it was claimed made such an agreement, had no authority to enter into such an agreement, and that said Perkins did not make such an agreement on the part of the company to return the premiums. There was no claim, so far as disclosed in the record, that the agreement was made by any one other than Perkins, and the court conclusively found that Perkins not only had no authority to make the agreement, but in fact did not make it. These findings of fact, under the practice in this court, we deem conclusive. The record does not undertake to set forth all of the testimony, so that we could not undertake to investigate any of the special findings of fact with a view of determining whether there was an entire absence of testimony to support them. The findings of fact in this case, in accordance with the repeated decisions of this court, being conclusive in the reviewing court, there can be no doubt as to the correctness of the judgment, which must follow, as matter of law, for defendant. The rule controlling this case has been stated in *Insurance Co. v. Hamilton*, 11 C. C. A. 42, 63 Fed. 93; *Humphreys v. Bank*, 21 C. C. A. 538, 75 Fed. 855; and *American Credit Indemnity Co. v. Athens Woolen Mills*, 34 C. C. A. 161, 92 Fed. 581. In *Humphreys v. Bank*, *supra*, Judge Taft, who delivered the opinion of this court, said:

"When a party in the circuit court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and, if he wishes to except to the conclusions of law drawn by the court from the facts found, he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits. A general finding in favor of the party is treated as a general verdict. A general verdict cannot be excepted to on the ground that there was no evidence to sustain it. Such a question must be raised by a request to the court to direct a verdict on the ground of the insufficiency of the evidence. If the views which the court takes of the law are deemed to be prejudicial to a party, he is required to except to the charge at the time that it is delivered, indicating those parts of it to which he objects. Where a cause is submitted to the court, however, the court cannot, in the nature of things, charge itself, and therefore no opportunity is presented to the party objecting to the views which the court entertains of the law to take his exceptions, unless he procures a special finding of fact to be made and special conclusions of law to be drawn therefrom. We regret that, in a number of cases brought before us, the submission of a law case to a court upon stipulation has proved a trap to counsel in this court, and we say what we have with the hope that it may direct the attention of those who shall bring cases here in the future to the fact that great care must be taken in the preparation of a case for error proceedings when no jury intervenes."

We are therefore limited to an examination of the alleged assignments of error upon the rulings of the court in the progress of the trial, as shown in the bill of exceptions. *Humphreys v. Bank*, *supra*.

An examination of these assignments of error shows that, with one exception, they relate to the admission or rejection of testimony concerning the alleged contract with Perkins for the return of the amount of the premiums paid in consideration of the agreement to delay suit. As the circuit court found, as a matter of fact, that Perkins had no authority to make such an agreement, it becomes immaterial to inquire further as to the correctness of the rulings of the court upon these matters of testimony, relating, as they do, to the issue of whether the contract was made as alleged in the second count of the declaration, which the court finds Perkins had no authority from the company to make. The other assignment of error as to admissibility of testimony is as to the cross-examination of the plaintiff by a question which was put to him, and which, so far as the record discloses, he did not answer, although the court ruled that he should. We find no error in the record. The judgment of the court below will be affirmed, with costs.

GRADY et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 20, 1899.)

No. 1,227.

POSTMASTERS—CONDITIONS OF BOND—MONEY-ORDER FUNDS.

The fact that a postmaster's bond does not contain the additional condition required by Rev. St. § 3834, relating to money-order business, does not relieve him or his sureties from liability for money-order funds misappropriated by him. Such additional condition is cumulative, and the money-order business is a trust imposed on the postmaster by a "regulation of the department," within both the spirit and letter of the general condition, which is for the faithful discharge of all such duties and trusts.

In Error to the United States Court of Appeals in the Indian Territory.

William F. Weeks, one of the plaintiffs in error, executed to the United States his bond as postmaster at Hartshorne, Ind. T., with John M. Grady and James F. Freeney, the other plaintiffs in error, as his sureties. The condition of the bond was as follows: "Now, the conditions of this obligation are such that, if the said William F. Weeks shall faithfully discharge all the duties and trusts imposed on him, either by law or the rules and regulations of the post-office department of the United States, then the above obligation shall be void; otherwise, of force." Weeks, as postmaster, received moneys which he refused to pay over or account for. Thereupon this action was brought on his bond against him and his sureties to recover the same. The defense set up in the answer was that the money embezzled by the postmaster was money-order funds, and that the bond which the defendants executed did not cover or include money-order funds, but only other postal funds. The lower court sustained a demurrer to the answer, and, the defendants declining to plead further, final judgment was rendered against them in favor of the United States on the bond, from which judgment the defendants appealed to the United States court of appeals in the Indian Territory. That court affirmed the judgment of the lower court, and thereupon the defendants sued out this writ of error.

Charles B. Stuart, Yancey Lewis, and J. H. Gordon, for plaintiffs in error.

Edward A. Rozier, U. S. Atty.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Section 3834 of the Revised Statutes of the United States provides:

"Every postmaster, before entering upon the duties of his office, shall give bond, with good and approved security, and in such penalty as the postmaster-general shall deem sufficient, conditioned for the faithful discharge of all duties and trusts imposed on him either by law or the rules and regulations of the department; and where an office is designated as a money-order office, the bond of the postmaster shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business."

The contention of the plaintiffs in error is that, as the bond does not contain the condition "for the faithful performance of all duties and obligations in connection with the money-order business," as required by section 3834, the sureties cannot be held liable for any misappropriation of money-order funds. The contention is not sound. The duty to account for the money-order funds is included in the general condition of the bond to "faithfully discharge all the duties and trusts imposed on him either by law or the rules and regulations of the post-office department." The requirement of the statute that, where an office is designated as a money-order office, the bond shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business, is merely cumulative, and a repetition, in legal effect, of the general condition of the bond. A postmaster who embezzles money-order funds which come into his hands in the regular course of business as postmaster does not "faithfully discharge all the duties and trusts imposed on him" as postmaster, and is guilty of a breach of that condition of his bond. In *Mayor, etc., v. Goldman*, 125 N. Y. 398, 26 N. E. 456, the statute required the conditions of the bond to be "for the faithful performance of the duties of his office, and the payment over of all taxes collected by him." The latter condition, to pay "over all the taxes collected by him," was omitted from the bond, but the court held "that the specific duty is included in the general duty, and the double condition is merely cumulative," and enforced the bond against a surety. While the supreme court in *Farrar v. U. S.*, 5 Pet. 373, 8 L. Ed. 159, declined to express an opinion upon this precise question, the court did say: "The court feel no difficulty in maintaining that, where the conditions are cumulative, the omission of one condition cannot invalidate the bond so far as the other operates to bind the party." Moreover, the condition of the bond in this case is that the postmaster "shall faithfully discharge all the duties and trusts imposed on him either by law or the rules and regulations of the post-office department of the United States." Under the rules and regulations of the post-office department, one of the duties of a postmaster whose office has been designated as a money-order office is to pay over to the United States all moneys received for money orders. Postal regulations are promulgated by the postmaster general under authority of an act of congress, and have the force of law, of which the courts must take judicial notice. *Caha v. U. S.*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; *Kirby v. Lewis* (C. C.) 39 Fed. 66; *In re Kollock*, 165 U. S. 533, 17 Sup. Ct. 444, 41 L. Ed. 813; *U. S. v. Eaton*,

144 U. S. 688, 12 Sup. Ct. 764, 36 L. Ed. 591; *Wilkins v. U. S.* (C. C. A.) 96 Fed. 837. Section 1402 of the postal laws and regulations provides:

"The money-order accounts must be kept separately from all other accounts and must be adjusted at the close of each day's business in order that the balance of money-order funds on hand may be accurately ascertained. Sums of money-order funds of \$50.00 or more, in excess of the amount of the unpaid advices on hand less than two weeks at a money-order office, must be remitted daily to the designated money-order post office of the first class, where the postmaster shall have been instructed to make his deposits."

As the bond specially provides that the principal shall comply with all the duties and trusts imposed on him either by law or the rules and regulations of the post-office department, the liability of the sureties is not only within the spirit, but the letter, of the bond. In any event, as said by this court in *Carnegie, Phipps & Co. v. Hulbert*, 36 U. S. App. 81, 16 C. C. A. 498, 70 Fed. 209:

"It is well settled that a bond given in pursuance of some requirement of law may be valid and binding on the parties, although not made with the formalities or executed in the mode provided by the statute under which it purports to have been given. This rule rests on the principle that, although the instrument may not conform to the special provision of the statute or regulations with reference to which the parties executed it, nevertheless it is a contract voluntarily entered into upon a sufficient consideration, for a purpose not contrary to law, and therefore it is obligatory upon the parties to it in like manner as any other contract or agreement is held valid at common law. *Bank v. Smith*, 5 Allen, 415; *U. S. v. Bradley*, 10 Pet. 357, 9 L. Ed. 448; *U. S. v. Linn*, 15 Pet. 311, 10 L. Ed. 742; *U. S. v. Hodson*, 10 Wall. 395, 19 L. Ed. 937; *Sheppard v. Collins*, 12 Iowa, 570. The bond in suit possesses all the requisites of a good common-law bond. It was voluntarily given upon a sufficient consideration for a lawful purpose, and is as obligatory on the makers as if it had conformed technically with the requirements of the act."

The judgments of the United States court of appeals in the Indian Territory and of the United States court for the Central district of the Indian Territory are affirmed.

HOLMES v. PHENIX INS. CO. OF BROOKLYN, N. Y.

(Circuit Court of Appeals, Eighth Circuit. November 20, 1899.)

No. 1,236.

1. INSURANCE—CONSTRUCTION OF POLICY.

In a policy of insurance against "loss or damage by wind storms, cyclones, or tornadoes," containing a provision that the company "will not be liable for any loss or damage that may occur from hail or lightning, directly or indirectly, or by the blowing down of chimneys, loose clapboards, weather vanes and shingles, unless other damage occur," the words, "unless other damage occur," apply only to the last member of the sentence, relating to minor damage by wind, and the company is not liable, in any event, for loss or damage occurring from hail or lightning.

2. CONTRACTS—RULES OF CONSTRUCTION—PUNCTUATION.

The construction of a written contract is determined by the words used, and their relation to each other, and not by the punctuation.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Sanford B. Ladd (John C. Gage and Charles E. Small, on the brief), for plaintiff in error.

M. A. Fyke, Ed. E. Yates, C. V. Fyke, and E. L. Snider, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The Phenix Insurance Company of Brooklyn, N. Y., insured "James T. Holmes against loss or damage by wind storms, cyclones, or tornadoes" to the building described in the policy. The policy contains this provision: "This company will not be liable for any loss or damage that may occur from hail or lightning, directly or indirectly, or by the blowing down of chimneys, loose clapboards, weather vanes and shingles, unless other damage occur." The building insured was damaged by a wind and hail storm, the chief damage occurring from the hail. The insured brought this action against the insurance company to recover for the damage done to the building by the hail as well as by the wind. The lower court instructed the jury that "all damage done to this building which was the result of the injury done by hail is not recoverable in this action for the reason that the policies exempt the company from damage or loss from hail." The giving of this instruction was duly excepted to by the plaintiff, and is the only error assigned.

The contention of the learned counsel for the plaintiff in error is that, when it was shown that damage was done to the building by the wind, the company was also liable for the damage done by the hail; that the words in the clause of the policy last quoted, "unless other damage occur," are not restricted to the last member of the sentence, namely, to damage done by the wind other than that done "to chimneys, loose clapboards, weather vanes and shingles," but that those words relate back to the first member of the sentence, and include damage done by "hail and lightning." The clause will not admit of any such construction. The words, "unless other damage occur," are manifestly restricted to the last member of the sentence, and refer to damage occurring from the thing insured against, namely, "wind storms," and are operative when the wind has damaged the building over and above "the blowing down of chimneys," etc. The obvious meaning of these words is precisely the same as if the clause read, "unless other damage occur" *from wind*. The last two words, which we have italicized, are plainly implied, and what is implied in a contract is as much a part of it as what is expressed. When the meaning of a statute or contract is perfectly plain and unambiguous, any ratiocination to make it plainer simply serves to make that which was before plain obscure.

But it is said that in the policy the two members of this clause are divided by a comma only, and stress is laid upon this fact. But in a contract the words, and not the punctuation, are the controlling guide in its construction. Punctuation is no part of the English language. The supreme court say that it "is a most fallible guide by which to interpret a writing." *Ewing's Lessee v. Burnet*, 11 Pet. 41, 54, 9 L. Ed. 624. The Century Dictionary tells us, what is common knowledge, that "there is still much uncertainty and arbitrariness in

punctuation." It is always subordinate to the text, and is never allowed to control its meaning. The court will take the contract by its four corners, and determine its meaning from its language, and, having ascertained from the arrangement of its words what its meaning is, will construe it accordingly, without regard to the punctuation marks, or the want of them. The sense of a contract is gathered from its words and their relation to each other, and, after that has been done, punctuation may be used to more readily point out the division in the sentences and parts of sentences. But the words control the punctuation marks, and not the punctuation marks the words. If there was not a punctuation mark in this whole clause, its meaning would be plain, and, whether a comma or a semicolon is placed between the two members of the sentence, the two members are there, separate and distinct, as a result of the obvious meaning of the words and their arrangement. The comma and semicolon are both used for the same purpose, namely, to divide sentences and parts of sentences, the only difference being that the semicolon makes the division a little more pronounced than the comma; but at the last it is the sense of the words, taken together, that dictates where the punctuation marks are to be placed, and what they shall be.

Another contention of the plaintiff in error is that the insertion of the provision regarding hail is tantamount to a declaration on the part of the company that, without it, the policy would have bound the company to pay for damage done by hail. There is no ambiguity in either clause, and no conflict between them. The insurance clause plainly states what it insures against, namely, "wind storms, cyclones, and tornadoes,"—not hail or hail storms. The two clauses are cumulative, but in no sense inconsistent or conflicting.

The rule for interpretation and construction of policies of insurance is pressed upon our attention to the effect that:

"If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company." *Thompson v. Insurance Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1023, 34 L. Ed. 413.

Many other decisions of the supreme court of the United States and other courts, to the same effect, are cited. We recognize in the fullest manner the binding obligation of these settled canons of construction. But when, as in the case at bar, there is no ambiguity in the policy, and no inconsistent or conflicting provisions, and nothing requiring construction or interpretation, there is no room for their application. The judgment of the circuit court is affirmed.

CITY OF CLEVELAND v. BIGELOW et al.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 743.

1. EJECTMENT—TITLE TO SUPPORT ACTION—RULE OF FEDERAL COURTS.

It is the settled law of the federal courts that a plaintiff in ejectment must show a good legal title in himself, and must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary.

2. BOUNDARY OF CITY LOT — DISCREPANCY BETWEEN PLAT AND MINUTES OF SURVEY.

A plat of a city, as originally laid out, which was recorded, and by reference to which conveyances were made, showed that a particular lot at the intersection of two streets was not rectangular, but that the exterior corner had been taken off, and added to the width of one of the streets. The minutes of the original survey contained a statement of the width of the street, without showing that it was not of uniform width throughout, as in fact it was, as shown on the plat, except at this particular corner, where it terminated. *Held*, that the plat and minutes were not inconsistent, but that, even if contradictory, the plat would control as to the boundary of the lot, where it was the settled policy of the state, as shown by its statutes, to require the recording of plats of cities and towns.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

M. G. Norton and Ford, Boyd & Crowl, for plaintiff in error.
Noble, Pinney & Willard, for defendants in error.

Before TAFT, LURTON, and DAY, Circuit Judges.

DAY, Circuit Judge. This suit, having been removed from the state court, was tried in the circuit court for the Northern district of Ohio, to recover possession of certain real estate in the city of Cleveland. The petition is an ordinary one in ejectment for the recovery of real estate, and describes the premises as being "all that part of original lot 97 in the plat of the village of Cleveland (now the city of Cleveland) lying southwesterly of a line commencing upon the southerly line of Huron street, at a post standing sixteen rods and thirteen feet westerly from the intersection of the westerly line of Miami street with the southerly line of said Huron street, and drawn thence northwesterly direct to a point on the easterly line of Ontario street, distant twenty-five rods four feet southerly from the northwest corner of said original lot 97." The city of Cleveland interposed a general denial of the allegations of the petition, and set up that the land described was, on April 9, 1831, deeded by one Horace Perry to plaintiff in error for the use of a road or highway; that said deed had been duly recorded, and said city had accepted the grant, and continuously owned and kept said premises. To the answer of the city a reply was filed admitting that the premises in question had been deeded at the time claimed in the petition by said Horace Perry to the trustees of the city of Cleveland to be used as a road or highway, but denying that the city had held, kept, or used said premises for said purpose. John W. Wardwell, as receiver of the Cleveland, Canton & Southern Railroad Company, was originally a party to the suit, but the issues between the plaintiffs and said Wardwell were determined by a consent judgment, and the case went to trial to a jury as to the issues joined between the plaintiffs and the city of Cleveland. At the trial the plaintiffs abandoned all claim to a portion of the property described in the petition, and claimed a legal title and right of possession in a part of the premises, for which they recovered a verdict and judgment. From the testimony and the admissions of the pleadings, it appears that both parties claimed title under Horace Perry, who, up to the time of the conveyance to the city

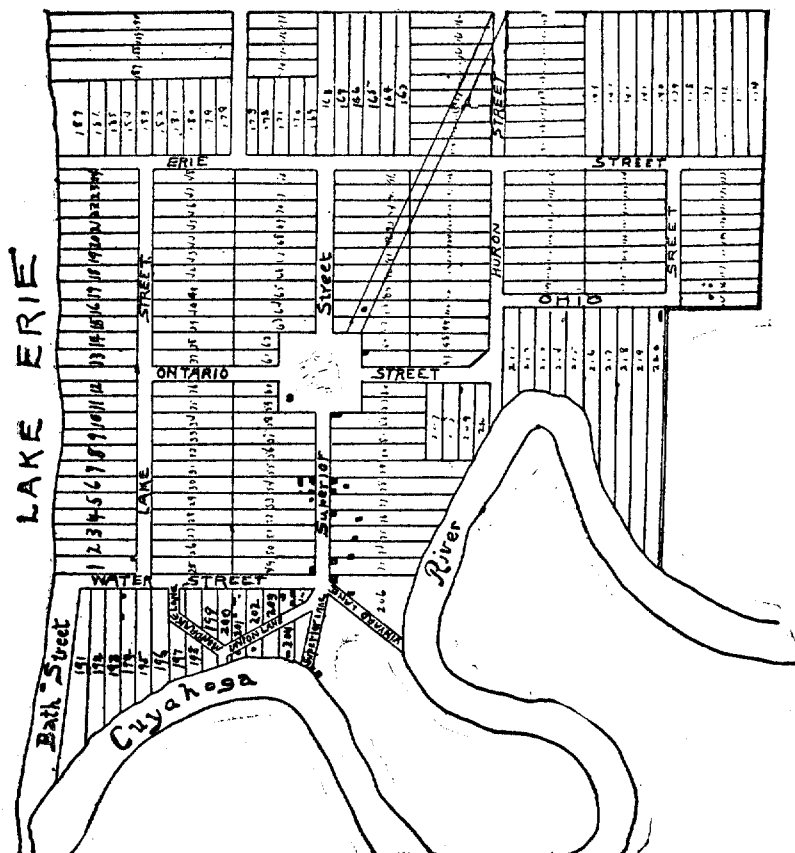
on April 9, 1831, may be regarded as the owner of the property in controversy. It was evidently the purpose of Perry to deed so much of lot 97 to the city of Cleveland as is described in the petition and answer. The testimony in the case, without reference to certain maps of the city, the competency of which were controverted in the court below, shows that lot 97 was one of the original lots on the plat of the village, now city, of Cleveland, and can be best understood by reference to Exhibit A, with its accompanying minutes, which was admitted in testimony from the Cuyahoga county records, and Exhibit B, also admitted in evidence from the same source.

Exhibit A.

"Cleveland Survey, by Amos Spafford, in 1801.

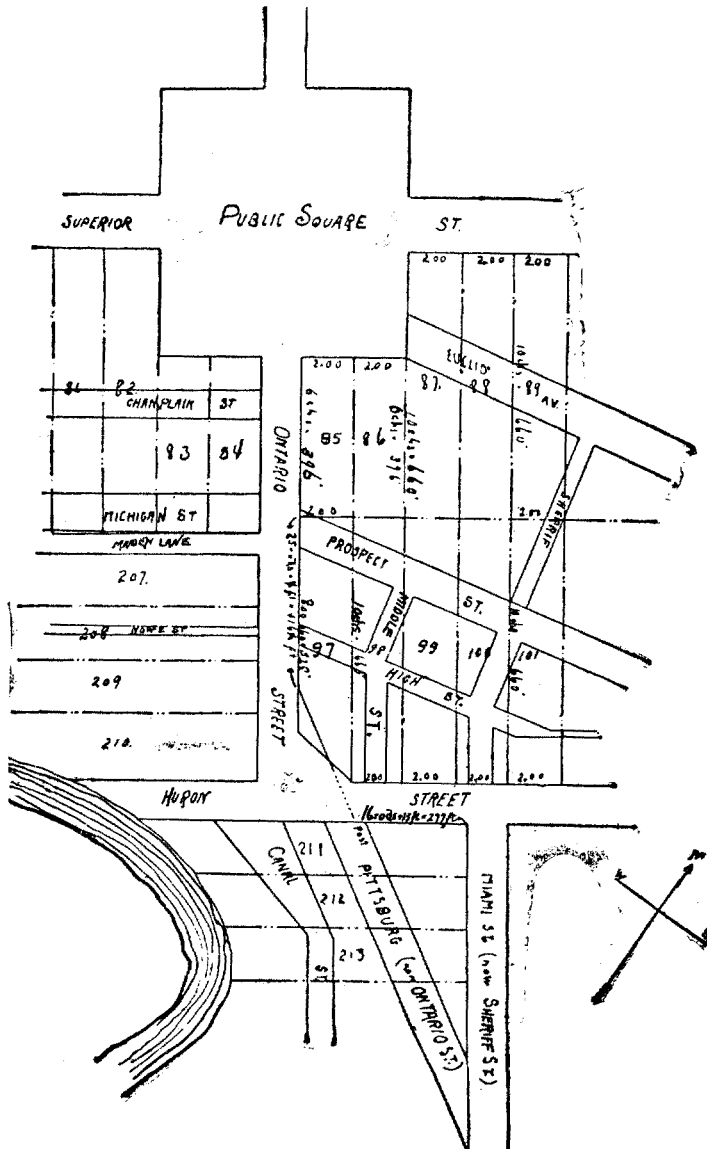
"Minutes of the survey of the outlines, roads, lands, and square of the city of Cleveland, as surveyed for the Connecticut Land Company in the year 1796, by Augustus Porter, said minutes retaken by Amos Spafford, surveyor, November 6, 1801: Said city is bounded as follows, viz.: Beginning on the lake shore, on the east bank of the Cuyahoga river; then eastwardly, on the shore of the lake, one hundred and two chains; then south, 34 degrees east, eighty-

Exhibit A.



eight chains and fifty links; then S., 56 degrees W., thirty-eight chains fifty links; then N., 34 degrees W., ten chains and 50 links; then S., 56 degrees W., to the bank of the Cuyahoga river; thence down said river as it winds and turns to the place of beginning,—containing in the whole about five hundred and twenty acres, through which the following roads are laid, in the following manner (viz.): Bath street, so called, begins in the east bank of the Cuyahoga river, seven chains 50 links above where it empties into Lake Erie; thence N., 66 degrees E., thirty chains, to a large white-oak post standing in the west line of Water street; all the lands between said lines and the lake is included

Exhibit B.



in said Bath street, and is from 3 to 5 chains wide. Water street is bounded by said post on the west side, and is one chain and 50 links wide, and runs from said post N., 34 degrees W., to the lake shore; then S., 34 degrees E., 29 chains to a white-oak post standing on the northwest corner of Superior street. Superior street is two chains in width, and begins at said last-mentioned post, and runs N., 50 degrees E., 50 chains and 50 links, to a white-oak post standing on the west line of Erie street. Erie street begins at the last-mentioned post, and is one chain and 50 links wide, and runs N., 34 degrees W., 32 chains, to the lake shore; then from said post S., 34 degrees E., 55 chains, to a white-oak post marked 'E. S. No. 133.' Ontario street begins at a post standing on the bank of the lake in the west line of said street, 24 chains east of the east line of Water street; then running S., 34 degrees E., 51 chains, to a post standing in the north line of Huron street; said street is one chain and 50 links wide. Huron street begins at a post in the north line of said street, on the east bounds of the city, 33 chains north by west from the southeast corner of said city; then running S., 54 degrees W., 53 chains, to the east bank of the Cuyahoga; said street being 150 links wide. Ohio street is 150 links wide, and begins at a white-oak post standing in the north line of said street, and in the west line of Erie street, 11 chains 50 links north of the south line of the city; then running south, 54 degrees W., 16 chains, to a white-oak post marked 'O. S. No. 117'; then turning at right angles, and running in the east line of said street twenty chains, to a white-oak post standing in the south line of Huron street. Lake street is 150 links wide, and begins at a white-oak post standing in the north line of said street, and in the west line of Erie street, 21 chains and 50 links north, 34 degrees west, from the northeast corner of Superior street; thence running S., 56 degrees W., 49 chains and 50 links, to a white-oak post standing in the east line of Water street. Superior lane begins at a post standing in the southwest corner of Water street and northwest corner of Superior street; thence running S., 77 degrees W., nine chains, to the Cuyahoga river; thence up the Cuyahoga river two chains fifty links; thence N., 72 degrees E., to a white-oak post standing in the center of Superior street on the west line of Water street. Union lane begins at the same post of Superior lane, is 100 links wide, and runs a west direction to the Cuyahoga. Mandrake lane is 100 links wide, and begins at a white-oak post standing in the north line of said road and west line of Water street, 13 chains south from the post standing at the southeast corner of Bath street, and running S., 56 degrees W., five chains, then nearly south, until it strikes Union lane. Vineyard lane begins at a white-oak post standing in the west line of said lane, being the southwest corner of Superior street; then running S., 12 degrees W., to the Cuyahoga river; said lane is 75 links wide. The square is laid out on the intersection of Superior street and Ontario street, and contains ten acres. The center of the junction of the two roads is the exact center of the square. The above-described city or plot is laid into 220 lots, of about two acres each, which contain what land is described in the outline, except about 50 acres lying in the bend of the Cuyahoga, which is bottom land, and not lotted out. For the particular numbers and boundaries of each lot reference is to be had to the field notes and maps in the register's office in the county of Trumbull or in the city of Cleveland. Recorded February 15, 1802, for me, John S. Edwards, recorder for Trumbull. I certify that the foregoing is a correct copy taken from Deed Book A, page 100, Trumbull county records, for A. Southerland, recorder.

"H. H. Leavitt, Clerk.

"Recorded Nov. 22, 1814. Horace Perry, Recorder.

"(Deed Book A, page 484, Cuyahoga County Records.)"

The testimony contains varying opinions of engineers as to the proper boundary of lot 97. There was also testimony tending to show that the Connecticut Land Company, for which company it appears that the original surveys and plats were made, by its trustees, had made a deed to Samuel P. Lord of lot 97 and certain other lots, in which they are described as follows:

"The several tracts of land hereafter described, situated in Cleveland city, in Trumbull county, and territory northwest of the Ohio, viz. lots number 85, 86, 87, 97, 98, 99, bounded as follows: Beginning at a post where the south

line of Superior street intersects the east line of the square of said city; running easterly, by said street, eight rods; thence southerly, to the southeast corner of lot No. 99, eighty rods, being the north line of Huron street; thence westerly to Ontario street; thence, by the east line of said street, to the said square, and following the lines of said square to the place of beginning."

It was the contention of the plaintiffs below that lot 97 should include within its boundaries, in addition to the land as shown on the plat, the triangular piece formed by extending the east line of Ontario street in a straight line to intersect the north line of Huron street. The testimony of the plaintiffs below tended to show that after the purchase from Perry of the portion of the lot lying southwest of the line described in his deed, as indicated on Exhibit B, the premises had been for many years occupied by Ontario street, except a small portion thereof, which the plaintiffs claimed the city had never accepted or had long since abandoned for street purposes, and which consequently, under the terms of the deed, had reverted to the plaintiffs, who were the heirs of Perry. This corner of the lot, claimed by the plaintiffs, is described as being "a piece of land triangular in shape, inclosed between the southwesterly line of Ontario street as now traveled, the northerly line of Huron street as originally laid out, and the easterly line of Ontario street as originally laid out, extended down 'Vinegar Hill,' so called; said piece of land running to a point at its northwesterly extremity." The court below submitted to the jury certain propositions of law, and the question of fact as to whether the plaintiffs were entitled to recover this triangular piece of land, and the jury returned a verdict, awarding so much of the premises as is included in this triangular piece to the plaintiffs, and judgment was rendered accordingly.

In order to recover in an ejectment suit, it has long been the settled law of the federal courts that plaintiff must show a good legal title in himself, and must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary. *Watts v. Lindsey's Heirs*, 7 Wheat. 158, 5 L. Ed. 423. In *Sheirburn v. Cordova*, 24 How. 425, 16 L. Ed. 741, it was held that, notwithstanding the statutes of a state making different requirements, ejectment or trespass to try title to real estate could be maintained in the United States courts only on a strict legal title. To the same effect are *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198; *Foster v. Mora*, 98 U. S. 425, 25 L. Ed. 191; *Bagnell v. Broderick*, 13 Pet. 436, 10 L. Ed. 235. The same general rules are recognized in Ohio. *City of Cincinnati v. Hamilton Co. Com'rs*, 7 Ohio, pt. 1, pp. 88, 89; *Eggleston v. Bradford*, 10 Ohio, 312.

The Ohio Civil Code (section 5781, Rev. St.) provides that, in an action for the recovery of real property, it shall be sufficient if the plaintiff state that he has a legal estate therein, and is entitled to possession thereof, etc. It was therefore essential that plaintiffs establish, before they were entitled to recover in this action, a legal title to the premises in controversy, or, at least, to so much thereof as they finally claimed when the case was submitted to the jury. In the view we take of the case, it is only necessary to determine whether the premises recovered are a part of lot 97. Looking at the plat, as shown in either Exhibit A or B, there is apparent an undertaking

to outline a system of streets leading from the public square, and lots laid out in connection with the square and streets, to the number of 220. Where Ontario street, at its southern extremity, joins Huron street, the former is shown to be widened so as to cut off a corner of lot 97. It is shown in the testimony that at or near the place of connection there was a steep bank or bluff. This would have been a sufficient reason for taking from lot 97 a portion of the land which it would otherwise have occupied in order to make a good connection between the streets. Whatever the reason, it is perfectly apparent, from an inspection of the plat, that the southwest corner was cut off in making the draft of lot 97 in connection with Huron and Ontario streets. An inspection of the plat would not leave any purchaser in doubt as to the outline of lot 97. If we are to pass upon the case by the plat alone, there is little room for controversy as to the correct conclusion. Expert testimony was introduced by plaintiffs at the trial, in which engineers undertook to give their views of the matter. It was claimed by the plaintiffs that the plat does not correctly show the outline of lot 97, because of the accompanying minutes recorded with the plat, in evidence in the case, in connection with Exhibit A, as heretofore shown. These minutes undertake to give the outlines of roads, lands, and squares for the city of Cleveland as surveyed for the Connecticut Land Company in 1796 by Augustus Porter, said minutes being retaken by Amos Spafford, surveyor, in 1801. They contain an outline of the boundary of the city, and, in describing the roads laid out, a list of the streets is given, among others Ontario street, which is described as "beginning at a post standing on the bank of the lake in the west line of said street, 24 chains east of the east line of Water street; then running S., 34 degrees E., 51 chains, to a post standing in the north line of Huron street; said street is 1 chain and 50 links wide." This description locates the west line of Ontario street south of its intersection with the north line of Huron street, and the street is said to be 1 chain and 50 links wide. Giving it this uniform width would, it is claimed, have the effect of including within the outline of lot 97 not only so much as is shown on the plat, but its area would include the additional triangular piece made by projecting the east line of Ontario street in a direct line until it intersects the north line of Huron street. This description of the street, it is urged, must prevail over the outline of the lot in the plat, and be considered as giving to lot 97 the dimensions claimed by defendants in error. We cannot agree to this contention. It was evidently the purpose in making the plat that a permanent record should be had of the lots, public grounds, and streets which should constitute the city. To such a plat a purchaser would have recourse to ascertain the location and boundary of any lot or lots which he might desire to purchase. All parts of the description, the plats, and the notes should be reconciled, if possible, so as to prevent contradiction, and to carry out the intention and purpose of the proprietors. Assuming the plat to correctly show lot 97 to have been irregular in shape, there is still left the full width of Ontario street as recorded in the minutes. It has the full width of 1 chain and 50 links throughout, widened, it is true, where it joins Huron street.

The full width of the street is given by this construction, and lot 97 is not enlarged or changed as designated upon the plat. To adopt the construction contended for, and extend the lines of lot 97 so as to limit the width of the street throughout to just 1 chain and 50 links, is to correct and alter the plat as made and recorded, and to change the outline of lot 97 as shown thereon. We think the description and the plat can be reconciled upon the theory that it was the intention to give Ontario street the width named, except where it joined to Huron street, where the purpose to widen it is distinctly shown. If there was any substantial contradiction between the minutes and the recorded plat, which we do not perceive, we think the lot, as shown upon the plat, would control in determining its true outline. There is nothing in the minutes which indicates a different outline of lot 97 than is shown on the plat. Of the lots it is said:

"The above-described city or plot is laid into 220 lots, of about two acres each, which contain what land is described by the outline, except about 50 acres lying in the bend of the Cuyahoga, which is bottom land and not lotted out. For the particular numbers and boundaries of each lot, reference is to be had to the field notes and maps in the register's office in the county of Trumbull or in the city of Cleveland."

The territory, including the city of Cleveland, was originally a part of Trumbull county. If there are field notes or maps of record there or elsewhere, they have not been produced, and were not in evidence in the court below, and hence can be of no assistance to us in deciding this case. Turning to the description written in the deed, we find that Mr. Perry, who is the common source of title, in describing the portion of lot 97 deeded to the city of Cleveland, states it to be "all that part of original lot 97 on the plat of the village of Cleveland (now the city of Cleveland) lying southwesterly of the line," etc. Here the lot is referred to in direct terms by its number on the plat. To that plat the parties must look for evidence of title. It was made and recorded for the purpose of giving the purchaser a permanent record of the lots which he might acquire. It has been the policy of Ohio legislation for many years to require the making and recording of plats for cities and villages in the state. This plat was of record in Cuyahoga county long before the deed from Mr. Perry to the city was made. By reference to Chase's Ohio Statutes, we find that an act was in force in Ohio for the recording of town plats, at least as early as 1805. A comprehensive scheme for that purpose is found in the act of March 3, 1831 (3 Chase, St. p. 1846). We refer to this as evidencing the settled practice in Ohio as to the recording of such plats, and as showing the purpose of the law of the state to furnish purchasers of town and city lots evidence of the location and outline of their property by recorded plats. We have therefore reached the conclusion that lot 97 must be held to include so much territory as was given to it in the recorded plat, and that it cannot be enlarged by reference to the description of the adjacent street given in the minutes. The view we take of this case is in harmony with analogous decisions where controversies have arisen as to what effect is to be given to plats made parts of the description of real-estate surveys. In *McIver's Lessee v. Walker*, first reported in 9 Cranch, 173, 3

L. Ed. 694, and again in 4 Wheat. 444, 4 L. Ed. 611, the description of the premises granted did not include a certain creek, and an annexed plat referred to showed this creek or water course, as laid out, running through the land, and the court held that the tract must be so surveyed as to include the water course, and to conform as nearly as may be to the annexed plat, although the lines run may not coincide with the description called for in the certificate or patent. When the case was before the court as reported in 9 Cranch, 173, 3 L. Ed. 694, there having been considerable controversy about the true meridian, the chief justice said that he did not think that question had anything to do with the case. "The court decided it upon the plat." Further, he said, in disposing of the question: "In this plat thus annexed to the patent, and thus referred to as describing the land granted, Crow creek is laid down as passing through the tract, and every one would be instructed by the plat that the lands lay on both sides of the creek." In the present case purchasers of lot 97 could have knowledge of the plat, and be instructed by an inspection thereof that it was irregular in shape. In *Parker v. Kane*, 22 How. 1, 16 L. Ed. 286, it is held that a deed which conveys an undivided one-fourth part of a tract of land, viz. lots 1 and 6, being that part of the N. E. $\frac{1}{4}$ lying east of the Milwaukee river, conveys only lots 1 and 6, and not that part of the N. E. $\frac{1}{4}$ which is without lots 1 and 6. In *Wolfe v. Scarborough*, 2 Ohio St. 361, it was held, Judge Thurman giving the opinion, that a description which calls for courses or distances may be controlled by a plat which is made part of a contract or deed. In this case there was a discrepancy between the lots as shown by the plat which had been made for the purpose of subdividing a tract of land, and the calls for courses and distances in the description thereof; it being the purpose of the original proprietor to make a plat which showed his entire tract of land divided into 13 lots. Speaking on this subject, Judge Thurman says, on page 367:

"We think it manifest that Hogg intended that the 13 lots should embrace all his land. And this intention is quite sufficient to control the estimate of quantity, and the memorandum that the lots are 200 perches square. The object of construction is to ascertain the intent of the parties, and, when this intent is discovered, it governs, unless the language employed renders it impossible to give it effect. There is no such difficulty in this case. The authorities are clearly on the side of the defendants. They show that, in a case like this, the map or plat is more to be relied on than a call for distance and quantity. *McIver's Lessee v. Walker*, 9 Cranch, 173, 3 L. Ed. 694; *Id.*, 4 Wheat. 444, 4 L. Ed. 611; *Lunt v. Holland*, 14 Mass. 149; *Davis v. Rainsford*, 17 Mass. 207; *Magoun v. Lapham*, 21 Pick. 135."

In the present case we are of opinion that the plat controls, and settles the rights of the parties. This view is not modified by the transcript of the deed from the land company to Lord, above referred to, and as shown on page 50 of the record, in which a description of certain territory, including lot 97, is given by metes and bounds. We think that description entirely reconcilable with the plat which shows the corner of lot 97 to be cut off for street or highway purposes. In reaching the conclusions herein stated, we have not considered the plats offered by the city, and excluded from testimony by the court below, and need not now determine whether sufficient testimony had

been introduced to lay the foundation for their introduction. The testimony introduced by the defendants in error clearly shows that their claim for title was based upon the theory that the description of Ontario street would control the boundaries of lot 97 as shown in the plat. Rejecting that theory, there was no testimony adduced by them establishing title to the part of lot 97 embraced in the recovery had in the court below. The case was one in which, the plaintiffs having failed to establish their title, the jury should have been directed to return a verdict for the city. The learned judge, assuming that testimony had been introduced tending to establish the title of plaintiffs, submitted the case to the jury with a series of propositions applicable to that view of the case. The court erred in thus charging the jury. Exceptions were duly taken to the charge in this respect. The propositions given assumed that the plaintiffs had introduced testimony tending to establish title to the triangular piece above described; whereas, they had failed to introduce any testimony which, properly considered, tended to show that they had title to the land in controversy. In this view of the case, the judgment must be reversed, and the cause remanded for a new trial.

MERCHANTS' LIFE ASS'N OF UNITED STATES v. YOAKUM.

(Circuit Court of Appeals, Fifth Circuit. November 21, 1899.)

No. 800.

1. LIFE INSURANCE—ACTION ON POLICY—DEFENSES.

One who takes out a policy of insurance on his life for the benefit of his estate has the right to procure from another the money with which to pay the premium thereon, and the terms of the contract between them are immaterial to the company issuing the policy, and can constitute no defense to an action thereon.

2. PLEADING—AMENDMENTS DURING TRIAL—TEXAS STATUTE.

Under the statute of Texas (Rev. St. 1895, art. 1188) which provides that all amendments to pleadings must, when court is in session, be filed under leave of court "before the parties announce ready for trial, and not thereafter," while amendments during trial may be permitted in the discretion of the court, and in furtherance of justice, a refusal of such permission is not error unless an abuse of discretion is shown.

3. EVIDENCE—ADMISSIONS—PARTY IN INTEREST.

In an action by an administrator on a policy of insurance on the life of his decedent, payable to his estate, the widow of the deceased is not such a party in interest that statements made by her constitute admissions affecting the plaintiff's right of recovery.

4. TRIAL—ORDER OF ADMITTING TESTIMONY.

A trial court may, in its discretion, permit a defendant at the time of cross-examination of a witness for plaintiff to make the witness his own, and examine him as to matters of defense, but the better practice, where the convenience of the parties and the witness will permit, is to limit defendant at that time to cross-examination, leaving him to recall the witness when the defense is reached.

5. WITNESSES—IMPEACHMENT—RIGHT TO CONTRADICT TESTIMONY.

In an action by an administrator on a policy of insurance on the life of his decedent, where the defendant called the widow of the deceased as a witness, and examined her as to matters immaterial to the issues, it was bound by her answers, and it was not error to refuse to permit it to show

inconsistent prior statements made by her for purposes of impeachment, especially where her only testimony as a witness for plaintiff had been as to matters not in dispute.

6. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—STATUTE AFFECTING BUSINESS OF LIFE INSURANCE.

The provisions of Rev. St. Tex. 1895, art. 3071, making life insurance companies failing to pay a loss within the time specified in the policy after demand made therefor liable to the payment of 12 per cent. damages on the amount of the loss, and all reasonable attorney's fees for the prosecution and collection of such loss, is not in violation of the fourteenth constitutional amendment, as denying to such companies the equal protection of the laws; but, in view of the magnitude and the peculiar nature of the business, of the fact that in making the contracts the parties do not deal on equal terms, but the terms of the contract are dictated solely by the insurer, and are often not understood by the insured, and the contracts are made in its behalf by agents whose power to bind their principal by their acts or knowledge is carefully limited, and the further fact that such contracts are not to be enforced usually until after the death of one of the parties thereto, such statute must be regarded as one making a classification having reasonable relation to the peculiar nature of the business affected and the object to be attained, which is to secure a righteous degree of care and fairness in the making of such contracts.

7. FOREIGN CORPORATIONS—STATE LAWS REGULATING—CONTRACTS OF LIFE INSURANCE.

Such statute is also, as applied to foreign life insurance companies, a legitimate and valid exercise of the power of the legislature to prescribe conditions upon which such companies are permitted to do business in the state, and is a condition of every contract made by such companies in the state since its enactment.

In Error to the Circuit Court of the United States for the Northern District of Texas.

D. A. Kelley, for plaintiff in error.

George Clark and D. C. Bolinger, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This was an action upon a policy of life insurance issued by the plaintiff in error on the life of John I. Hassler, the intestate of the defendant in error. The plaintiff in error (the defendant below) answered (1) by a general demurrer, upon which no action of the court was taken; and (2) by the general issue; and then specially as follows:

"(3) Further answering specially herein, this defendant says that it is not liable upon the policy of insurance sued on herein, and that it ought not to be compelled to pay the same, for the reason that said policy of insurance was obtained fraudulently, and is null and void, by reason of the following facts, to wit: This defendant says that said policy of insurance sued on herein, which is shown and described in the plaintiff's petition, was based upon a written and printed application therefor dated and signed by John I. Hassler, the deceased, being plaintiff's testator, on the 28th day of September, 1897, wherein said Hassler, among other things, was required to answer as to how long prior to said application it had been since he was attended by a physician or had to consult one, and that he answered thereto, 'May and June, last,' which meant May and June of the year 1897. And further, in said application he was required to answer if he had ever had any disease of the throat, lungs, heart, liver, kidney, or bladder, and that he answered thereto 'No,' meaning thereby that he had never had, nor was he at that time affected with, any of the diseases called for in said question indicated aforesaid. And it is further alleged that in said application the said John I. Hassler was required to an-

swer whether or not he had ever had shortness of breath, or habitual cough, or pneumonia, or spitting of blood, and that he answered 'No,' thereby meaning that he had never been, and was not then, affected with any of said ailments or diseases. And it is further alleged that the said John I. Hassler was further required in said application to answer whether or not he was then, and if he was usually, in good health, and that he answered 'Yes,' thereby meaning that he was then in good health, and that he was usually in good health. And it is further alleged that the said John I. Hassler was also required in said application to answer if he had enjoyed good health in the past twelve months prior to said application, to which he answered, 'Yes, except an attack of malarial in May and June last,' thereby meaning that he had enjoyed good health except as to an attack of malarial fever during the time stated. Now, this defendant says that the foregoing answers of the said John I. Hassler were false in this: It is alleged that at the time said application was made and said answer given as hereinbefore stated, and at the time of the issuance and delivery of the policy of insurance sued on herein, the said John I. Hassler was not in good health, but, on the contrary, was in bad health, and that he had a disease of the throat commonly called 'bronchitis,' and he also had shortness of breath, and an habitual cough, and a frequent spitting of blood; and he also had a disease of the lungs commonly called 'pulmonary consumption,' which finally resulted in his death; and that he was in a feeble condition, and unable to attend to his usual avocation, which was that of a truck gardener; and that from the time of the alleged attack of malarial fever to the date of said application said Hassler had frequent occasions to consult, and did consult, a physician with reference to his physical condition. This defendant further says that, if it had known of the true physical condition of said Hassler at the time he made said application and at the time said policy was issued, it would never have issued said policy, but would have rejected the application of said Hassler for insurance, and would have refused to issue the policy sued on, and would have refused to take any risk whatever upon the life of said Hassler; and, if it had known of said Hassler's condition at the time said policy was delivered, it would not have delivered the same. And this defendant further says that all of the statements and answers made by said Hassler in reply to the questions which he answered in said application, as hereinbefore stated, were material, and that by the terms of said application he consented and agreed that they should be material, and that they were warranties, and that they were true and complete, and that they were made as a basis for the issuing of the policy then applied for and which is here now sued on; and it was further agreed, as shown by the terms of said application, that said policy then applied for should not take effect or be binding upon this defendant unless and until said policy was issued and delivered to him during a continuance of the good health of said Hassler, which was meant that said Hassler was in good health, and not subject to any of the diseases or ailments hereinbefore referred to, both at the time he applied for said insurance, which was on the 28th day of September, 1897, and also at the time said policy was issued, which was on the 7th day of October, 1897, and at the time said policy was delivered, which was on the 15th day of November, 1897; and it is further alleged that he was not in good health either at the time that he applied for said policy or at the time it was issued, aforesaid, or at the time said policy was delivered; but it is alleged that he was in bad health, and affected with the diseases and ailments hereinbefore stated and referred to, at the date of said application, and at the time said policy was issued, and at the time it was delivered, as aforesaid, which operated as a fraud upon this defendant, and rendered said policy sued on null and void. This defendant further says that the plaintiff herein is personally interested in the recovery herein sought by him as executor, and that he was a party to the fraud hereinbefore shown, wherein this defendant was induced to issue and deliver the insurance policy sued on, in this: This defendant says that the plaintiff herein was acquainted with said John I. Hassler several years prior to the procurement of the policy sued on, and knew him to be in feeble health, and not a fit subject for the procurement of insurance on his life upon the basis of his being in good health, and had good reason to believe that he was affected with a disease of the lungs, which rendered him wholly un-

worthy as an applicant for insurance upon his life; and, notwithstanding this, it is alleged that the plaintiff entered into a conspiracy with the said John I. Hassler for the purpose of procuring the policy of insurance sued upon, and as a matter of speculation for the benefit of the plaintiff herein, and that he procured and induced said Hassler to make said application for insurance, and brought him in contact with the defendant's agent, with the fraudulent design aforesaid, and with full knowledge of said Hassler's condition, as aforesaid; and that upon said Yoakum ascertaining that said policy had been written in the name of said Hassler's wife as beneficiary, he (the said Yoakum), before said policy was delivered, acting in conjunction with said John I. Hassler, procured the said policy to be changed so that the amount therein named should be paid to the estate of said Hassler instead of to his wife, as hereinbefore stated; and, in addition to this, and in still furtherance of his scheme and design, in conjunction with said John I. Hassler, to defraud this defendant, the plaintiff, on, to wit, the 15th day of November, 1897, paid the premium called for in said policy, and then and there had said policy delivered on said 15th day of November, 1897, and on the said day, and before the same was so delivered, said Yoakum took judgments against said John I. Hassler for the sum of \$4,000 in the district court of McLennan county, Fifty-Fourth judicial district, upon a waiver of service and confession by said Hassler upon a pretended note for the sum of \$4,000, made by said Hassler to said Yoakum, dated the 8th day of November, 1897, bearing 6 per cent. per annum interest, and to become due on the day that it was executed, aforesaid, without grace. And it is further alleged that on the said 15th day of November, 1897, said Yoakum and said Hassler still further intended to defraud this defendant for the benefit of said Yoakum, and said Hassler executed his last will and testament, wherein and whereby he appointed said Yoakum his executor without bond, with the power to administer his estate out of court, and to pay all of the debts against his estate, etc., which said will was subsequently probated, as stated in plaintiff's petition. This defendant further says that said note for \$4,000 was wholly without consideration, and that there was no basis for the same, and that there were no transactions between said Hassler and plaintiff Yoakum wherein and whereby said Hassler was indebted unto the said Yoakum in said sum of \$4,000, or any like amount, except such obligation as may have arisen between said Hassler and Yoakum in carrying out said conspiracy to defraud this defendant. Of these matters the defendant is ready to verify, and the defendant prays that said policy of insurance be canceled and annulled, that this defendant be allowed to go hence, and that this defendant be also allowed to refund, and pay to whomsoever this court may adjudge, the \$233.55 received by this defendant as a premium for the issuance of said policy, and which amount this defendant here now tenders and offers to pay subject to the orders of this court.

"Penry & Garrett,

"D. A. Kelly,

"Attorneys for Defendant."

On the trial the court, on its own motion, charged the jury as follows:

"In this case the plaintiff, William Yoakum, executor of the estate of John I. Hassler, deceased, as such executor, sues the defendant, the Merchants' Life Association of the United States, to recover loss upon a contract of life insurance entered into between John I. Hassler, deceased, and the defendant insurance company, and for statutory damages, and all reasonable attorney's fees for the prosecution and collection of the loss, alleged to have accrued to the plaintiff under the provisions of the statute of the state of Texas relative to and controlling the operation of life insurance companies in the state of Texas. The defendant, among other things, sets up and alleges as a defense to this cause of action that the insurance policy sued upon was obtained upon the faith of an application made by John I. Hassler, the deceased, wherein he was required to answer, among other things, the following questions: 'How long since you were attended by a physician, or had occasion to consult one?' to which he made answer, 'May and June last.' '(2) Have you had any disease of the throat or lungs?' to which he made answer, 'No.' '(3)

Have you had any shortness of breath, habitual cough, or pneumonia? to which he made answer, 'No.' '(4) Are you now, and usually, in good health?' to which he made answer, 'Yes.' '(5) Have you enjoyed good health in the past twelve months?' to which he made answers, 'Yes, except an attack of malarial in May and June last.' You are charged that the answers to these questions are by the terms of the policy of insurance made a part of the contract, and are made material, and constitute warranties upon the said Hassler and his estate to the effect that each and all of said answers were literally true as given. If you believe from the testimony that either one of the answers made to any one of the above-enumerated questions by the deceased was not literally true, then it would be your duty to find a verdict for the defendant. The question which you are called upon to decide is, did John I. Hassler make literally true answers to the questions propounded to him as above enumerated? And if you believe from the evidence that his answers to each of the questions propounded were literally true, it would be your duty to find for the plaintiff; and the burden of proof is upon the defendant company, and it must establish by a preponderance of the evidence, the falsity of either one or more of the answers to said questions, in order to sustain its contention in this case. And if it has failed to establish the falsity of either one or more of the answers to the above questions by a preponderance of the evidence, it would be your duty to find for the plaintiff. The representation that a person is in good health at the time he applies for life insurance does not mean that he is entirely free from disease, but that he is in an ordinary state of health, and that he is not affected with any disease tending to increase the risk of the insurance company, and that he is free of any disease to the vital organs, or that might jeopardize the applicant's life. You will bear in mind this construction of the term 'good health' in reaching your conclusions as to the truth or falsity of the answers of the deceased, Hassler, to the questions as to whether or not he was at the time of the application, and usually, in good health, and as to whether or not he had enjoyed good health in the past 12 months. If you find that the defendant company was liable to pay the loss accrued by the death of John I. Hassler upon the policy sued on, and if you find that the defendant company has failed to pay the same in the time specified in said policy, to wit, thirty days, and if you further find that said demand was made upon said company for said loss, then, in the event you should find for the plaintiff, it will be entitled to recover, and you should so find in your verdict, 12 per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss, and also 6 per cent. interest on said loss from date of the demand therefor. You are instructed that the note executed by John I. Hassler, deceased, to William Yoakum, executor, as well as a judgment rendered thereon, and the last will and testament of John I. Hassler, deceased, and probate thereon have been admitted in evidence, not for the purpose of having the jury in this case pass upon the validity of either of said documents, but merely as facts bearing upon the issue as to whether or not there was fraudulent conspiracy or combination between the said John I. Hassler, deceased, and William Yoakum, to defraud the defendant company in the procurement of the policy upon the life of John I. Hassler sued upon in this case, and in pursuance of said conspiracy the deceased, Hassler, made false answer or answers to any one or more of the questions above enumerated. If you find from the evidence that the answers of John I. Hassler above enumerated were literally true, then said judgment, will, and probate become immaterial, and you will not consider them."

The court refused to give certain charges requested by the defendant. The jury returned a verdict for the plaintiff, on which the court rendered judgment.

The plaintiff in error submits that the circuit court erred in refusing to give to the jury the following requested charge:

"You are further instructed that, if you believe from the evidence that William Yoakum was not a creditor of John I. Hassler, and that Hassler did not owe him \$4,000, or any like sum, and you further find that said Yoakum paid

the premium for the insurance shown in the policy sued on, with the understanding that he was to get the benefit of the insurance represented by said policy, or any part thereof, on account of said payment made by him for the premium, then you are instructed that said Yoakum would not have any insurable interest in the life of said John I. Hassler; and, if you so believe, you will find a verdict for the defendant."

The answer shows that the deceased made application for the insurance on the 28th of September, 1897. The witness Fitzhugh testified that he was the defendant's agent at Waco; that he learned that Mr. Hassler wanted insurance; that he learned this in this case in the same way that he did in other cases; that he was not able to remember who told him; the first time he talked with the deceased about taking out insurance was in the office of one Easterling; that the policy is dated the 7th of October, 1897, and it came to the hands of this witness, the defendant's agent at Waco, about the 10th of that month; that Hassler was not at Waco at the time the policy arrived, but was at Colorado City, and that the witness wrote to him at that place; that, in accordance with the application, the policy was written payable to Hassler's wife as the beneficiary; that about the 15th of November, 1897, at Hassler's house in Waco, Yoakum being present, Hassler's wife signed the request to the company to have the policy changed as to the beneficiary, so that, instead of being for herself, it should be in favor of Hassler's estate; that the premium—\$233.55—was paid by Yoakum; that the policy is a 10-year policy,—that is, the party pays for 10 years, and then has a paid-up policy. The witness says that this is the most expensive kind of insurance; that the annual premium on this policy for \$5,000 is \$233.55,—that is, \$46 per \$1,000 for a man 46 years old; that a straight policy, without the tontine feature, would have cost only \$18 per \$1,000, or \$90 for \$5,000; that the amount of annual premium paid by Hassler—\$233.55—would have secured a straight policy, without the tontine feature, for \$20,000, or more, though the defendant company would not write a policy for over \$10,000. It is clear from this evidence that Yoakum advanced to Hassler the money to pay this first premium. It is equally clear that this advance was not made until more than a month after the date of the policy, and immediately before, and in order to secure, its delivery to the insured.

The action in this case is not brought by a stranger or by a creditor, but by the executor of the last will and testament of Hassler, on a policy of insurance obtained on the application of the testator, intended originally for the benefit of his wife, and at her request changed so as to inure to the benefit of his estate, doubtless with the view to enable him to use it as a security to obtain an advance of the necessary premium proportionate to the amount and character of the insurance desired. Any person has a right to procure an insurance on his own life, and to assign it to another, provided it be not taken by way of cover for a wager policy. Hassler had a right to take out a policy on his own life for the benefit of his estate, and he had a right to procure an advance from Yoakum to pay the premium required to obtain the policy of insurance, and the terms of his contract with Yoakum with reference to the advance

were and are wholly immaterial to the company writing the policy. It gets a perfect quid pro quo in the stipulated premiums. It cannot justly refuse to pay the insurance when incurred by the terms of the contract. *Insurance Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251; *Insurance Co. v. France*, 94 U. S. 561, 24 L. Ed. 287.

The second assignment of error submits that the court erred in its charge to the jury touching the warranties relied upon in the answer of the defendant below in that the charge in reference thereto is contradictory and confusing, and the jury was authorized by it in believing that, if only one of the answers was false, this was not sufficient to set aside the policy, but that the defendant must show that all of them were false, before the jury could find in defendant's favor,—in other words, that the answers to all of the questions might be false except one, still the defendant could not recover; and that the court erred in refusing to give to the jury the defendant's request for the following instruction:

"Now, if you believe from the testimony that either one of said answers [being the same as those quoted in the charge of the court above] was not true and complete in every respect, then you are instructed to find a verdict for the defendant."

This assignment is not supported by the record, as we read it. The charge of the court is not subject to the criticism passed upon it by the counsel for the plaintiff in error. It appears to us that only the bias of interest or of advocacy could lead to the conclusion that the charge authorized the jury to find for the plaintiff, although it should be satisfied that the defendant had shown that the answers to one of the questions were not true. On the contrary, it appears to us that the charge is rather subject to the criticism of being over-strict in the rule it puts on the plaintiff. The plaintiff, having recovered, does not complain of this strictness. The charge says:

"You are charged that the answers to these questions are, by the terms of the policy of insurance, made a part of the contract, and are made material, and constitute warranties upon the said Hassler and his estate, to the effect that each and all of said answers were literally true as given. If you believe from the testimony that either one of the answers made to any one of the above-enumerated questions by the deceased was not literally true, then it would be your duty to find for the defendant."

This is carrying the rule beyond the language of the contract, which only warranted that the answers were true, and did not stipulate that they should be literally true, any more than it provided that they should only be substantially true. The warranty is that the answers are true. The presumption is that the answers are true, and the charge correctly instructs the jury that the burden of proof is upon the defendant company to establish by a preponderance of the evidence the falsity of either one or more of the answers. The issue, therefore, is a question of fact: Are the answers true, or are they not true? A panel of competent jurors do not require that the word "true" should be defined. It is difficult to define it in other terms which will render it more intelligible than it should be and is to a competent jury. There are no degrees in truth. A matter is true or it is not true. All language is more or less relative, and when an issue is stated as clearly as it is when the question

presented is, were these answers made by the applicant true? the work of the jury is not to define the terms, but to weigh the proof; and the instruction, "You are to determine from the preponderance of the evidence whether these answers were true, and, if you find that they were not true, or either of them was not true, you must find for the defendant," is, in our judgment, more correct, without any refinements as to the letter and the substance, which tend to confuse, rather than enlighten, the minds of laymen.

The plaintiff in error submits that the court erred in refusing to allow the defendant below during the trial of the cause to amend its pleadings so as to allege an additional ground why the policy of insurance sued on was void. The Texas statute provides that all amendments to pleadings must, when court is in session, be filed under leave of the court, upon such terms as the court may prescribe, before the parties announce ready for trial, and not thereafter. Rev. St. 1895, art. 1188. This statute limits the right which it confers, but does not take away the discretion which, prior to the statute, the courts had to admit amendments in order that justice might be done. In Texas, as elsewhere, the courts sometimes, in the exercise of that discretion, pending the trial permit a party to amend after he has announced ready for trial. In that state the courts of last resort have approved of the action of trial courts in granting leave to amend pending a trial, but we have not been referred to any case in which it has held that the trial court erred in refusing leave to amend after the party had announced ready for trial, and had entered on the trial of the case. The bill of exceptions shows that:

"On the trial of this case, beginning on the 13th day of December, 1898, during the progress of the trial, and after the plaintiff had introduced his testimony in chief and rested, and the defendant had introduced its testimony and rested, and the plaintiff had introduced his testimony in rebuttal, to wit, late in the afternoon of December 14th, plaintiff's witness Dr. G. B. Fosque testified that he had made an examination of John I. Hassler during the spring of 1897 as a subject for life insurance; that he did not examine him carefully, and did not examine his lungs, but merely made an inspection, taking his family history and his own statements regarding his health; the application being in a company that did not require a careful examination. Upon cross-examination by the defendant's counsel the witness stated that the insurance referred to was for a small amount in the Sun Life Insurance Company, which amount was less than \$500, and that the same was granted to him, so the witness was told. The court thereupon adjourned for the next day, and on the 15th day of December, 1898, on the opening of court, and as the plaintiff was about to conclude his testimony in rebuttal, the defendant moved the court to permit it to amend its pleadings to the extent of alleging another ground of forfeiture of the policy sued upon; that in Hassler's application for insurance he was required to answer in what companies and for what amounts he was then insured, giving date of policies, and that he, the said Hassler, answered 'None.' The defendant claimed that it had been surprised by the testimony of the plaintiff's witness Fosque on the preceding afternoon concerning the existence of this prior insurance, which was not disclosed, but suppressed, in the application of Hassler for the policy sued on; whereupon the plaintiff produced to the court the first application of Hassler to the defendant company for insurance, made in August, 1897, addressed to the defendant company, and which had been refused by the company, and returned to its medical examiner, Dr. J. C. J. King, of Waco, Texas, wherein Hassler had stated that he had other insurance in the Sun Life Insurance Company, dated

the 1st of July, 1895. It was also shown that in the proofs of death furnished by the plaintiff, Yoakum, as executor, to the defendant, early in September, 1898, which proofs of death had been before that introduced in evidence in this case by the defendant, the deceased, Hassler, had other insurance, amounting to \$220, in the Sun Life Insurance Company, at the time of his death, besides the policy sued on; and it was further shown that the proofs of death had been furnished the defendant company early in September, 1898, and had been in its possession ever since, showing this fact. Thereupon the court refused to allow the defendant to amend its pleadings for the reason that the defendant appeared to be affected with sufficient facts to put it upon full notice of the existence of this prior insurance in time to have availed itself of this point as a defense; failing in which the defendant was guilty of negligence and laches, and was not entitled to amend its pleadings so as to set up a new case of forfeiture at this stage of the trial. It was further shown that the Sun Life Insurance Company had an office in Waco, and had had for several years, and that its agent was C. S. Swinney."

We think the application to amend pending the trial was addressed to the sound discretion of the trial court, the exercise of which in this case, if subject to review, should not be held to be reversible error.

We reserve for consideration later the fourth assignment of error. The fifth assignment is that the court erred in refusing to allow the defendant to prove by the witnesses J. L. Garrett and L. C. Penry, the attorneys for the insurance company, that the witness M. V. Hassler had made statements to them out of court contradictory to those made by her in court. M. V. Hassler is the surviving wife of the insured. She was called as a witness by the executor, and testified only to the death of her husband, and that she was the surviving widow. Thereupon, being tendered the defendant for cross-examination, its counsel asked her, among other things, what was the matter with the deceased at the time of his death, intending to follow up this question with further questions to elicit from her all the facts which were subsequently testified to by her when she was recalled by the defendant as its witness; but the plaintiff objected that the counsel should confine his questions to a strict cross-examination as to the matters which had been inquired about by the plaintiff, which objection the court sustained. When the defendant came to offer its testimony, it called this witness, and she then testified that her husband had to take to his bed in January, 1898; that he had not been coughing before that time, except once in a while; that he was a farmer and gardener, and rented land from Mrs. Earle, onto which he moved in December, 1896; that the only spell he had while on Mrs. Earle's place in 1897 was a little spell during April, which lasted him about a week, and that he was not sick in May and June of that year; that he rented of Mrs. Earle 12 acres in orchard and 12 acres in garden and truck patches; that the rent was payable in part of the produce; that he did not get any advances from Mrs. Earle, or anything in the way of supplies to run the place, and did not mortgage to her two horses and a hack and a wagon for the purpose of getting money to raise a crop there for the year 1897; that she first heard of the \$4,000 judgment in favor of Mr. Yoakum against her husband about a year ago, and that she first heard of the will made by her husband naming Yoakum as executor about the time the policy was issued; that her husband owed Yoakum

\$4,000 for borrowed money to run his business of farming and gardening while working for Mrs. Earle, and a Mr. Faulkner, from whom he rented land for five or six years before he rented from Mrs. Earle; that she did not remember how much was borrowed in any year, and never heard her husband say how much was borrowed, nor the time when it was borrowed, in any year, and that all the money she ever saw Yoakum give to her husband was \$10, during his last illness, a while before he died. The defendant offered to prove by the witnesses Garrett and Penry that Mrs. Earle had stated to them during the month of November, 1898, that she had never heard, until she was told by them, of the existence of the judgment against Hassler in favor of Yoakum for the sum of \$4,000; that her husband did not owe Yoakum any borrowed money at all, and did not owe him \$4,000, and only owed him a few dollars advanced to him during his last sickness, which was furnished in the nature of supplies long after the issuance of the policy sued on; that she knew nothing about her husband's having made a will naming Yoakum as executor, and providing for the payment of his debts in preference to the gifts and allowances to his wife, and that she should receive only such portion as should be left after the payment of all debts against the estate. To the introduction of this testimony the plaintiff objected for the reason that the defendant, having called Mrs. Hassler as its witness, was precluded from attacking her credibility and from impeaching her by independent statements made out of court; and, further, because it had laid its predicate for such impeachment upon immaterial matter, and was concluded by the answers of the witness. It is stated in the assignment of error that the defendant offered this testimony for the reason that Mrs. Hassler was a hostile witness, interested in the result of the litigation, and virtually a party to the suit, and that the statements made by her out of court were against her own interests, and that the defendant was surprised by her testimony. The objections of the plaintiff were sustained, and the court refused to allow the offered testimony of Garrett and Penry to be introduced. The record does not show that Mrs. Hassler's relation to this case is such that any statements made by her out of court could be used to limit the right of the executor to recover on the policy on which this action was brought. The rules for conducting the examination of witnesses are such as to fully justify the trial court in restricting the defendant in the exercise of its right to cross-examine to matters on which the witness had testified on the direct examination. If the witness had knowledge of other facts tending to support the defendant's case, the court might, to meet the convenience of the witness or of the parties, permit such testimony to be given, on a proper examination by the defendant, at the time the witness was first called, although called by the plaintiff. The better practice, however, where the convenience of the witness and of the parties will permit it, is to restrict the examination by the defendant to the matter which the plaintiff has introduced, and require the defendant, if it so desires, to call the witness as its own when the time is reached for it to introduce evidence in support of its case. It is manifest from the whole tenor of the

testimony drawn from this witness, and from the substance of the testimony offered to be given by the witnesses Garrett and Penry, that the material purpose was to contradict Mrs. Hassler, not in reference to any matter about which she had testified at the instance of the plaintiff, because it was not in dispute that the insured was dead, and that this witness is his widow. As her testimony could not be used as declarations of a party against interest to limit or defeat the recovery by the executor, it is difficult to see what purpose could be served by permitting the attorneys for the defendant to testify that when they had approached her several months before on the subject of this litigation, to which they now say she is an adverse party, she had then answered in a different manner from that in which she answered their questions when called as a witness in open court. It is manifest from the undisputed facts in this record that the insured was indebted to Yoakum to the extent of the premium advanced; and, as the case is here presented, it is wholly immaterial to the defendant whether the insured was or was not further indebted to Yoakum. All the testimony on that subject, so far as it affects this assignment, was immaterial, and the second objection made by the plaintiff was well taken. 3 Jones, Ev. §§ 827, 855, 857, 858; 1 Greenl. Ev. (14th Ed.) § 462.

The sixth assignment is that "the court erred in its charge to the jury in limiting the period in which Hassler had stated that he was then and had been in good health to the date of said application." Further on it is said in this assignment that "the charge of the court in making the limitation herein complained of is shown in assignment of error No. 2, above." The most critical examination that we have been able to make of the assignment No. 2 does not disclose to us any such express limitation. It may be that there is an omission in the general charge, but, if so, it is not pointed out either in this assignment or in assignment No. 2. The record nowhere discloses that any exception was taken to the charge on this ground, or bill of exception reserved, or counter instruction requested. Moreover, there is nothing in the testimony brought up in the different bills of exception tending to show that Hassler was not in as good health when he received the policy as he was when he made the application. The entire contention of the defense in the case was that the answers made in the application were false. The issue on this defense was fairly submitted to the jury, and found against the defendant.

The fourth assignment is that "the court erred in rendering judgment for 12 per cent. damages upon \$5,000, and also for \$750 for attorney's fees, for the reason that such charges constitute a penalty upon the defendant for defending this litigation, and discriminate against it, and are consequently contrary to law and unconstitutional." The circuit court instructed the jury that the plaintiff sued the defendant for statutory damages and all reasonable attorney's fees for the prosecution and collection of the loss alleged to have accrued to the plaintiff, under the provisions of the statute of the state of Texas relative to and controlling the operation of life insurance companies in the state; and that, if the jury found for the

plaintiff on the issues of fact as presented, he would be entitled to recover, and the jury should find by their verdict 12 per cent. damages on the amount of the loss, together with all reasonable attorney's fees for the prosecution of the suit. The statute referred to in the charge of the court, as originally passed on May 2, 1874, is the ninth section of an act to regulate life and health insurance companies and all associations, partnerships, or individuals doing life and health insurance business, incorporated within or without the state of Texas. As then passed, the language was:

"The several foreign life insurance companies, and those incorporated out of this state, in all cases where a loss occurs, and when they refuse to pay the same within the time specified in the policy, shall be liable to pay the holder of said policy, in addition to the loss, not more than twelve per cent on the liability of said company for said loss; also all reasonable attorney's fees for the prosecution of the case against said company; and should any such company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty days after notification of the issuance thereof, then and in that event the certificate issued to said company shall immediately become null and void, and said insurance company shall be prohibited from transacting any business in this state until said execution shall be fully satisfied and discharged." 2 Pasch. Dig. art. 7116.

The foregoing section was somewhat modified, evidently to meet decisions construing the fourteenth amendment to the constitution of the United States, and carried forward into the Revised Statutes of Texas of 1879, where it appears in articles 2953 and 2954, c. 3, of title 53, relating to the general subject of insurance, in the precise language in which it now appears in the Revised Statutes of Texas of 1895, in articles 3071 and 3072, c. 3, of title 58, on the subject of insurance, as follows:

"Art. 3071. (2953) In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss.

"Art. 3072. (2954) Should any life or health insurance company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty days after the officer holding such execution has demanded payment therefor from any officer, agent or attorney of such company in this state or out of it, such officer shall immediately certify such demand and failure to the commissioner of insurance, and thereupon the commissioner shall forthwith declare null and void the certificate of authority issued by him to such company, and such company shall be prohibited from transacting any business in this state until said execution shall be fully satisfied and discharged, and until such commissioner shall renew his certificate of authority to such company."

The validity of article 3071 has been several times drawn in question in the supreme court and in the courts of civil appeals of Texas, and had been uniformly sustained until the rendition of the judgment on rehearing by the court of civil appeals for the Second district in the case of Insurance Co. v. Smith, 41 S. W. 684, 687. In that case the trial court had rendered judgment in favor of the policy holder for the statutory damages and attorney's fee, and the court of civil appeals announced its decision affirming the judgment, but said in its opinion:

"We would be inclined, however, to hold, upon the authority of the decision of the supreme court of the United States in the case of *Railroad Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, that the attorney's fees and penalty allowed in the judgment of the lower court, as provided for in article 3071, Rev. St. Tex., could not be recovered; but, in view of the recent action of the supreme court of Texas in refusing a writ of error in the case of *Casualty Co. v. Allibone*, 90 Tex. 660, 40 S. W. 399, we follow the authority of the latter court, and in all things affirm the judgment herein."

The courts of civil appeals of Texas consist of three judges. On a rehearing in the foregoing case a majority of the court reversed its former decision. After referring to their former opinion, they use this language:

"We now think, however, that there can be no room to doubt that the said article is unconstitutional, and contrary to and violative of section 1 of the fourteenth amendment to the constitution, especially when read by the light of the case of *Railway Co. v. Ellis*. * * * We think the cases of *Insurance Co. v. Chowning*, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 504; *Insurance Co. v. Walden* (Tex. Civ. App.) 26 S. W. 1012; *Casualty Co. v. Allibone* (Tex. Civ. App.) 39 S. W. 632; and *Id.*, 90 Tex. 660, 40 S. W. 399,—were all erroneously decided, and they are overruled."

Mr. Justice Hunter dissented from the decision and opinion of the majority as rendered on this rehearing, and in his dissenting opinion, referring to a message of the governor of Texas to the legislature, and to the statistics of the commissioner of insurance, he says:

"Life insurance companies principally chartered by and domiciled in the state of New York have for years done a large business in this state [Texas]. The excess of premiums over losses paid these companies by the people of Texas for the year 1895 was \$2,471,192. The premiums which our people paid three New York companies for the past ten years amounted to \$18,644,124.85, and the policies which they paid aggregated only \$4,947,659.51. The appellant in this case, a New York corporation, commenced doing business in this state [Texas] in 1881, and up to the close of business in 1895 had collected from our people in premiums \$6,349,979.68, while during the same period it paid back to us in losses only \$1,877,941.90. The same report shows that the Equitable Life Assurance Society of New York commenced in 1876, and had collected \$6,404,256.21, and had only paid back \$2,133,304; while the Mutual Life Insurance Company of New York commenced in 1880, had collected \$7,351,743.80, and had paid back in losses only \$1,648,546.33, or less than 22½ per cent. of what it had collected. The same report shows that these three New York corporations—two without any capital stock, and the other (the Equitable) with only \$100,000 capital stock—had accumulated assets aggregating \$548,253,214.55, and their aggregate surplus over and above all liabilities had grown in 1895 to the enormous sum of \$101,804,289.23. There were 20 other life insurance companies doing business in this state in 1895 upon the same plan, rates, and methods, and withdrawing from the people their resources upon about the same ratio. It is a well-known fact that a corporation known as the 'Louisiana Lottery Company,' lately driven from the shores of this country because of its demoralizing methods of doing business, and of the vast sums of money it drained from the people monthly and annually, sold tickets to the people of the value of \$3,000,000 monthly, and paid back to them in cash prizes \$1,500,000. In other words, it collected \$2, and paid back \$1. Yet these great moral corporations, by their equally alluring schemes, collect from our people \$4 and pay back only a little over \$1, and often then, as the records of the courts of the state will show, at the end of a long, tedious, and expensive lawsuit. If the financial prosperity and welfare of the people of the state may be taken into consideration by our legislature, and, in the exercise of the police powers of the state, sound public policy would authorize discriminating legislation against lottery companies, because, among other reasons, of their methods of doing business, and of the

great amounts of money drained annually from our people, and carried away to glut the coffers of greed and avarice, then why should these great money cormorants of New York escape? It seems to me that the legislature of Texas, in the exercise of this great residuum of power still left in the people of the states, had the right to enact the statute in question, discriminating against this character of business, and that good reasons, founded in sound state policy, existed therefor; and that, therefore, the statute is not in contravention of the fourteenth amendment to the constitution of the United States, but is valid and binding as part of the contract sued on in this case, and that the appellee ought to recover the penalty and attorney's fees provided for therein, the same as if they were named in the face of the policy."

Without concerning ourselves with any question as to the good reasons, founded in sound state policy, for the passage of the act in question, and without adopting Judge Hunter's nervous rhetoric, we may derive instruction from the facts which he recites. In a recent case the supreme court of the United States passed on the constitutionality of a somewhat similar statute of Kansas:

"An act relating to the liability of railroads for damages by fire.

"Section 1. Be it enacted by the legislature of the state of Kansas: That in all actions against any railway company organized or doing business in this state, for damages by fire, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages (which proof shall be prima facie evidence of negligence on the part of said railroad): provided, that in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"Sec. 2. In all actions commenced under this act, if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment."

Sess. Laws 1885, p. 258, c. 155.

We quote at some length different portions of the opinion of the court in this case:

"It is contended that it [the Kansas act] is in conflict with the fourteenth amendment to the federal constitution, and this contention was distinctly ruled upon by the supreme court of the state adversely to the railroad company. In support of this contention great reliance is placed upon *Railroad Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. In that case a statute of Texas allowing an attorney's fee to the plaintiffs in actions against railroad corporations on claims, not exceeding in amount \$50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations. It was so regarded by the supreme court of the state, and its construction was accepted in this court as correct. While the right to classify was conceded, it was said that such classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted; that no mere arbitrary selection can ever be justified by calling it classification. And there is no good reason why railroad corporations alone should be punished for not paying their debts. Compelling the payment of debts is not a police regulation. We see no reason to change the views then expressed, and, if the statute before us were the counterpart of that, we should be content to refer to that case as conclusive. But, while there is a similarity, yet there are important differences, and differences which, in our judgment, compel an opposite conclusion. The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not

cast upon such corporations in all cases, but only in those in which the fire is 'caused by the operating' of the road. It is true that no special act of precaution was required of the railroad companies, failure to do which was to be visited with this penalty, so that it is not precisely like the statutes imposing double damages for stock killed where there has been a failure to fence. *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463. And yet its purpose is not different. Its monition to the railroads is not, 'Pay your debts without suit, or you will, in addition, have to pay attorney's fees;' but rather, 'See to it that no fire escapes from your locomotives, for, if it does, you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed.' It has been frequently before the supreme court of Kansas, has always been so interpreted by that court, and its validity sustained on that ground. * * * In 1887 the legislature of the state of Missouri felt constrained to pass an act making every railroad corporation responsible in damages for all property destroyed by fire communicated, directly or indirectly, from its engines, and giving the corporation an insurable interest in the property along its road. This statute was, after a full examination of all the authorities, held by this court a valid exercise of the legislative power. *Railroad Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611. So, when the legislature of Kansas made a classification, and included in one class all corporations engaged in this business of peculiar hazard, it did so upon a difference having a reasonable relation to the object sought to be accomplished, to wit, the securing of protection of property from damage or destruction by fire. * * * As individuals, we may think it better that the legislature prescribe the specific duties which the corporations must perform. We may think it better that the legislation should be like that of Missouri, prescribing an absolute liability, instead of that of Kansas, making the fact of fire *prima facie* evidence of negligence. But, clearly, as a court, we may not interpose our personal views as to the wisdom or policy of either form of legislation. It cannot be too often said that forms are matters of legislative consideration; results and power only are to be considered by the courts.

"Many cases have been before this court involving the power of state legislatures to impose special duties or liabilities upon individuals and corporations, or classes of them, and, while the principles of separation between those cases which have been adjudged to be within the power of the legislature and those beyond its power are not difficult of comprehension or statement, yet their application often becomes very troublesome, especially when a case is near to the dividing line. It is easy to distinguish between the full light of day and the darkness of midnight, but often very difficult to determine whether a given moment in the twilight hour is before or after that in which the light predominates over the darkness. The equal protection of the laws which is guaranteed by the fourteenth amendment does not forbid classification. That has been asserted in the strongest language. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. In that case, after, in general terms, declaring that the fourteenth amendment was designed to secure the equal protection of the laws, the court added (pages 31, 32, 113 U. S., page 359, 5 Sup. Ct., and page 925, 28 L. Ed.): 'But neither the amendment,—broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts,—such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all per-

sons and property, under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' This declaration has, in various language, been often repeated, and the power of classification upheld, whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. It is also clear that the legislature (which has power in advance to determine what rights, privileges, and duties it will give to and impose upon a corporation which it is creating) has, under the generally reserved right to alter, amend, or repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation. *Railroad Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746.

* * * Our conclusion in respect to this statute is that, for the reasons above stated, giving full force to its purpose as declared by the supreme court of Kansas, to the presumption which attaches to the action of a legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public, it must be sustained, and the judgment of the supreme court of Kansas is affirmed. *Railroad Co. v. Matthews*, 19 Sup. Ct. 609-613, 43 L. Ed. 913."

The record before us does not disclose in full the policy sued on, the application therefor, and the report of the medical examiner. The answer says that the policy of insurance sued on was based upon a written and printed application therefor, wherein the applicant was required to answer, etc., which phrase "required to answer" is repeated from time to time as the several breaches of warranty are counted on. From this it appears, as we also know from common knowledge, that the application, the report of the medical examiner, and the policy are all in the form prescribed by the plaintiff in error. There is no statutory regulation in Texas to control or moderate the companies in propounding such forms, and it is safe to assume that the numerous companies (including the plaintiff in error) doing business in that state substantially follow classic precedents, and attain the perfection of such literature as we find it described in *Grattan v. Insurance Co.*, 80 N. Y. 290, wherein it is said:

"The application covers more than two pages of the printed case. It contains questions numbered from one to seven, most of them divided into parts distinguished by letters of the alphabet from A to F, inclusive, and subclauses characterized by neither figure nor letter, but separated from the context by blank spaces, calling for twenty-eight answers, while the medical examiner's certificate annexed thereto covers more than three pages, and calls for upwards of one hundred answers, to be signed also by the applicant for the insurance; and, as given, purport to be transcripts of his answers to the medical examiner."

In the case before us the answer avers:

"That all of the statements and answers made by said Hassler in reply to the questions which he answered in said application, as hereinbefore stated, were material, and that all the terms of said application he consented and agreed should be material, and that they were warranties, and that they were true, and complete, and that they were made as a basis for the issuing of the policy then applied for, and which is here now sued on."

At common law the warranty of the truth of the answer to a specific inquiry in the application implies the agreement that the subject-matter of the question and answer is to be regarded as material, and that an untrue answer thus warranted avoids the policy,

whether the answer be made in good faith or not. *Anderson v. Fitzgerald*, 4 H. L. Cas. 484. The foregoing rule of the common law in its harshest strictness appears to retain its force in Texas. We quote from a recent decision in that state:

"In the application, which is made a part of the policy, the assured stated in writing that his place of residence was Kyle, Hays county, Texas. The evidence beyond dispute establishes the fact that at the time of his application, before, or since, he did not reside at Kyle, but was a farmer, residing in the country about 12 miles from Kyle. [We note that it does not appear in the opinion that the applicant did not reside in Hays county, and that Kyle was not his post-office address.] The application in unequivocal terms warrants the literal truth of the statements made therein, and declares that the knowledge by an agent that any statement made by the assured was false shall not, in any manner, affect the right of the company to declare the policy void on account of the breach of the warranty; and the policy expressly provides that any false statement shall avoid the contract of insurance. It results from these facts that the assured falsely stated his place of residence, and, in accordance with the well-settled rule of law upon the question, this necessarily avoids the policy, although the false statement may not relate to a matter that is material, and although the risk may not be increased by reason of the fact that the applicant resides elsewhere than as stated in the application. When once it is ascertained that the statement is a warranty, and that it is false, and the policy expressly provides for a forfeiture in that event, the contract must be so enforced, although it concerns a matter of slight importance, and may not in any manner seriously affect the risk. In this case it is not insisted that the agent who accepted the application had notice of the falsity of the statement of the assured in this respect when it was made; but, assuming that under the facts he may have known that it was false, still the terms of the policy settle this question. The parties to the contract of insurance had the right to make, as a part of their agreement, the condition that the knowledge of the agent of the falsity of the answers should not preclude or estop the company. This was one of the express provisions of the policy, and is as much binding upon the assured as any other of its terms. *Fitzmaurice v. Insurance Co.*, 84 Tex. 61, 19 S. W. 301." *Hutchison v. Insurance Co.* (Tex. Civ. App.) 39 S. W. 325.

In many of the states the legislature has interfered with rational regulation on this subject, and has provided substantially as shown in the act of the legislature of Pennsylvania passed June 23, 1885:

"That whenever the application for a policy of life insurance contains a warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk."

Referring to this statute, the supreme court of Pennsylvania say:

"This act has effected a change in life insurance contracts,—a much-needed change so far as some companies are concerned. The questions of materiality and good faith are ordinarily questions of fact, and therefore are for the jury. They were certainly so in this case. * * * The evident purpose of this legislation was to strike down in this class of cases literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. It provides a rule of construction for the purpose of preventing injustice, and it is as much the duty of courts to enforce such rules as it is to administer the statute of frauds and perjuries." *Hermany v. Association*, 151 Pa. St. 17, 24 Atl. 1064.

The warranties counted on in the defense in the case we are considering all relate to the state of physical soundness and health of the applicant, and are material to the risk. Touching these, four

physicians who had attended the applicant in a professional capacity were called to testify. It is a hoary maxim that doctors will differ. One of the physicians called in this case testified that he made a careful examination of the applicant in October, 1897, and found "that he was in the third stage of consumption, and had a cavity in his lung as big as your fist." The three other physicians each testified substantially that they had attended the applicant in a professional capacity at different times during the year 1897 (early spring, 28th of September, latter part of November), had examined his lungs, and found that they were sound and healthy. In the state of New York it is provided by statute that:

"A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Code Civ. Proc. § 834.

The Code provides in a subsequent section (836) for the waiver by certain parties of the bar of this privilege, which waiver must be made in open court on the trial of the action or proceeding, and "a paper executed by a party prior to the trial, providing for such waiver, shall be insufficient as such a waiver. But the attorneys for the respective parties may, prior to the trial, stipulate for such waiver, and the same shall be sufficient therefor." Amendment of section 836, to take effect 1st of September, 1899 (Laws 1899, c. 53). This statute is discussed in numerous decisions by the New York courts, of which we cite only a few: *Edington v. Insurance Co.*, 67 N. Y. 185; *Dilleber v. Insurance Co.*, 69 N. Y. 256; *Cahen v. Insurance Co.*, Id. 300; *Grattan v. Insurance Co.*, 80 N. Y. 281; *Id.*, 92 N. Y. 274; *Nelson v. Village of Oneida*, 156 N. Y. 219, 50 N. E. 802. It is also fully discussed by the supreme court of the United States in *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708. Somewhat similar provisions appear to have been made in very many of the American states. See "Privileged Communications," 19 Am. & Eng. Enc. Law, pp. 147, 148, note 5. In the case of *Railroad Co. v. Ellis*, supra, Mr. Justice Gray, with whom concurred Mr. Chief Justice Fuller and Mr. Justice White, expressed regret—

"That so important a precedent as this case may afford, for interference by the national judiciary with the legislation of the several states on little questions of costs, should be established upon argument *ex parte* in behalf of the railroad corporation, without any argument for the original plaintiff."

He added:

"But it is hardly surprising that the owner of a claim for fifty dollars, having been compelled to follow up, through all the courts of the state, the contest over this ten-dollar fee, should at last have become discouraged, and unwilling to undergo the expense of employing counsel to maintain his rights before this court."

In the case of *Casualty Co. v. Allibone*, 90 Tex. 660, 40 S. W. 399, we note this language in the opening of the opinion by the chief justice:

"Since the filing of the application for the writ of error in this case, counsel for the appellee, desiring, as he says, to eliminate the federal questions involved,

has offered to remit in this court so much of the recovery as was given for attorney's fees and damages under the statute."

The court held that the remittitur could not be allowed in the supreme court. The decision and judgment of the trial court and of the court of civil appeals were affirmed, and, as the case has not appeared in the supreme court of the United States, it is safe to assume that counsel for the appellee made the remittitur out of court to eliminate the federal question, and thus obtain the collection of the principal sum. That suit was by the widow of the insured. Her husband's death occurred on the 23d day of August, 1891. Proof of death was made formally on February 29, 1892. Suit was filed by the widow on the policy in the United States circuit court at Dallas on the 4th of May, 1892. That suit was dismissed for want of jurisdiction in February, 1893, and suit was immediately brought on the policy (February 3, 1893) in the state court, in which court the defendant, the insurance company, obtained judgment on its plea of limitation. This judgment was reversed on appeal by the court of civil appeals. 32 S. W. 569. On a second trial the widow recovered judgment. The defendant insurance company thereupon appealed to the court of civil appeals, and the judgment was affirmed. 39 S. W. 632. The insurance company then applied to the supreme court for a writ of error, which was granted, and at the hearing thereon the case was decided in favor of the policy holder, and the judgment of the lower courts affirmed April 29, 1897, or nearly six years after the death of the insured.

In the quotation which we have made from the opinion of Judge Hunter in the Smith Case we have seen that he alludes to the fact that in Texas money is received from the insurance companies in payment of losses to the extent of only a small per cent. of the premiums received by them, and "often, then, as the records of the courts of the state will show, at the end of a long, tedious, and expensive lawsuit." It must be manifest to the most casual observation that the parties to these insurance contracts and to such a controversy are unequally matched. It is human nature and human experience that the stronger will use his strength. He may piously declare his benevolent intentions, and disclaim any purpose to profit by his power, but he will use it none the less. Without the aid of a legal fiction, we cannot say or think that the minds of these contracting parties do or can ever meet. One is a mere legislative thought, a legal, artificial, imaginary entity, invisible, endowed with immortality, and almost superhuman powers of organization and delegated activities, and infinite capacity for expansion and the receiving of tribute. It can act only through agents. For the exercise of its controlling powers, it is able to secure, and constantly retain, the highest order of talent in every department of its organization. In a world-wide field of minute operations these governing agents, wherever located, must, of necessity, be practically unapproachable by the vast concourse of parties with whom the invisible principal deals. A hierarchy results. Of this hierarchy the lowest rank, in prodigious swarm, fill the land. The scope of their agency is limited with marvelous skill. Armed with longer and shorter

catechisms, and a form of covenant devised with consummate ingenuity, one of these inspired special agents finds the Hays county farmer at his plow tail, 12 miles from Kyle (probably his nearest railroad town, most accessible post office, and the home of the agent), proclaims his gospel, and receives the novice into the host of the contributing elect. A brother of like degree finds the horticultural laborer in McLennan county, engaged in raising on rented land vegetables, berries, and fruits, and peddling the same to families in the county town. He learns that this market, garden, and truck farmer wants to get his life insured for the benefit of his wife. These parties meet, and exchange views on the subject. With the aid of a medical examiner, appointed by the insurance company, the special agent opens and explains the questions in the catechisms, and reduces to writing in due form (as these experts explain and declare) the required answers,—128, more or less,—each of which answers as thus written by the agent and the medical examiner this unlettered novice is required to adopt and warrant to be true, without any regard to the answers as actually spoken by him or to the facts patent to the sight of these special agents, whose auditory and optic nerves have been so paralyzed by the limitations on the scope of the agency that they do not connect with the mind of the mystic principal. These paralyzed agents are the only human organs through which the insurer corporation expresses itself to the mind of the insured. Where the strict literal warranty doctrine obtains, the wonder is not that a breach of a contract, thus written and construed, can often be established, but that such a contract so construed can ever be enforced after the death, and hence without the testimony of the insured.

The subject is a large one. It is one of peculiarly vital public interest. It challenges legislative attention. The foregoing examples, which we have taken from the record in this case and from the Texas Reports, are by no means exceptional in that state, but are representative. It seems to us that the state legislation drawn in question by this assignment is not in conflict with the fourteenth amendment to, or any other provision of, the constitution. It is not simply a statute imposing a penalty on life or health insurance companies for failing to pay certain debts, but is one to enforce reasonable regulations and conditions on which such companies are permitted to do business in Texas. The purpose of this statute is not to compel the payment of debts. Life and health insurance companies do not usually neglect or defer the payment of their admitted debts. They generally advertise themselves as having a large accumulation of surplus revenue, and as being ready to pay, as soon as it matures, whatever debt they owe. The obvious purpose of the act is to secure a righteous degree of care in writing policies of insurance, so that the immortal insurer will not receive premiums from an honest recipient of one of its policies which does not bind it to meet the loss that he bargains it shall meet, and in consideration for which he parts with his money while he is alive and able to make earnings, that he may, to the extent stipulated, protect his family or his creditors against the contingency of his death, which must

occur. To enforce the exercise of this righteous care on the part of the very strong in contracting with the weaker and less learned, and in conducting humanely this peculiar business that reaches so often across the graves of the insured to the homes of afflicted dependents, so that the insurers will not receive premiums from honest parties whom the contracts as written do not insure, would seem to be within the legislative power. The classification here involved is, therefore, not arbitrary, but has reasonable relation to the peculiar features of the business to which it applies. It does not discriminate against some and favor others, but, though limited in its application, does, within the sphere of its operation, affect alike all persons similarly situated. It seeks to subserve the general interest of the public. It must be sustained. Whatever may be the sound conclusion as to the unqualified validity of this Texas statute, we hold that the fourth assignment of error in this case is not well taken, on the ground that the state has the right to prescribe the terms upon which foreign corporations may do business therein. "Insurance companies established by charter from one state have no natural right to carry on business in any other state, and permission to do so is a privilege for which the payment of a substantial sum as licensee may be required." *Tied. Police Power*, p. 281. As articles 3071 and 3072, c. 3, tit. 58, Rev. St. Tex., were in force at the time the Yoakum policy was written, those provisions were assented to by the contracting parties, and were written into the contract.

The judgment of the circuit court is affirmed.

SCHOFIELD v. GOODRICH BROS. BANKING CO.

(Circuit Court of Appeals, Eighth Circuit. October 23, 1899.)

No. 1,235.

1. BANKS AND BANKING—POWER TO PURCHASE STOCK IN OTHER BANK—LIABILITY FOR ASSESSMENT.

The purchase by a corporation, only empowered by its charter to transact a banking business, of the stock of another corporation, as an investment, and not as security or in payment of a debt, is *ultra vires* and void, and cannot be validated by estoppel. Hence such a corporation cannot be held liable for an assessment as a stockholder of a national bank, where it purchased the stock as an investment, although it retained such stock until the national bank became insolvent, and received dividends thereon.

2. FEDERAL COURTS — FOLLOWING STATE DECISIONS—CONSTRUCTION OF STATE STATUTES.

The decisions of the supreme court of a state, defining and limiting the powers of corporations created under the statutes of the state, are constructions of such statutes which will be followed by the federal courts.¹

3. BANKS—STATUTORY POWERS—NEBRASKA STATUTES.

Consol. St. Neb. 1891, p. 132, § 294, enacted in 1889, requiring state banks to make reports to the state auditor containing specified information, did not add to the powers of such banks; and the requirement therein that such banks should report, among other things, "the par value and ac-

¹ State laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548, *Wilson v. Perrin*, 11 C. C. A. 71, and *Hill v. Hite*, 29 C. C. A. 553.

tual market value of all stock or bond investments," did not empower them to purchase the stock of other corporations as an investment, where, under the prior statutes, as construed by the supreme court of the state, they were without such power.

In Error to the Circuit Court of the United States for the District of Nebraska.

W. A. Moore (Earl M. Cranston and Robert J. Pitkin, on the brief), for plaintiff in error.

J. W. Deweese (John Heasty, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action by the receiver of a national bank to enforce a stockholder's liability, under section 5151 of the Revised Statutes. The defense is that the purchase of the stock was ultra vires of the state bank, the alleged stockholder. The material facts are these: The Union National Bank of Denver is a corporation organized under the national banking laws, and the plaintiff in error, John W. Schofield, is its receiver. The defendant in error, the Goodrich Bros. Banking Company, is a banking corporation which was organized under the laws of the state of Nebraska in 1886. The statutes under which it was organized were general in their terms. They allowed any number of persons to become incorporated for the transaction of any lawful business by the adoption and filing of articles of incorporation, and the publication of a notice, among other things, of the general nature of the business of the corporation. Comp. St. Neb. 1899, §§ 1826, 1829, 1833, 1834. The supreme court of Nebraska, in construing these laws, has held, in accord with the general current of authority, that the enumeration of its powers by a corporation in its articles of incorporation, under these statutes, is the exclusion of all other powers. *State v. Railroad Co.*, 24 Neb. 162, 38 N. W. 43. The only powers secured to the defendant in error were those obtained by the use in its articles of these words: "The general nature of the business to be transacted by the corporation is banking in all its various forms and branches." In 1889 the legislature of the state of Nebraska enacted a statute for the purpose of obtaining information relative to the financial standing of banks in that state, which required them to report to the state auditor, among other things, "the amount loaned upon bond and mortgage, the par value and actual market value of all stock or bond investments, designating each particular kind and the amount invested in each." Consol. St. Neb. 1891, p. 132, § 294. Between 1889 and 1895 the defendant in error obtained, partly by subscription and partly by purchase, the 20 shares of the stock of the Union National Bank upon which this action is based, and received six dividends, which amounted in the aggregate to \$585. None of this stock was taken by the state bank as security for or in payment of any loan made by it or indebtedness to it, but it was all subscribed for or bought by the defendant in error as an investment. Upon this state of facts, the court below rendered judgment for the defendant in error, and counsel for the receiver insists that this was error, because

the purchase of the stock by the state bank was not beyond its powers, and because, if it was, that bank was estopped from defending on that ground by the fact that it permitted itself to appear as a stockholder on the books of the National Bank, and received dividends on its stock for years, while that bank was incurring its liabilities to the creditors whom the receiver now represents.

Both the questions which the plaintiff in error presents have been decided by the supreme court of the United States, and by the supreme court of the state of Nebraska, and those decisions are controlling authority upon these questions in this court. It would therefore be futile for us to consider or discuss them. Each of these courts has held that the purchase of the stock of another corporation as an investment, and not as security or in payment of a debt, by a corporation simply empowered to transact a banking business, is beyond its powers, and void, and that, since such a purchase is *ultra vires* and void, it cannot be made or validated by estoppel. *Bank v. Kennedy*, 167 U. S. 362, 366, 371, 17 Sup. Ct. 831; *Bank v. Hart*, 37 Neb. 197, 201, 206, 55 N. W. 631.

The decision of the supreme court of Nebraska is a construction of the statutes of that state under which the defendant in error is organized, and it is an elementary principle that the federal courts will construe and apply such statutes as they are interpreted by the highest judicial tribunal of the state which enacts them, when no question of general or commercial law and no right under the national constitution or laws is involved. There is no class of cases where they follow, and for obvious reasons ought to follow, the decisions of the state courts more implicitly than that in which these courts define and limit the powers of corporations created under the statutes of their respective states. What a medley of contradiction, confusion, and conflict would result if such corporations could exercise powers under the decisions of the national courts which are denied to them by the courts of their respective states. The decision in *Bank v. Hart* is therefore binding authority in this court in the case in hand. *Madden v. Lancaster Co.*, 65 Fed. 188, 192, 12 C. C. A. 566, 570, 27 U. S. App. 528, 536; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 77, 82 Fed. 124, 128, 49 U. S. App. 523, 534; *Id.*, 19 Sup. Ct. 341, 344.

The contention that this decision is inapplicable because the purchase of the stock under consideration in that case was made before the act of 1889 was passed, while the subscription and purchase here in question were negotiated after the passage of that act, cannot be successfully maintained. The defendant in error was incorporated in 1886, before that law was enacted, and its rights and powers were granted and limited by the statutes of Nebraska and the law of the land at that time. Under the decision to which we have adverted, these powers did not include the right or authority to purchase as an investment, either directly or by estoppel, the stock of another corporation. The act of 1889 did not grant that power to this corporation. It was neither the purpose nor the effect of that law to add to or enlarge the powers of banking corporations, but it was enacted for the sole purpose of regulating, controlling, and restricting the exer-

cise of the powers already given. The provisions which it contains, to the effect that these corporations must report to the state auditor the value of all their stock and bond investments, gave them no power to make such investments which the general statutes and the common law had not already granted to them, but its effect was clearly limited to the general purpose of the act, and that was to simply call for information relative to the financial standing of the banks of the state under the powers theretofore granted to them. The construction given by the supreme court of Nebraska to the charters of banks organized under the statutes of that state prior to 1889 is therefore conclusive in this case, and it is in accord with the interpretation given by the supreme court to the franchises conferred upon national banks in similar terms by the acts of congress. The judgment below is sustained by the opinions of the supreme court of the United States and of the supreme court of the state of Nebraska, and it is accordingly affirmed.

GREAT WESTERN COAL CO. v. CHICAGO G. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1899.)

No. 1,208.

1. PLEADING—JOINDER OF COUNTS IN PETITION.

A count in a petition, setting out a contract between plaintiff and defendant, and alleging its breach by defendant, and the damages sustained by plaintiff thereby, for which judgment is asked, and a count alleging the same facts, and, in addition, that a subsequent contract was made between the parties, by which defendant agreed to pay plaintiff a certain sum in compromise and settlement of such claim for damages, that defendant had failed to comply with such agreement, and asking judgment for the amount so agreed to be paid, are not inconsistent under the Code of Procedure of Missouri, since the facts alleged in the two counts are consistent, and they may both properly stand under such Code; the only effect of the additional matter alleged in the second count being, if proved, to liquidate the amount of damages recoverable for the breach of the original contract.

2. APPEAL—PREJUDICIAL ERROR—COMPELLING ELECTION BETWEEN COUNTS OF PETITION.

Under the Missouri Code a plaintiff is permitted to state the same cause of action in separate counts in different forms to meet the proof, and, where the counts of a petition meet the requirements of such provision, it is prejudicial error to compel an election between them before trial.

3. PLEADING—WAIVER OF ERROR.

Where a plaintiff is erroneously required to elect, before trial, between two counts of his petition, which state the same cause of action in different forms, and under which there could be but a single recovery, and he saves an exception to such ruling, he does not waive the exception by going to trial on the remaining count.

4. APPEAL—JUDGMENT ON REVERSAL.

A plaintiff was erroneously required to elect, before trial, between two counts of his petition, which stated the same cause of action in different forms to meet the proof, and on his election a judgment of dismissal was entered as to the abandoned count. A trial on the remaining count resulted in a judgment for defendant. *Held*, it appearing that there was no error in the trial, that the judgment on the count so tried would be affirmed, but that plaintiff was entitled to a reversal, and a trial on the count dismissed.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Stephen S. Brown (R. A. Brown and J. E. Dolman, on the brief), for plaintiff in error.

Frank Hagerman (Daniel W. Lawler, L. C. Krauthoff, and James C. Davis, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The general question which arises upon this record is whether the trial court committed an error in compelling the Great Western Coal Company, the plaintiff below and the plaintiff in error here, to elect, in advance of the trial, upon which one of two causes of action stated in its petition it would proceed to trial. The motion to compel an election, which was made in behalf of the Chicago Great Western Railway Company, the defendant below and the defendant in error here, was sustained, notwithstanding an objection which was duly interposed by the plaintiff company. Having been compelled by a peremptory order of the trial court to choose as between the two counts contained in its petition, it elected to stand on the second count, whereupon the court ordered and adjudged that the first count be dismissed at the costs of the plaintiff. A trial was afterwards had on the second count, which resulted in a verdict and judgment in favor of the defendant company.

The first count of the petition was an ordinary declaration upon a contract, for a breach thereof; and the second count was likewise a declaration upon a contract, and claimed damages for a breach of the same. It will suffice to say, generally, concerning the two counts of the petition, without reciting either of them at length, that in the first count the plaintiff company alleged, in substance, that it had theretofore made a contract with the defendant company to supply to the latter a large quantity of coal at certain of its coaling stations along the line of its road at an agreed price of \$1.45 per ton; that it had proceeded with the execution of said contract up to a certain point, and had delivered a certain quantity of coal, when one of its coal veins gave out, or proved defective; that it thereupon entered into an agreement with another coal company, to wit, the Maple Grove Coal & Mining Company, to obtain from the latter at its mines the amount of coal which was necessary to enable it to complete its contract with the defendant company, and that it advised the defendant company of such fact, and of the terms of the arrangement; that the defendant, when so advised of the arrangement between the plaintiff and said Maple Grove Coal & Mining Company, assented to the arrangement which had been so made, and agreed to take the remainder of the coal which was due under its contract with the plaintiff from the mines of said other coal company, pursuant to the terms of the agreement between the plaintiff and said other company; but that the defendant company subsequently refused to take any coal from the mines of said Maple Grove Coal & Mining Company in fulfillment of the contract with

the plaintiff, as it had agreed to do, although the plaintiff was at all times ready and willing to supply coal in the quantities needed, and strictly in accordance with the modified agreement. For the breach of the aforesaid agreement damages were demanded by the plaintiff in the sum of \$65,000.

The second count of the plaintiff's petition was the same as the first up to the *ad damnum* clause and prayer for judgment. It was then averred, in substance, that, inasmuch as the plaintiff claimed damages from the defendant in the sum of \$50,000 because of the breach of the contract described in the preceding paragraphs of the count, the two parties—that is to say, the plaintiff and defendant—had thereupon entered into another agreement for the purpose of compromising and settling the differences that had arisen under the first contract, by which compromise agreement it was made obligatory upon the defendant to pay to the plaintiff the sum of \$24,000 in installments as soon as the plaintiff had made a settlement with said Maple Grove Coal & Mining Company which would be effective to release the defendant company from all obligation on its part to take more coal from said Maple Grove Coal & Mining Company. The plaintiff next averred that with great difficulty and expense it had caused such a settlement to be made with the Maple Grove Coal & Mining Company, but that the defendant, in violation of the second or compromise agreement, had wholly failed to keep and perform the same, to the damage of the plaintiff company in the sum of \$24,000, for which latter amount it demanded a judgment.

In support of the judgment below it is argued that the two counts of the petition are inconsistent, and that for that reason the motion to require an election was properly sustained. We think, however, that this view of the case is erroneous, since the facts alleged in the first count are obviously consistent with those alleged in the second, in that proof of the facts averred in either count would in no wise disprove the facts stated in the other. The first contract may have been made and broken to the plaintiff's damage in the sum of \$65,000, and thereupon the parties may have entered into the second or compromise agreement, which was likewise broken to the damage of the plaintiff in the sum of \$24,000. Clearly, therefore, there is no inconsistency in matters of fact, and it is such an inconsistency—that is to say, where the proof of one state of facts alleged disproves the other—which vitiates a pleading under the Code of Procedure of the state of Missouri, from whence this case comes. *Nelson v. Brodhack*, 44 Mo. 596; *Roberts v. Railway Co.*, 43 Mo. App. 287, 289. It is true, no doubt, and that point may be conceded, that the plaintiff below was not entitled to a judgment under both counts of his petition. If he succeeded in recovering a verdict on the first count, there was no basis for a recovery on the second; and if he was successful in establishing the compromise agreement alleged in the second count, then it followed that, as the parties had liquidated the damages occasioned by the breach of the first contract by mutual agreement, the recovery by the plaintiff of such liquidated damages would necessarily prevent a recovery on the first count. Do these considerations lead to the conclusion that the trial court

could properly compel an election before any testimony was introduced? We think not. Under the Missouri Code of Procedure it is the established doctrine that the provision of the Code of that state which requires the plaintiff to set forth in his petition "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition" does not prevent a party plaintiff from stating the facts which entitle him to a single recovery in different counts, and so varying the form of the statement as to meet any possible state of proof. *Brinkman v. Hunter*, 73 Mo. 172, 178, 179; *Lancaster v. Insurance Co.*, 92 Mo. 460, 467, 5 S. W. 23. No more perspicuous illustration of the rule last stated can be given than is afforded by the case first cited in support thereof. Certain telegraphic correspondence between the parties to the suit was declared upon in one count as an acceptance of a draft, and in the second count as a promise to accept. It is clear that the correspondence in question could not, in point of law, be both an acceptance and an executory agreement to accept. It was either the one or the other. Nevertheless the court held that the method of pleading was proper under the Missouri Code, and that, while there could be only one recovery or satisfaction, the court could not compel the plaintiff to elect upon which count of his petition he would proceed to trial. So, in the case in hand, the court had no right to compel the plaintiff to abandon one of its counts, and by so doing part with a possible right of recovery before any evidence had been adduced. If an election can be compelled in such cases as the one in hand, it certainly ought not to be enforced until all the evidence has been adduced; and even then we see no necessity for forcing an election, since it is always possible to submit both counts to the jury under proper instructions, advising them therein in an appropriate way that the plaintiff is entitled to but one satisfaction, and that a finding for the plaintiff on one count will necessarily compel them to find in favor of the defendant on the other. In the case at bar, and in all others of a similar character, where, by reason of the complexity of the transaction, it is permissible, as in the state of Missouri, to state a single cause of action in different ways to meet the proof, the practice last suggested is, in our judgment, the proper procedure.

It was suggested in the course of the oral argument, as we understood, that, although the plaintiff company had been compelled to abandon the first count of its petition, and submit to a judgment dismissing that count, yet the cause of action stated in that count was not barred by the adverse judgment subsequently rendered on the second count, and that the plaintiff was still at liberty to sue on the count which he had been forced to dismiss. If this proposition was tenable, it would serve to further convince us of the error that was committed in compelling an election, since the Missouri Code of Procedure (Rev. St. Mo. 1889, § 2040) permits a joinder of two or more causes of action in the same petition or complaint which arise out of "contract express or implied" where they affect "all parties to the action," and do not "require separate places of trial." The two counts of the petition were founded on contracts existing

between the plaintiff and the defendant, and did not require separate places of trial; hence they were properly joined in one petition, and from the standpoint last mentioned it was wrong to force an election, and compel two trials where one would have sufficed. The suggestion, however, that the plaintiff may still sue on the abandoned count does not seem to be tenable, since in such cases as the one in hand, where a plaintiff having the right to a single recovery states his case in two ways to meet the proof, a verdict and judgment rendered on either count is a bar to a suit on the other. This is the Missouri rule, which has been enforced by several local decisions. *Owens v. Railroad Co.*, 58 Mo. 386, 394; *Lancaster v. Insurance Co.*, 92 Mo. 460, 468, 5 S. W. 23; *Brownell v. Railroad Co.*, 47 Mo. 239. The result is, therefore, that the verdict on the second count, which was rendered in favor of the defendant below, would probably prevent the plaintiff from bringing another action; but, if such is not the result of that verdict, the judgment which was entered, dismissing the first count with costs, is apparently final as to that count if it is allowed to stand. The action of the trial court, therefore, in compelling the plaintiff to elect as between the two statements of its cause of action which it thought proper to make, has deprived it of the right to a hearing on the first count, to which, as we think, it was clearly entitled.

It is further claimed in behalf of the defendant company that by electing to stand on the second count after it was ordered to do so, and by proceeding to a trial on that count, the plaintiff company thereby waived the exception which it took to the action of the trial court in compelling an election, and cannot be heard to insist on that error in this court. Several decisions by the supreme court of the state of Missouri are cited in support of this contention, in which it has been held substantially that, if a defendant goes to trial on an amended petition after his objection to the amendment thereof has been overruled, he cannot assign error on appeal because of the amendment; also that a defendant cannot assign error because his answer is stricken out if he subsequently files an amended answer in place of that which was adjudged insufficient, and goes to trial thereunder. *Fuggle v. Hobbs*, 42 Mo. 537; *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981; *Holt Co. v. Cannon*, 114 Mo. 514, 519, 21 S. W. 851. We think, however, that the principle on which these decisions appear to rest is not applicable to the case at bar, but that the rule announced in *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237, is more in point, namely, that a person does not waive a valid objection to the mode of service if, after appearing specially, and moving to set the wrongful service aside, he answers to the merits, and goes to trial, first having reserved an exception to the action of the court in refusing to quash the service. The principle which underlies that decision seems to be strictly applicable to the case in hand. When the plaintiff was compelled to elect as between the two counts in its petition, it may have made elaborate preparations for a trial on the second count, the benefit of which it did not care to lose, as it would have done if it had refused to elect, and had suffered an adverse judgment to be entered.

against it on both counts. It was entitled, as we think, to a trial on one count of the petition if it could not obtain a trial on both, and by going to trial on the second count—which was all that it could obtain—it should not be held to have thereby lost its right to a trial on the other count, which it was forced to abandon. If it had recovered a verdict and judgment under the count on which it saw fit to stand, that would probably have ended the case, as it was only entitled to one satisfaction; and in that event the enforced election would have been regarded on appeal as error without prejudice. But, as the plaintiff failed to recover on the second count, we are of the opinion that it is now entitled to a trial on the first count, and that the defendant company, which induced the error by its motion to compel the election, is not in a position to complain of that result. The two counts, not having been tried together, must now be tried separately, to afford the plaintiff that opportunity for relief which the law requires.

The trial on the second count of the petition seems to have been conducted fairly, and no errors are assigned with respect thereto which would warrant a reversal of the judgment upon that count. The record shows that two judgments were in fact rendered,—one upon the first count, which was erroneous, because the plaintiff was wrongfully compelled to abandon that count; and one upon the second count, which is not affected by error. Under these circumstances we think that the judgment on the second count should be affirmed, and that the judgment dismissing the first count should be reversed, and the cause remanded for a new trial on the first count. It is so ordered.

SANBORN, Circuit Judge (dissenting). If the counts in a petition state facts which constitute different and inconsistent causes of action, the plaintiff should be compelled to elect upon which he will proceed to trial; but if they merely state in different ways the same facts which constitute the same cause of action, no election should be required. It is an inconsistency in the facts stated which constitute the causes of action, and not in the ways of stating the same facts, which warrants the election. The authorities cited in the opinion of the majority sustain this rule. They were all cases where the facts constituted but one cause of action, and the counts were merely different ways of stating these facts. Thus the two counts in the petition in the case upon which the opinion of the majority seems to rest—the case of *Brinkman v. Hunter*, 73 Mo. 172, 176—were different ways of stating the legal liability upon a single telegram in these words: “We will pay Clark and Goldsby’s draft, six hundred eight dollars ninety-two cents.” As the court said at page 179:

“In the first count the telegram of the defendants is declared upon as an acceptance by them for the sum of \$608.92. In the second count the plaintiffs sue for a breach of the promise to accept contained in the telegram.”

Here was but a single cause of action, based on a single fact stated in different ways, so that there was no ground for an election. There was no inconsistency in the facts upon which the two

counts rested, because they were based upon the same facts. The distinction between such a case and one in which the facts stated in the counts of a petition are so different and inconsistent that, if those stated in one of the counts exist, the cause of action stated in the other cannot be, is plainly pointed out in the other decisions of the courts of Missouri cited in the opinion of the majority. In *Nelson v. Brodhack*, 44 Mo. 596, 599, the supreme court of that state said, in speaking of inconsistent defenses:

"Some interpretation, then, of the term 'consistent defenses' should be adopted, if possible, that shall be consistent with the statute, and secure the rights of defense. That right will be secured if the consistency required be one of fact merely, and if two or more defenses are held to be inconsistent only when the proof of one necessarily disproves the other."

In *Roberts v. Railway Co.*, 43 Mo.App. 287, 289, Judge Rombauer, in delivering the opinion of the court, said:

"The office of pleadings is to produce issues of fact or of law, and, as the proof in all cases must correspond with the allegations made, it would lead to the most absurd results if the plaintiff, in support of one count of his petition, were permitted to adduce evidence, the tendency of which is to directly contradict his averments in another count of the same petition. It results from the above, as the correct rule, that where several counts in the same petition are inconsistent, so that the proof of one necessarily disproves the other, the court should, if requested by the defendants so to do, and may, of its own motion, compel the plaintiff at any time to elect on which one of the inconsistent counts he will proceed to trial."

There are three established tests for the determination of the identity of causes of action. They are: Will the same evidence support both? Will the same measure of damages govern both? And will a judgment against one bar the other? *Whalen v. Gordon*, 37 C. C. A. 70, 95 Fed. 305, 313; *Scovill v. Glasner*, 79 Mo. 449, 453; *McDonald v. Jackson*, 55 Iowa, 37, 7 N. W. 408. Let us apply these tests to the causes of action pleaded in the petition in the case in hand. (1) One of these causes is for the recovery of \$65,000 for the breach of a contract to purchase coal at certain rates. The other is for the recovery of \$24,000, which the defendant promised to pay in compromise settlement and discharge of the claim for the \$65,000. The only evidence necessary to prove the first cause of action is the contract of purchase, the refusal to perform it, and the profits lost. But this evidence will not sustain the second cause. That cause requires for its maintenance proof that the claim for \$65,000 was compromised and settled, and that the defendant agreed to pay \$24,000 in consideration of that settlement. Moreover, proof of these additional facts, necessary to the maintenance of the second cause of action, establishes the fact that the first cause does not exist, and that the liability on which it rests has been settled and discharged. The proof of the second cause necessarily disproves the existence of the first. (2) The measure of damages in the first cause is the profits which the plaintiff would have made from the sale of coal. In the second cause it is the amount which the defendant promised to pay in compromise of the original claim. (3) A judgment that the second cause of action does not exist is no bar to the first cause. Witness the proposed

order in this case affirming the judgment for the defendant on the second cause of action and permitting the plaintiff to proceed to recover a judgment on the first notwithstanding. Thus each of the three established tests shows that the causes of action in question here differ in the facts indispensable to their respective maintenance; that the variance does not consist in different ways of stating facts which constitute the same cause of action, but that the facts essential to the maintenance of the cause stated in the second count of the petition are fatal to the existence of that set forth in the first count; that the facts essential to the maintenance of the cause set forth in the first count are insufficient to sustain that pleaded in the second, and that a judgment against the cause stated in one of the counts is no bar to that pleaded in the other. In my opinion, the causes of action pleaded in the two counts of this petition were inconsistent, because the facts that were indispensable to the maintenance of the second were fatal to the first, and because a judgment against the second is no bar to the first. I agree with the trial judge that the plaintiff was properly compelled to elect on which of these inconsistent causes he would proceed to trial, and I think the judgments below should be affirmed. *Babcock v. Hawkins*, 23 Vt. 561, 564; *Henderson v. Boyd*, 85 Tenn. 21, 1 S. W. 498; *Perkins v. Hershey*, 77 Mich. 504, 513, 43 N. W. 1021; *Soap Works v. Sayers*, 51 Mo. App. 314-316. The logical and necessary result of these views is that, inasmuch as the two causes of action were different and inconsistent, and the plaintiff was compelled to abandon the first without a trial on its merits, he would be entitled to commence and to maintain another action thereon, notwithstanding the judgment below, so that the practical result in this case would differ from that prescribed only in the award of costs if the judgments were affirmed, as I think they should be.

UNION PAC. RY. CO. et al. v. COOK.

COOK v. UNION PAC. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 23, 1899.)

Nos. 1,197, 1,198.

1. DEEDS—CONSTRUCTION OF CONDITION.

Plaintiff conveyed to the Union Pacific Railroad Company, then engaged in building its road, a city lot, on condition that the grantee should construct and maintain its "road through said tract," otherwise the lot to revert to the grantor. *Held*, that the word "road," as therein used, should be construed to mean not merely the track of the railroad, but the entire right of way, 200 feet in width, which the company was authorized by its charter to acquire and hold, and which was necessary for the construction and maintenance of its track; and that, the lot being within the limits of such right of way, there was no breach of the condition, although no part of the track was laid upon it.

2. SAME—FORFEITURE FOR CONDITION BROKEN—LIMITATION.

According to the modern rule, the commencement of a suit in ejectment by a grantor after condition broken takes the place of a formal entry and demand of possession; and where a grantee, on condition subsequent, has

clearly manifested his intention not to perform the condition, so that his holding thereafter may be deemed to be adverse, the statute of limitations will run from that time against a suit by his grantor.

3. SAME—ADVERSE POSSESSION OF GRANTEE.

The possession of a grantee on a condition subsequent, although such condition is not performed within the time it should have been, cannot be considered adverse to his grantor so long as the land remains vacant, and the grantee has done nothing to indicate that he does not intend to some time comply with the condition.

4. SAME—CONDITIONS—IMPOSSIBILITY OF PERFORMANCE.

Where a lot, conveyed on condition that it should be used by the grantee for a specified purpose, was washed away or submerged by the action of a river, before the lapse of a reasonable time within which to comply with the condition, so as to render a compliance impossible, the title cannot be recovered by the grantor on the ground of a breach of the condition.

In Error to the Circuit Court of the United States for the District of Nebraska.

These are two writs of error, which were sued out respectively by the Union Pacific Railway Company and the Omaha & Grant Smelting Company, the defendants below, and by Ira Cook, the plaintiff below, to reverse the same judgment. The suit was in ejectment for the recovery of lot 3 in block 65, lot 1 in block 97, and lot 8 in block 96, all situated in the city of Omaha, Neb. The plaintiff below recovered the possession of lot 8, but failed to recover lots 1 and 3. Errors were accordingly assigned by both parties, and separate writs of error were brought. The case was tried below without a jury, and the following facts, in substance, were found specially by the trial judge: In June and November, 1865, Ira Cook, the plaintiff below, and his wife, Mary Cook, by two deeds, conveyed the three lots in controversy, for a valuable consideration, to the Union Pacific Railroad Company, which was then engaged in constructing its railroad from the city of Omaha to Ogden, in the territory of Utah. The habendum clause in each deed was as follows: "To have and to hold the same unto the said Railroad Company, their successors and assigns, forever: provided, in case said Railroad Company do not construct their road through said tract, or shall, after construction, permanently abandon the route through said tract of land, then the same shall revert to and become reinvested in the said grantor, heirs or assigns." Afterwards, but at a date not established, lot 1 in block 97 was washed away or submerged by the Missouri river, on the bank of which the lot was located. A great portion of lot 8 in block 96 was also washed away or submerged subsequent to the execution of the aforesaid deed, so that only a small part thereof now remains; but before it was washed away the railroad company had constructed, at a date not established, a switch track across the lot, which was washed away and abandoned before the commencement of the present action, and such part of the lot as was then above water was in the possession of the Omaha & Grant Smelting Company, one of the defendants below, hereafter termed the "Smelting Company," as lessee of the Railroad Company under a lease executed by the latter on April 23, 1886, for a term of 25 years, to expire in April, 1911. By a lease made by the Railroad Company on October 23, 1889, to the Smelting Company, it reserved to itself the right to lay a track across lot 8, which was demised by its previous lease, dated April 23, 1886; but it has never as yet availed itself of that privilege. So much of lot 8 as is now in existence is used by the Smelting Company for a roadway along the east side of its works, but no part thereof is covered by buildings or other structures. Actual possession of that part of lot 8 which is not submerged was taken by the Railroad Company in April, 1886, when it leased the same to the Smelting Company. The greater part of lot 3, in block 65, on the other hand, is within the right of way of the Railroad Company, treating that right of way as 200 feet in width; that is to say, the greater part of lot 3 is less than 100 feet distant from the center of the main track of the Railroad Company as originally constructed in the year 1865, and as it is still maintained, but no part of said track is laid on said lot. Certain switch tracks, however, connecting

with the main track, do cross lot 3, and are in use by the Railroad Company. Actual possession of lot 3 was not taken by the Railroad Company, except by constructing its track as aforesaid, until October 23, 1889, when it leased that lot, together with other property, to the Smelting Company, and constructed a switch track across the same. Ira Cook has been a resident of Des Moines, Iowa, since he made the conveyances aforesaid, and he had no personal knowledge of the manner in which the property conveyed had been employed, or the uses to which it had been put, until the year 1891. He brought the present suit on July 13, 1895, having served notice of forfeiture upon the Railroad Company and the Smelting Company on June 17, 1895.

W. R. Kelly, E. P. Smith, and John N. Baldwin, for the Union Pac. Ry. Co.

James G. Berryhill, George F. Henry, E. Wakeley, and Arthur C. Wakeley, for Ira Cook.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The right of Ira Cook, the plaintiff below, to recover lot 3 in block 65 depends altogether upon the contention that by a true construction of the conveyance of that lot to the Union Pacific Railroad Company in the month of November, 1865, the plaintiff intended that the land should revert to him unless the track of the railroad (meaning thereby the rails and ties) were actually laid on or through the lot in controversy. The claim is, in other words, that the word "road," as used in that clause of the deed which is above quoted, means simply the narrow strip of land on which the track is laid. We think, however, that such a construction of the deed would be unreasonable in view of the circumstances under which it was executed. When the deed was made, the Railroad Company was engaged in building its line from Omaha to Ogden. It was authorized by act of congress (13 Stat. 357, c. 216, § 3) to acquire a right of way 200 feet in width for the construction and operation of its road, and it needed a strip of land on each side of its track for ditches, and from which to obtain material for grading, as well as on which to lay its ties and rails. Besides, we cannot assume from the findings made by the trial court that at that time the laying of the ties and rails of the contemplated railroad on or through the lot in controversy would have been any more beneficial to the plaintiff than the extension of the right of way across the same, or that the plaintiff had any special motive in binding the Railroad Company to construct its track as distinguished from its right of way through the lot. The word "road," when applied to a railroad, is often used in a sense which comprehends not only the ground on which the ties and rails are laid, but the strip of ground on either side thereof extending to the limits of its authorized right of way, and we have no doubt that it was used in that sense in the present instance. Inasmuch, then, as the greater part of lot 3 is less than 100 feet from the center line of the main track of the Union Pacific Railroad Company, as originally constructed, and within the boundaries of its authorized right of way, we are of opinion that the case discloses no breach of the condition on which that lot was conveyed,

and that the judgment in favor of the defendant below, as to that lot, was properly rendered.

A more important question is whether the plaintiff below was entitled to recover lot 8 in block 96, or such portion thereof as is not now submerged. The Nebraska statute of limitations (Consol. St. Neb. 1891, § 4542) provides that:

"An action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages."

In behalf of the defendant companies it is claimed that after the lapse of a reasonable time within which to comply with the condition on which lot 8 in block 96 was granted to the Union Pacific Railroad Company, the plaintiff below had a right to enter for condition broken; that a cause of action to recover the title and the possession then arose, and was barred by virtue of the aforesaid statute, because more than 10 years had elapsed after the expiration of a reasonable time to comply with the condition before the present suit was instituted. It is true, no doubt, that the grantor of an estate upon a condition subsequent is no longer bound to make a formal entry for breach of the condition, but may sue to recover the possession if the condition is not fulfilled within the time limited. According to the modern view, the commencement of a suit in ejectment by the grantor takes the place of a formal entry and demand of possession. *Cowell v. Springs Co.*, 100 U. S. 55, 58, 25 L. Ed. 547; *Ruch v. Rock Island*, 97 U. S. 693, 697, 24 L. Ed. 1101; *Austin v. Cambridgeport Parish*, 21 Pick. 215, 224; *Cornelius v. Ivins*, 26 N. J. Law, 376, 386; *Jackson v. Chrysler*, 1 Johns. Cas. 125; *Tied. Real Prop.* § 277; *Hopk. Real Prop.* p. 174. In a proper case, therefore, we perceive no reason why the Nebraska statute of limitations may not be invoked as a defense to an action brought by the grantor of an estate upon a condition subsequent to recover his title and possession for nonfulfillment of the condition. The statute is one of repose, and for that reason it should be construed liberally to effectuate its purpose. A proper case, however, for the application of the statute would be one where the grantee of land upon condition has clearly manifested his intention not to comply with the condition, and has done so for 10 years after the condition should have been fulfilled, so that his possession during that period may be said to have been adverse to the right of the grantor of the estate. If the land to which a condition subsequent applies remains vacant and unoccupied after the expiration of the period within which the condition on which it was granted should have been performed, we perceive no reason why such holding by the grantee should be deemed adverse to the grantor from whom he acquired the title. In such a case the grantee's holding is not essentially different from that of a lessee who remains in possession after the expiration of his term without the consent of his lessor. Such possession by a lessee is not adverse; he is a tenant at sufferance; and for like reasons the grantee of an estate upon a condition subsequent should not be regarded as holding adversely to his

grantor, even after a reasonable time has elapsed to comply with the condition, where the land remains vacant, and nothing has been done with it to prevent a future compliance with the condition, or to indicate that the grantee does not intend at some time to comply therewith. The fact that the grantor sees fit to allow his grantee something more than a reasonable period to satisfy the terms of the grant should not put the statute of limitations in operation against him until the grantee devotes the land to some use not consistent with, or not contemplated by, the grant, which indicates clearly that he does not intend to comply with the condition upon which it is held. The grantee of an estate upon condition holds generally in subordination to the right of the grantor to enter for condition broken. Tenure exists between them, and for that reason a mere constructive possession by the grantee such as accompanies the legal title ought not to be deemed a denial of the grantor's right to enter. Some act must be done by the grantee which is tantamount to a disavowal of his obligation to perform the condition. Such an act might consist in putting the land to a use other than that which was limited in the grant; but suffering it to remain vacant and unused for a period longer than is reasonably necessary to comply with the condition, where the limitation is to some specific use, cannot be regarded as a denial of the grantor's right to enter for condition broken, and therefore as sufficient cause to start the statute of limitations.

From the findings made by the trial judge it appears that the Union Pacific Railroad Company did not take possession of lot 8 in block 96 (otherwise than by constructing a switch track across the same, which was speedily washed away and abandoned) until April 23, 1886,—less than 10 years before this suit was instituted. At the latter date it leased so much of lot 8 as then remained above water to the Smelting Company, which made use of the lot from that time forward as an ordinary roadway. From the date of the grant of the lot for specified uses on June 19, 1865, until April 23, 1886, the lot appears to have been vacant and unoccupied. The railroad at most only had a constructive possession. At all events, no act was done or performed by the grantee which can be said to have clearly indicated that it did not intend to put the lot to the use for which it had been conveyed, but did intend to put it to other and inconsistent uses. In view of this finding it may be conceded that the statute of limitations began to run as against the grantor of the lot on April 23, 1886, when the lot in controversy was leased to a third party, and put to uses which were incompatible with the condition on which it was granted; but we are of opinion that the statute did not begin to run prior to the last-mentioned date, because the holding prior thereto was not adverse, and that the plaintiff was not barred of his right of action or entry when the present suit was instituted.

With respect to lot 1 in block 97, the trial court concluded that, because that lot was washed away before a reasonable period had elapsed within which to comply with the condition, and the grantee was thereby prevented by an act of God from complying with the

condition, no forfeiture of that lot took place. In that view of the law we fully concur. It is accordingly ordered that the judgment below be affirmed.

SANBORN, Circuit Judge. I concur in the views expressed in the foregoing opinion relative to the title to lots 1 and 3, and as to lot 8 I concur in the result, on the ground that the construction of the switch track on that lot by the Railroad Company evidenced an intention to comply with the condition in the deed, and the first evidence of an abandonment of that intention and of the use of the lot for a railroad disclosed by the findings is its lease to the Smelting Company on April 23, 1886, within ten years of the commencement of the action. But I do not assent to the proposition that a grantor may not, by laches and acquiescence, waive his right and bar his action to recover vacant and unoccupied land for a breach of a condition subsequent. If the condition subsequent is negative in its character, if it does not require the use or occupancy of the land granted, then I agree that acquiescence in its vacancy may not waive the condition. But where the condition subsequent expressly requires the occupancy and use of the premises by the grantee for a specified purpose within a reasonable time, as in the case at bar, then the mere vacancy for an unreasonable length of time is itself a breach of the condition, and gives rise to a right of action for the recovery of the land; and, if the grantor does not enforce the right or bring the action within the time limited by the statute of limitations for the commencement of such actions, no sound reason occurs to me why, upon general principles, his laches and the limitation of the statute are not alike fatal to him. "The strongest equity may be forfeited by laches or abandoned by acquiescence" (Swift v. Smith, 79 Fed. 709, 712, 25 C. C. A. 154, 158, 49 U. S. App. 181, 186; Peebles v. Reading, 8 Serg. & R. 484, 493; Great West Min. Co. v. Woodmas of Alston Min. Co., 14 Colo. 90, 95, 23 Pac. 908; Sullivan v. Railroad Co., 94 U. S. 806, 811, 24 L. Ed. 324); and it seems to me that a mere right to enforce a forfeiture, which is never favored in the law, may be forfeited or waived in the same way (1 Warv. Vend. p. 450, § 9; Ludlow v. Railroad Co., 12 Barb. 440, 445; Jones v. McLain [Tex. Civ. App.] 41 S. W. 714, 715; Kenner v. Contract Co., 9 Bush, 202; Coon v. Brickett, 2 N. H. 163, 165; 2 Washb. Real Prop. p. 20, § 18).

PERKINS v. McCAULEY et al.

(District Court, S. D. California. November 27, 1890.)

No. 1,295.

BANKRUPTCY—JURISDICTION OF ACTIONS BY TRUSTEE.

Under Bankr. Act 1898, § 23b, providing that suits by a trustee in bankruptcy shall be brought or prosecuted only in those courts where the bankruptcy might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, a court of bankruptcy has no jurisdiction of a suit by such trustee to set aside a transfer of property made by the bank-

rupt, and alleged to be in violation of the act, either as a preference or as a fraudulent conveyance, when the bankrupt, the trustee, and the defendant are citizens of the same state.

On demurrer to a bill in equity filed by Gregory Perkins, Jr., as trustee in bankruptcy of the San Gabriel Sanatorium Company, against J. W. McCauley and others.

E. T. Dunning, for complainant.

Anderson & Anderson, for defendants Markham & Smith.

A. R. Metcalfe, for defendant First Nat. Bank of Pasadena.

D. P. Hatch, for defendant J. W. McCauley.

WELLBORN, District Judge. The present hearing is on demurrer to the bill, and raises, among others, the following question: Has a district court of the United States jurisdiction, under the bankrupt act now in force, over a suit brought by a trustee in bankruptcy to set aside a transfer of property made by the bankrupt, either as a preference or without consideration, in violation of said act, when the complainant and defendant are citizens of the same state? Upon this question the courts are divided. Among the numerous cases cited in complainant's briefs to the affirmative are *In re Gutwillig* (D. C.) 90 Fed. 481; *In re Brooks* (D. C.) 91 Fed. 508; *In re Sievers*, Id. 366, affirmed (on points, however, other than the jurisdictional one) in *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325; *Carter v. Hobbs* (D. C.) 92 Fed. 594; *Trust Co. v. Benbow* (D. C.) 96 Fed. 514. The negative is supported by *Burnett v. Mercantile Co.* (D. C.) 91 Fed. 365; *Mitchell v. McClure*, Id. 621; *In re Abraham*, 35 C. C. A. 592, 93 Fed. 768; *Hicks v. Knost* (D. C.) 94 Fed. 625; *Camp v. Zellars*, 36 C. C. A. 501, 94 Fed. 799. My views accord with the latter line of decisions. The supreme court cases referred to in complainant's briefs (*Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Ray v. Norseworthy*, 23 Wall. 128, 23 L. Ed. 116; *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414; and *Glenny v. Langdon*, 98 U. S. 20, 25 L. Ed. 43) concern the bankrupt acts of 1841 and 1867, and are ineffective as aids to the interpretation of the bankrupt act of 1898, for the reason that the limitations upon the jurisdiction of United States courts prescribed in the latter act do not appear in the former acts. The grant of jurisdiction to the district courts by the bankrupt act of 1898 is found in section 2 of said act, and the directly pertinent provisions of said section, so far as concerns the point now under consideration, are as follows:

"That the courts of bankruptcy * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

The limitations referred to in the clause, "except as herein otherwise provided," just quoted, are found in section 23 of the said act, and are as follows:

"Sec. 23. Jurisdiction of United States and State Courts. (a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by

the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. (b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. (c) The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective limits, of the offenses enumerated in this act."

Complainant contends that, inasmuch as a bankrupt himself could not maintain a suit to set aside a transfer made by him in fraud of the bankrupt act, therefore subdivision "b," § 23, of said act, above quoted, does not apply to a suit of that character, but only includes suits upon causes of action which existed in the bankrupt prior to his bankruptcy. The vulnerability of this argument is clearly shown by Judge Bellinger, in an opinion briefly expressed, but remarkably lucid and comprehensive, in *Burnett v. Mercantile Co.*, supra. I quote from the opinion as follows:

"It is argued that because the bankrupt cannot maintain a suit to set aside a conveyance, as fraudulent, made by himself, therefore the provision quoted does not apply in a case like this. But this is a question of jurisdiction,—a question of the right to determine, not of the principles to obtain in reaching a determination. If the bankrupt himself brought the suit, he could not be turned out of court on the question of jurisdiction. The authority of the court to decide as to his rights would be unquestioned, although he might be precluded in his right to relief by his own act. * * * As already suggested, it is wholly immaterial that in the one case—a case where the proceeding is instituted by the bankrupt himself—there could be no recovery upon the principles of estoppel, and in the other case, where the proceeding is brought by a creditor, a different result would follow. As stated, it is not a question of the determination to be reached, but of the jurisdiction to hear and make a determination."

Another excellent statement of the question is found in *Re Abraham*, supra, where Judge McCormick says:

"If * * * resort must be had to legal proceedings, the adverse claimant is entitled to his day in court, and in that court in which the bankrupt could have brought suit against him for the recovery of the property and assets. The fact that the bankrupt might be estopped and fail of securing a recovery in no manner changes the aspect of the question as to the court in which a suit for such recovery could be brought by him."

To the same effect, in *Mitchell v. McClure*, supra, Judge Buffington says:

"The action is for the possession of personal property. On the face of the pleadings no reason appears why the bankrupt could not have brought replevin in the common pleas of Pennsylvania. If such be the case, clause 'b' of section 23 provides that, where suit is brought, the bankrupt's trustee should resort to that court. It is contended, however, that this section does not apply to the present action, because the bankrupt, having conveyed these goods in fraud of his creditors, had no standing to question the defendant's title; that the right of action vested in the bankrupt's receiver or trustee never was in the bankrupt, and consequently clause 'b' has no application. Possibly a sufficient answer to this contention is that such a defense goes to defeat the action, and not to affect jurisdiction."

Comparing the provisions of section 2 of the bankrupt act of 1898, above quoted, with the corresponding clauses of the bankrupt act of 1867, which were as follows: "The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend: * * *

Second. To the collection of all the assets of the bankrupt,"—Judge Buffington, in the same case (*Mitchell v. McClure*, *supra*) further says:

"The language thus employed, 'cause the estates of bankrupts to be collected,' is not broader, if, indeed, as broad, as that in the former act; for it may be said that a jurisdiction extended 'to collection' of assets implies a grant of power to the authorized court to itself enforce such collection, while a grant of power 'to cause estates to be collected' necessarily carries with it no such implication. But, assuming they are substantially the same, why should the words of the latter act be given a construction which corresponding ones did not have under the former? The absence, too, in the new act, of a jurisdictional grant of power to bring plenary suits, corresponding to the third clause of section 2 of the former act, quoted above, is also suggestive of a purpose in congress not to grant such power. But this is not all. In the twenty-third section of the present act (30 Stat. 552) we find a much narrower grant of federal jurisdiction, and that to the circuit court alone. That section, which by its caption refers to the 'Jurisdiction of United States and State Courts,' by subdivision 'a' limits the jurisdiction of the circuit court between trustees, as such, and adverse claimants, concerning property acquired or claimed by trustees, to cases where such court would have had jurisdiction had such controversy been between the bankrupt and such adverse claimants, and no proceedings in bankruptcy been instituted. Subdivision 'b' expressly restricts suits brought by a trustee to a court where a bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted. To that extent it limits jurisdiction in both circuit and district courts. Such restriction of federal jurisdiction, as compared with the broad jurisdictional provisions of the former act, and the further positive requirement that suits by the trustee shall be brought in courts where the bankrupt could have done so, evidence the intent of congress that other courts besides the circuit and district ones could, and in some cases must, be resorted to, in causing the estates of bankrupts to be collected. To attribute to that part of section 2, viz. 'cause the estates of bankrupts to be collected,' etc., the sweeping effect here claimed, viz. to authorize the district court to entertain jurisdiction of a plenary, common-law action, is to ignore the limiting provisions of section 23, which by its caption refers to the 'Jurisdiction of United States and State Courts.'"

I am fully satisfied, after careful consideration of the question, that the purpose of congress in the enactment of said section 23 was, in part, to make the boundaries, under said act, between federal and state judiciaries, as to "all controversies at law and in equity, as distinguished from proceedings in bankruptcy," coincident with the lines of demarkation then existing, thus giving an adverse claimant, against whom a trustee in bankruptcy asserted a cause of action, the privilege of being sued in local courts, and thereby saving to such claimant the burdensome expenses and costs necessarily incident to litigation in a distant tribunal, except in cases where, if the bankrupt had been plaintiff, and proceedings in bankruptcy had not been instituted, the suit, because of diverse citizenship, or a federal question not related to the bankrupt act itself, and a requisite amount in controversy, could have been brought in the United States courts. This construction is at once indicated by the caption of said section 23, and required by the peculiar phraseology of subdivision "b," which confines the trustee, not to courts where the bankrupt might have maintained (that is, successfully prosecuted) the suits, but to courts where the bankrupt "might have brought or prosecuted them." These words manifestly refer to the ordinary requirements of federal jurisdiction, and not to the merits of controversies. Said section, then, being designed to restrict the juris-

diction of federal courts, constructive enlargement of such jurisdiction is inadmissible. The argument in *Re Sievers*, supra, that because said subdivision "b" is found between subdivisions "a" and "c" of the same section, both of which latter subdivisions in terms refer to circuit courts of the United States, therefore subdivision "b" must be limited to the same courts, is fully answered by the title or headline of the section, "Jurisdiction of United States and State Courts." Said argument is based on the postulate, undoubtedly correct, that subdivisions "a" and "c" refer exclusively to circuit courts of the United States. Now, if subdivision "b" also refers exclusively to said courts, then the section contains no reference whatever to state courts, and the title or headline, which was enacted by congress as a part of the section, is in direct conflict with the body of the section, and must be absolutely ignored. Surely, a construction which leads to such results ought not to be adopted, over one which, while giving due effect to each of the clauses herein quoted, harmonizes all with the manifest policy of the statute on the subject to which they relate. Demurrer sustained, and bill dismissed, for want of jurisdiction.

In re STYER.

(District Court, E. D. Pennsylvania. December 12, 1899.)

No. 95.

1. BANKRUPTCY—JURISDICTION OF REFEREE—SALE OF REALTY.

A referee in bankruptcy has authority to appoint appraisers to value the estate of the bankrupt, and to order the trustee to sell the real estate free of liens, his action in that behalf being subject to review by the judge; but, in case the property is in the hands of a receiver before adjudication, appraisement or sale can be ordered only by the court.

2. SAME—SALE FREE OF LIENS.

The court of bankruptcy will not order a trustee in bankruptcy to sell the bankrupt's real property free of liens, unless satisfied that the interests of the general creditors will be advanced thereby, and that the interests of creditors holding liens on such property will not be injuriously affected.

In Bankruptcy. On review of order of referee in bankruptcy directing trustee to sell real property of the bankrupt free of liens.

Edward H. Hall, for trustee in bankruptcy.

Edward A. Price, Edward Jones, Horace L. Cheyney, and John T. Reynolds, for lien creditors.

McPHERSON, District Judge. A question of practice was raised upon the argument of these exceptions, which it may be desirable to settle, namely, whether a referee has authority to order a sale of the bankrupt's property. Clause 7 of section 1 of the act provides that the word "court" shall mean "the court of bankruptcy in which the proceedings are pending, and may include the referee." Gen. Order No. 18 (32 C. C. A. xx., 89 Fed. viii.) and forms 42, 44, 45, and 46 (32 C. C. A. lxxiii.-lxxv., 89 Fed. xlix.-li.), show a con-

struction of this clause by the supreme court in favor of the referee's authority upon the point in controversy. But any order made by the referee is subject to revision by the district court.

Similar remarks may be made concerning the referee's authority to appoint appraisers. See form 13 (32 C. C. A. lviii., 89 Fed. xxxiv.).

When the property is in the hands of a receiver before adjudication, the district court is, of course, the only tribunal that can appoint the appraisers or order a sale.

The referee had authority, therefore, to make the order now under consideration, but I find myself obliged to disagree with his conclusion that the sale should be ordered. Without deciding the question whether this court has power to sell a bankrupt's real estate discharged of liens, and assuming, for present purposes, that such power exists, it is clear that the sale should not be ordered unless the court is satisfied that the interest of the general creditors would thus be advanced, and that the interest of the lien creditors would not be injuriously affected. In the present case I am not satisfied upon this point. I think the interest of the general creditors quite as likely to be advanced by accepting the proposition of the mortgage creditors, stated orally at the argument and repeated in the briefs of their counsel, while this course will also relieve the court of apprehension lest the interest of the mortgage creditors might suffer by a sale discharged of liens.

If, therefore, the Delaware County Mutual Insurance Company file a stipulation within 10 days in the office of the clerk, agreeing to make no claim upon the personal estate of the bankrupt, either by virtue of its mortgage or of the bond secured thereby; and if El Dorado Manley, individually and as guardian, file a stipulation within 10 days in the office of the clerk, agreeing that, if he becomes the purchaser of the nine-acre tract, he will make no claim upon the personal estate of the bankrupt, save in respect of the difference between the price at which he may buy the property, or between the appraised value of the tract, whichever sum may be the greater, and the aggregate amount of the judgments upon his mortgages,—the clerk will enter an order sustaining the exceptions.

UNITED STATES v. BOOKER.

(District Court, D. North Dakota. December 9, 1899.)

NATIONAL BANKS — FALSE REPORTS BY OFFICERS — ESSENTIALS OF OFFENSE.

The president of a national bank cannot be convicted, under Rev. St. § 5209, of the crime of making false entries in reports made by such bank to the comptroller upon evidence that he signed and verified reports containing false entries, where it is also shown that such entries were not made by him, or by his direction.

This was a prosecution of the defendant under Rev. St. § 5209, for making false entries in reports made by a national bank, of which he was president, to the comptroller of the currency. On motion by defendant for direction of a verdict.

P. H. Rourke, U. S. Atty.
Cochrane & Corliss and Alexander Hughes, for defendant.

AMIDON, District Judge. This case has already been before the court on demurrer. See *U. S. v. Booker* (D. C.) 80 Fed. 376. The defendant is now upon trial under an indictment which charges him with making false entries in four different reports of the Grand Forks National Bank to the comptroller of the currency, in violation of section 5209 of the Revised Statutes. It affirmatively appears by the evidence of the government that the defendant neither made any entry in the reports in question nor directed any other person to do so. His only act in connection with the reports was to sign and verify them, at the request of the assistant cashier, under whose supervision they were prepared; but the evidence tends further to show that defendant made oath to the reports, without instituting any investigation to ascertain their truthfulness; and that, if he had exercised reasonable care and supervision, he would have learned that the entries in question were false. At the close of the government's case, counsel for defendant moves the court to direct a verdict of acquittal, upon the ground that the signing and verifying of a report containing a false entry does not constitute the crime of making a false entry, provided the defendant neither made the entry himself nor directed any other person to do so. If the statute is construed according to the ordinary signification of its terms, the decision of the motion would seem to be easy and plain. Making an entry in a report is certainly not the same act as signing or verifying the report. To be sure, when the cashier or president of a national bank verifies a report of its condition under oath, he thereby certifies that all the statements contained in the report are true, and it is quite possible that he might be indicted for perjury for making a false oath to such a report. But that is not the offense with which the defendant is charged in the indictment. He is charged with making a false entry, and, under the elementary rules of construction applied to criminal statutes, in order to hold him guilty, it must be shown that he either made the false entry himself, or directed some servant or employé under his control to do so. The precise question raised by the motion has never been directly decided, but the supreme court of the United States, in the case of *Cochran v. U. S.*, 157 U. S. 286, 293, 15 Sup. Ct. 628, 39 L. Ed. 704, uses language which clearly indicates the correct decision. In that case the defendants Cochran and Sayre were indicted for making false entries in a report of the condition of a national bank. They themselves prepared the report, and made the false entries, but the report was signed and verified by the cashier of the bank upon their statement that it was correct. The defendants urged as a defense that they could not be held liable, because they did not sign and verify the report. In answering this objection, the supreme court says:

"The argument of the defendants assumes that the making of the entry and the making of the report are the same thing, whereas in fact they are wholly different. By section 5211 the report must be made by the association, and must be verified by the oath or affirmation of the president or cashier, and attested by the signature of at least three of the directors. But, under section

5209, there is no penalty affixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by section 5209 is affixed to the one who makes any false entry in any book, report, or statement of the association, and that penalty is applicable to any officer or agent of the bank who actually makes the entry with intent to injure or defraud or to deceive any agent appointed to examine the affairs of any such association."

Here the supreme court expressly holds that the crime denounced by section 5209 is the making of the false entry, and that "no penalty is affixed to the president or cashier for verifying such report." While this last statement is obiter, it is so clearly consonant with the language of the statute under consideration that it seems conclusive of the question raised by the motion.

It is urged, however, that the act of the defendant is as much within the mischief which section 5209 was intended to provide against as the act of making a false entry, and that, therefore, the court ought, by construction, to bring his act within the statute, because it is within the mischief. But that rule of construction is wholly inadmissible in the case of a penal statute. In *U. S. v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37, the supreme court, speaking by Chief Justice Marshall, answered such a contention as follows:

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime, and ordain its punishment. It is said that, notwithstanding this rule, the intention of the law-maker must govern in the construction of penal as well as other statutes. This is true. But this is not a new, independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this: That, though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provision so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

The same principle was declared in an able opinion in this circuit by Judges Dillon and Caldwell (*U. S. v. Clayton*, Fed. Cas. No. 14, 814):

"The principle that the legislative intent is to be found, if possible, in the enactment itself, and that the statutes are not to be extended by construction to cases not fairly and clearly embraced in their terms, is one of great importance to the citizen. The courts have no power to create offenses, but if, by a latitudinarian construction, they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the

citizen are put in peril, and that the legislative domain has been invaded. Of course, an enactment is not to be frittered away by forced constructions, by metaphysical niceties, or mere verbal and sharp criticism. Nevertheless the doctrine is fundamental in English and American law that there can be no constructive offenses; that, before a man can be punished, his case must be plainly and unmistakably within the statute; and, if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the supreme court of the United States. *U. S. v. Morris*, 14 Pet. 464, 10 L. Ed. 543; *U. S. v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37; *U. S. v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199. And see, also, *Ferrett v. Atwill*, Fed. Cas. No. 4,747; *Sedg. St. & Const. Law*, 324, 334; 1 *Bish. Cr. Law*, §§ 134, 145."

The recent case of *U. S. v. Chase*, 135 U. S. 255, 261, 10 Sup. Ct. 756, 34 L. Ed. 117, in which the doctrine now urged might have been allowed to prevail much more plausibly than in the case at bar, is instructive. The statute there under consideration was as follows:

"Every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print or other publication of an indecent character, * * * and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene or lascivious delineations, epithets, terms or language may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office, nor by any letter carrier," etc. (Rev. St. § 3893); and it is made a crime to deposit any such document in the mail.

The defendant in that case was indicted for violating this statute by depositing in the post office an obscene letter, inclosed in a sealed envelope. The supreme court held that he could not be convicted; that sending an obscene letter in a sealed envelope was not within the crime defined by the statute. But it was urged upon the court that it was at least within the mischief, and in answering that contention the court says:

"Another argument on which indictments of this character have been sustained by some of the circuit courts (*U. S. v. Huggett* [C. C.] 40 Fed. 636) is that a reasonable construction must be given the statute, and, it being evident that congress intended to exclude anything of an obscene character from the mails, it is immaterial whether the thing prohibited is inside or outside of an envelope, and therefore unreasonable to hold that congress intended not to allow a decent writing in an obscene envelope, but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous, and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress. *U. S. v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199; *U. S. v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37; *U. S. v. Morris*, 14 Pet. 464, 475, 10 L. Ed. 543; *U. S. v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *U. S. v. Reese*, 92 U. S. 214, 23 L. Ed. 563."

It was for many years contended that a cashier or president who simply directed a clerk in the bank to make a false entry in a report of its condition could not be convicted under the statute we are considering, because it could not be said that he himself made the entry; and in imposing the liability the courts expressly rested their decisions upon the ground that the clerk, in making the false

entry, was the mere instrument of the officer whose direction he obeyed. In re Van Campen, Fed. Cas. No. 16,835; U. S. v. Fish (C. C.) 24 Fed. 585, 594. The rule and its limitations are accurately stated by Judge Sanborn in U. S. v. Allis (C. C.) 73 Fed. 165, 172, as follows:

"A false entry made in the books or reports of the bank by a clerk, book-keeper, or other subordinate employé or other officer by the command or direction of the president of the bank, is a false entry made by the president, and he is liable to punishment for it under this statute if he gives the direction knowing the entry to be false, and with the intent explained."

If simply verifying a report containing a false entry made by another constitutes a crime under the national bank act, why have the courts at all times been at such pains to rest their decisions upon the ground that directing the employé to make the false entry was equivalent to making the entry in person?

The result of the case is much to be deplored. Beyond question the act of the defendant in verifying the reports containing false entries is quite as much within the mischief intended to be provided against by the statute as the act of making the false entries. Such acts ought to be made a crime, but the courts have no power to create crimes directly; neither ought they to do so indirectly by forced constructions. The motion must therefore be granted.

In re EBERLE.

(Circuit Court, N. D. Illinois, N. D. November 10, 1899.)

No. 25,348.

GAME—NATURE OF PROPERTY—POWER OF STATE TO REGULATE PRIVILEGE OF HUNTING.

The sovereign ownership of wild game is in the state, in trust for the benefit of its citizens; and a statute requiring the payment of a license by a nonresident for the privilege of hunting such game within the state is a police regulation within the power of the state, and not in violation of article 4, § 2, of the federal constitution, or of section 1 of the fourteenth amendment, although such fee is not required of residents of the state; nor is the validity of such regulation as to a particular individual, who is a nonresident of the state, affected by the fact that he is a stockholder in a corporation of the state which owns lands maintained as a game preserve.

This was a petition by Frank Eberle for a writ of habeas corpus. Le Monte Cowles, for petitioner.

KOHLSAAT, District Judge. This matter comes before me upon the petition of Frank Eberle for release upon habeas corpus from the custody of the sheriff of Henderson county, Ill. The petition shows the following facts: Petitioner is a citizen of the state of Iowa, and resides therein. He is a member of, and stockholder in, the Crystal Lake Club, an Illinois corporation authorized to acquire and own real estate in Illinois, and to use the same as a game and fish preserve, the charter of which corporation grants to the mem-

bers thereof the sole right and authority to hunt and fish on the lands owned by it. Subsequent to the incorporation of the club, the legislature of this state passed a law regulating the manner and seasons in which hunting and fishing should be pursued in this state, in which the privileges of residents of this state were distinguished from those of nonresidents, in that the latter were required to pay a license fee of \$10, which license fee was not required of residents. Petitioner was hunting upon land belonging to the club during the season when residents were permitted to hunt, when he was arrested upon a criminal capias, upon the charge of being a nonresident and hunting without a license. At the trial he was adjudged guilty of the said violation of the statute, and was sentenced to pay a fine of \$25 and costs, and to stand committed until the same was paid. He is now in custody in pursuance of said sentence and judgment. Petitioner alleges that he was hunting upon land belonging to himself and the other members of said club jointly; that the part of the statute under which he was found guilty and sentenced is illegal and void, as being in contravention of the constitution of the United States, and especially of section 2 of article 4 of the federal constitution, which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states," and section 1 of the fourteenth amendment to said constitution, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The decision of this matter depends upon the nature or status, under our laws, of animals *feræ naturæ*, and the rights which individuals, whether citizens and residents or nonresidents, may have therein or thereto. In the case of *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, this matter is quite elaborately treated, and the right of a state to regulate and control the manner in which wild game may be appropriated by individuals is sustained upon two grounds: (1) The sovereign ownership of animals *feræ naturæ* by the state in trust for the benefit of its citizens; and (2) the police power of the state, which flows from its duty to preserve for its people a valuable food supply. In this case is cited with approval the case of *Magner v. People*, 97 Ill. 320, which is the leading Illinois case upon the question. In the latter case it is held, without qualification, that there are no individual property rights in wild animals within the state; that:

"To hunt and kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority, not a right inhering in each individual; and consequently nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. * * * The ownership of the sovereign authority is in trust for all the people of the state, and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state. But in any case the question of individual enjoyment is one of public policy, and not of private right."

In the case of *People v. Bridges*, 142 Ill. 43, 31 N. E. 118, it is said:

"We think the rule will not be questioned that a general statute regulating the killing of game, or restricting the right to kill it to certain portions of the year, applies as well to the game which a particular landowner may chance to find on his own premises as to that which may be found on the land of others, or upon lands belonging to the public."

But petitioner says he is not challenging this right of the state; that, admitting that the state has this power, yet he, as a landowner, cannot be placed on a different footing with respect to hunting game on his own premises from other landowners, simply on the ground that they are residents and he is a nonresident; and that the attempt to thus discriminate against him deprives him of the equal protection of the laws of this state. I find that petitioner has not brought himself within the rule he seeks to invoke. In his petition he states that he is a member of, and stockholder in, an Illinois corporation, which corporation is the owner of the land on which he was hunting at the time it is alleged he violated the statute. Without, therefore, determining whether a nonresident landowner would be relieved from the provision of the statute in question when shooting wild game upon his own premises, I deny the petition on the ground that the allegations thereof do not entitle petitioner to the relief prayed.

CIMIOTTI UNHAIRING CO. v. MISCHKE.

SAME v. AMERICAN UNHAIRING MACH. CO.

(Circuit Court, S. D. New York. November 27, 1899.)

PATENTS — ANTICIPATION — MACHINE FOR REMOVING HAIRS FROM FUR SKINS.

The Sutton patent, No. 383,258, for a machine for removing water hairs from fur skins, claim 8, considered with reference to a claim of anticipation, and *held* not anticipated, and valid; also *held* infringed.

In Equity. This was a suit in equity for infringement of a patent. On final hearing.

Louis C. Raegenar, for plaintiff.

Henry Schreiter, for defendant.

WHEELER, District Judge. The patent here, No. 383,258, dated May 22, 1888, and granted to John W. Sutton for a machine for removing water hairs from fur skins, was before this court held by Judge Townsend, in *Unhairing Co. v. Bowsky* (C. C.) 95 Fed. 474. It is there fully explained, and the eighth claim, now relied upon here, was upheld, and found to have been infringed. That claim is for:

"(8) The combination of a fixed stretcher bar, means for intermittently feeding the skin over the same, a stationary card above the stretcher bar, a rotary separating brush below the same, and mechanism, substantially as described, whereby the rotary brush is moved upward and forward into a position in front of the stretcher bar, substantially as set forth."

Patent 304,992, dated September 9, 1884, and granted to Henry W. Covert, was in that case, and fully considered, and found not to defeat that claim. That decision cannot, with propriety, be, and is not,

here reviewed, but is accepted as final upon all questions in that case as it stood.

In this case is a machine made by Covert, which has stood in the machine shop of Riley & Cowley, corner of Richards and Browne streets, South Brooklyn, as it now is, since April, 1886, more than two years before Sutton's application, and, so far as is made to appear, before his invention of what is covered by this eighth claim. It was built there as an experiment, was altered in various ways, and was used at various stages practically and commercially; but nothing is shown with sufficient clearness as to its construction in respect to the combination of this eighth claim at any time prior to when it came to be as it now is. The use of it was open, and mechanically, but not commercially, successful, and was on the latter account abandoned. It has a revolving cloth-covered cylinder where the rotary separating brush of that claim is; and the real question as to this now seems to be whether the rotary separating brush is merely an equivalent of, or an advance upon, the revolving cloth-covered cylinder in this art. In this delicate operation of so controlling the fine fur as to keep it out of the way of removing the water hairs in the operation of the machines, the cloth-covered cylinder is not made to appear to be a full equivalent to the separating brush; and the effect of the patent, as showing the latter to be an advance upon anything before it in this combination, remains, and this claim must now be considered to be valid. The difference between the defendant's machine and the patent appears to be in the movement of the fur to and along the brush, instead of the brush to and along the fur, to do the same thing in substantially the same way. Decree for plaintiff.

HANCOCK INSPIRATOR CO. v. HAYDEN & DERBY MFG. CO.

(Circuit Court, S. D. New York. November 23, 1899.)

PATENTS—VALIDITY—IMPROVEMENT IN BOILER FEED INJECTORS.

The Park and Williston patent, No. 614,752, for an improvement in boiler feed injectors, discloses patentable invention, and is not invalidated by abandonment or prior use; nor was it anticipated by anything in the prior art, or by the Huber patent, No. 604,233, which was previously granted, and covers substantially the same invention, independently conceived by Huber, but subsequent to the invention of Park and Williston.

This was a suit in equity for infringement of a patent. On final hearing.

Elmer P. Howe and Odin B. Roberts, for plaintiff.

Wm. Raimond Baird, for defendant.

WHEELER, District Judge. This suit is brought for infringement of patent No. 614,752, applied for August 2, and dated November 22, 1898, and granted to one Park and one Williston, assignors to the plaintiff, for an improvement in boiler feed injectors, whereby the final overflow-valve may be independently closed, leaving the steam-valve free to be opened, and whereby the overflow-valve connections are automatically restored to engagement with the steam-valve mech-

anism. The first claim is for the combination of a rod connecting the steam-valve operating mechanism with the final operating mechanism, provided with a notch adapted to engage with the steam-valve operating mechanism, together with the other well-known parts of such an injector; and the second is for the same combination, with the addition of a guiding surface on the rod adjacent to the notch-opening whereby the notch and a stud attached to the steam-valve operating mechanism are slipped into engagement. The improvement, as understood, is in the notch and the guiding-surface; and there is no question but that the defendant infringes these claims, if they are valid. The defenses set up and relied upon are lack of patentable novelty, laches, abandonment, and being on sale more than two years prior to the application.

The engagement made by this notch sliding to place and dropping astride the stud was before made by turning a clutch, having a projection to take hold of, by hand, over and around the stud, to make the engagement. The projection was in the way of, and the movement of it embarrassing to, the engineer. Notches sliding to place to drop into engagement shown, and well enough known, are relied upon to anticipate, or to narrow within less than patentability, the invention; but none of them in such a machine, with such or similar surroundings. Ingenuity greater than mechanical skill appears to have been necessary to contrive them into use in this combination, and the exercise of it in accomplishing this result by Park and Williston seems well to amount to patentable invention.

Park and Williston appear to have made a full-sized machine embodying this invention in July, 1896. One Jacob Huber, assignor to the defendant, appears to have conceived substantially the same thing independently in December, 1896; to have made a drawing of it in January, 1897; and to have embodied it in a full-sized machine in June, 1897. The plaintiff sold machines embodying it in January, 1898. An application for a patent for it was filed by Huber, assignor, February 12, 1898. Machines embodying it were sold by the defendant soon afterwards. Patent No. 604,233 was granted for it to Huber, assignor, May 17, 1898, before the application of Park and Williston, assignors; and their application was granted without any interference being declared between it and the Huber patent. The being on sale alleged is not satisfactorily proved,—not that the honesty of the witness whose testimony is relied upon to make it out is at all doubted, but no sale is shown or claimed to be shown; and the putting of the machine embodying the invention into the hands of a possible customer by the treasurer of the plaintiff, not a salesman, which does not appear to have come to the knowledge of the salesman through whom a sale would have been made, does not seem to amount to such a putting on sale as would at any time defeat a patent. Huber could not have a valid patent, as this case stands, for Park and Williston clearly preceded him. They did nothing to induce him or his assignees to obtain it, and do not appear to have kept silent when they should have spoken concerning it or the invention. What they did and did not do, or said or did not say, was wholly between themselves. They made application for the patent, within the statute, the

being on sale alleged not being found, and there was no unlawful delay. They merely kept the invention to themselves till they made the application. They gave it to no one, and there is no evidence of any abandonment of it to any one, and so none to all. That some of the officers or agents of the plaintiff may have thought poorly of it would not amount to an abandonment, although it might be evidence of an intention to let it go, which was not carried out. In this view, all these defenses fail. Decree for plaintiff.

GERMAN-AMERICAN FILTER CO. OF NEW YORK v. ERDRICH.

(Circuit Court, E. D. Pennsylvania. November 21, 1899.)

No. 27.

1. PROCESS PATENTS—ANTICIPATION.

One who accomplishes a result by a process which he understands but partially, or not at all, has made no invention, and cannot deprive another, who afterwards discovers and proclaims the true principle of the operation, of the rights of an inventor.

2. SAME—INVENTION.

A process, all the steps of which are old, may be new and patentable, when, co-operating with each other, they produce a result that is new and useful.

3. SAME—INFRINGEMENT—FILTERING PROCESS FOR BEER.

The Stockholm patent, No. 378,379, for a filtering process for beer, in which the operation is performed by a filter placed between the store cask and the keg, through which the beer is forced under pressure, and which, by means of back pressure, and vents at the top, by which any free gas, air, or foam accumulating in the filter may be drawn off, is kept at all times full of solid beer, to insure a steady flow, and prevent the escape of gas during the operation, was not anticipated, and is valid; also, construed, and held infringed.

This was a suit in equity for infringement of a patent. On final hearing.

Wetmore & Jenner, for complainant.

Cyrus E. Lothrop, for respondent.

GRAY, Circuit Judge. This suit is brought for alleged infringement of letters patent No. 378,379, dated February 21, 1888, for a "filtering process for beer," granted to Simon Uhlmann and Frederick Uhlmann, as assignees of Heinrich Stockheim, of Mannheim, Germany; application for same having been filed November 28, 1887. Complainant's title to the patent accrued by a duly executed and recorded assignment. The patent describes and claims a process of finishing lager beer in completing it for the market, so as to take out therefrom the impurities and retain therein the carbonic acid gas. Mr. Paul Weidner, of Detroit, Mich., is the manufacturer of the filter complained of; having sold the same to the defendant, who, with it, in connection with certain appliances of his brewery, carries out the alleged infringing process. The bill prays the usual equitable relief, injunction, and accounting.

The contention of the defendant is (1) that the patent in suit (at least, in so far as it can be held to apply to the process employed

by defendant) is void, both by reason of want of novelty, and because the process of the patent is nothing more or less than the natural and inevitable function and operation of the apparatus of the patent to the same inventor, application for which patent was filed March 2, 1887; and (2) that, even granting the patent in suit to be valid, the defendant does not infringe.

The specifications state the object of the invention thus:

"The object of this invention is the filtration of beer which contains mechanical impurities, and also carbonic acid gas under pressure. In the filtration of such liquids it is important that the liquid—beer, for example—should be filtered continuously in its passage from the store cask to the keg into which it is drawn for sale, without material loss of the gas contained in the beer, and without material foaming in the keg into which the filtered beer is delivered. The methods in use prior to my invention for clearing beer of the yeast which is produced in it as a product of fermentation have generally involved the use of isinglass, by which the yeasty particles are collected and precipitated to the bottom of the tun or cask containing the beer. Isinglass is, however, costly, and involves a very large annual expenditure where any considerable amount of beer is brewed, and much trouble in preparing it for use as a 'fining,' and it is slow in its operation; nor are the results entirely satisfactory, as all of the yeasty particles are not thereby removed, but some portion remains, and, yeast being a fungous growth, that which remains propagates more yeast, fermentation continues, and in consequence the beer is apt to become cloudy and spoiled. The result is especially noticeable in beer which is bottled and intended to be kept for some time, either for export or domestic use. In mechanical filtration, variations in the supply of beer to the filter, and in the speed with which the filtered beer is discharged into the keg, permit the carbonic acid gas generated in the beer to escape in considerable quantities while the beer is passing through the filter, and the beer, having lost its carbonic acid gas, or a considerable quantity of it, comes out flat and insipid, or is discharged into the keg in a foamy condition, and soon becomes worthless, besides which the escape of the gas in the filter causes foaming therein, the foam collects upon and clogs the pores of the filtering substance, or the gas permeates the filtering substance, thereby affecting its efficiency as a separator of mechanical impurities, or both results ensue; and thus the operation of the filter is materially retarded, the variations of supply and discharge are increased, and in consequence the filtering substance fails to collect much of the yeast. To modify these results would require the frequent changing of the filtering substance, and this would involve not only expense for filtering material, but considerable loss of beer, and delays in the filtering operation. Continuous filtration, without material variation in the speed with which the beer is discharged from the cask, is also important, because if the speed of the discharge is materially diminished the accumulated air pressure will burst the cask, unless it is closely watched; and the cask being usually in a cellar, where neither continuous sunlight nor gaslight is permitted, because either would elevate the temperature of the cellar, such watching is inconvenient. For these reasons, among others, mechanical filtration has not, I believe, been generally or successfully practiced by beer brewers before my invention. By my improved method of filtering I dispense entirely with the use of isinglass or other finings, and thus very great economy is secured, the beer is thoroughly clarified, all or substantially all of the yeasty particles being removed, the operation of filtering is rapid and continuous, without material variation in speed, and without the necessity of changing or cleansing the filtering substances, the carbonic acid gas is substantially preserved in the beer, and the beer comes out of the filter retaining all its brilliancy and liveliness, ready to be discharged into the keg at the racking-off bench without any danger of subsequent cloudiness or other deterioration due to the filtration, and without having had imparted to it any undesirable taste. The drawings illustrate the arrangement of mechanism in and by which my improved filtering method is carried out."

Then come descriptions of the drawings which accompany the specifications. Afterwards they proceed as follows:

"In case any air enters the filter, either through the connecting pipes or otherwise, or if any gas escapes from the beer from changes or variations of pressure either on the entrance or discharge side, or by reason of partial clogging of the filtering media, or from other cause, the air or gas, as the case may be, at once ascends to the top of one or other of the gas-traps, where, being easily observed, it is, together with the foam thereby caused, allowed to escape through the vent-cock, the filtration meanwhile proceeding without any interruption or disturbance. In the drawings, Fig. 1, the racking-bench is shown as situated on the floor, or on a level above that of the store cask, and this is the arrangement, I believe, in most breweries. The result is that the column of beer in the pipe, G, and hose, M, constitutes a back pressure by which the filter and the gas-traps at the top thereof may be kept completely filled with beer; but in some breweries the racking-bench is situated on the same floor or level as the cask. In such case a back pressure sufficient to keep the gas-traps filled with beer should be formed by elevating the hose, M, at a point between the filter and the racking-off bench, a little above the top of the lantern, or by narrowing the capacity of the hose, M, relatively to the capacity of the hose, K, and the air pressure at the cask. As there is always more or less circulation of beer in the lantern, and the lantern being of glass, the beer therein may be conveniently observed, and the quality of the beer passing through the filter—that is, its freedom from impurities—may be known. Of course, if the gas-trap is not of lantern construction, a sample of the filtered beer may from time to time be drawn off for observation by means of the vent-cock, and the vent-cock may from time to time be opened to allow the escape of any air, gas, or foam which may have accumulated in the gas-trap; but this is less convenient than to make the trap of lantern construction. The interior of the chambers of the filter may also be so formed as to constitute traps for air, gas, or foam, the vent-cocks being placed at their highest points; but such arrangement is still less desirable.

"Having thus described my process, and the apparatus in and by which it is conducted, what I claim as new is: (1) The process of filtering beer, consisting in drawing the beer to be filtered from the cask under a pressure exceeding atmospheric pressure, conducting the same to and through a filtering apparatus in which that pressure is maintained during the filtering operation, keeping the filtering apparatus full of beer, collecting and carrying off any air entering the filter along with the beer and gas separating from the beer during the filtering operation, and discharging the filtered beer from the filter under pressure, substantially as hereinbefore set forth. (2) The described process of filtering and keeping beer, which consists in forcing the beer under a pressure exceeding atmospheric pressure from the store cask through a filtering apparatus, and thence to the keg, keeping said apparatus full of beer during the operation, and collecting and carrying off from the beer during its passage from the store cask to the keg air that may be mingled with the beer and gas that may separate from the beer, substantially as and for the purposes hereinbefore set forth. (3) The process of filtering beer, consisting in drawing the beer from the cask under a pressure exceeding ordinary atmospheric pressure, forcing the beer under said pressure through a filter, maintaining that pressure in the filter during the filtering operation, and creating and maintaining a back pressure in the filter, so as to keep the filter full of beer, substantially as described. (4) The process of filtering beer, consisting in drawing the beer from the cask under a pressure exceeding ordinary atmospheric pressure, forcing the beer under said pressure through a filter, maintaining that pressure in the filter during the filtering operation, creating and maintaining a back pressure in the filter, so as to keep the filter full of beer, and collecting and carrying off from the beer any gas separating from the beer on its way from the store cask to or through the filtering apparatus, substantially as described.

"Signed at New York, in the county of New York and state of New York, this 7th day of October, A. D. 1887. Heinrich Stockheim."

This patent has heretofore been the subject of litigation in, among others, the following suits, in which judgment went for complainant, sustaining the validity of the patent, finding infringement of all the claims, and directing an injunction and accounting, viz.: *Uhlmann v. Brewing Co.* (C. C.) 41 Fed. 132, decided January, 1890, in circuit court for Northern district of Illinois, by Gresham, Circuit Judge; *Id.* (C. C.) 53 Fed. 485, decided January, 1893, in circuit court for Eastern district of Pennsylvania, by Dallas, Circuit Judge. Unless constrained to the contrary by very strong reasons, such as the introduction of new evidence, this court will feel itself bound by the two decisions referred to, establishing the validity of the patent in suit. A careful consideration of the record and the arguments of counsel have failed to disclose to the court any grounds for a different decision in this case. The alleged anticipations now proved, which were not before the court in either of the previous cases, have been carefully examined, and have not been found to have embodied and set forth, with the clearness required by the law, the substantial process of the patent in suit. Some of them seem to have employed one or more of the steps of the Stockheim process, but in none of them has the court been able to find that process, as a whole, embodied and explained. The result to be achieved was the delivery of beer from the storage cask to the racking-bench and the shipping barrels without loss of its carbonic acid gas, and freed from its impurities by filtration between the storage cask and the racking-bench. The evidence discloses that this had been for a long time a desideratum with German and American brewers, before the invention of the Stockheim process; that, previous to the publication of his process, numerous attempts at mechanical filtration of beer had been made in Germany, and some in this country, but without success. The method of clarification and fining beer in general use was that of placing beech chips or shavings in the storage cask, which attracted the grosser particles of yeast and other impurities; and an isinglass solution, which, after the second fermentation had begun, was poured into a cask, and spread in a gelatinous film over the surface of the beer, and, gradually sinking to the bottom, carried with it the yeast germs and other impurities of fermentation. But this required from one to several weeks, nor did it always do its work effectually; and the isinglass was expensive, and added materially to the cost of manufacture. This old method also made necessary the use of a large quantity of chips, and the process required time, and the judgment and discretion of skilled labor, besides sometimes imparting an unpleasant taste to the beer. The advantages to be obtained by the mechanical filtration of beer between the storage cask and the racking-bench, if it could be successfully accomplished, were obvious. The principal difficulty which presented itself in the efforts made for the accomplishment of such filtration was the loss of carbonic acid gas in the passage of the beer through the filter, especially of the highly-charged beers in this country, and the consequent foaming and turbidity of the beer when delivered at the racking-bench. The process of racking

off beer was and is through a hose from storage cask or chip cask to the racking-bench and shipping barrels. Through this hose the beer was forced by the pressure in the storage cask, which was above the atmospheric pressure, and was generally maintained or increased by an air pump during the operation. After the air was expelled from the hose, and such foam or gas as would form on the comparatively small exposed surface of beer in the hose had been discharged at the racking-bench, a solid stream of beer was easily maintained by the pressure of air and gas in the storage cask and from it to the shipping barrels, and, by keeping the flow uninterrupted until the cask was emptied, no opportunity for loss of carbonic acid gas or formation of foam occurred. The difficulty of interposing a filter between the storage cask and the racking-bench, before the Stockheim process was practiced, was, as we have stated, that the continuous and solid stream of beer was interrupted by passing through the filter. The tendency, in the escape of beer from the hose into the larger receptacle of the filter, would be to relieve it of some of the pressure, thereby liberating gas and presenting free surfaces, which tended to accelerate, by attraction, further escape of the gas. This would naturally produce a disturbance in the filter, which would show itself in foam at the racking-bench. The forcing of the beer through the filtering material by the pressure in the storage cask would also naturally tend, by dividing the beer into little streamlets, to produce free surfaces, and consequent liberation of gas. All this was the result of breaking up the continuity and solidity of the stream from the storage cask to the kegs. It seems easy enough now, that the method has been suggested and successfully tried, to say that the remedy for this state of things would be to provide for filling the filtering apparatus with beer, and to keep it full under pressure, so that there should still be a solid stream of beer from the storage cask to the kegs, just as it was in the hose before the use of the filter; the filter only, in its place, enlarging the dimensions of the stream, but continuing its solidity and continuity, so that there should be no opportunity for free surfaces or escape of gas. But this has been true in the case of many inventions whose utility, novelty, and patentability are everywhere recognized. They seemed simple and obvious methods of procedure or operation after they had been once explained and demonstrated.

The really essential features of the process of the patent in suit, as described by Dr. Henry Morton, a distinguished expert who testified in the cause, are:

"The keeping of the filter full of solid beer, by two operations, in the main: (1) The maintenance of an adequate pressure above that of the atmosphere; and (2) the absence of all free surfaces of air, gas, or foam, by the removal of the same whenever necessary, and the maintenance of back pressure, pressure in the filter, and forward pressure, or pressure on the supply cask, so as to prevent the recurrence of such free surfaces."

These essential features seem to be covered by the claims of the patent in suit, claim 3 and claim 4 especially comprehending them in their broadest construction. The "back pressure" of the third

and fourth claims, by which the filter was to be kept full of beer, is a most important step in the process. How it is to be effected is explained in the specifications as follows:

"In the drawings, Fig. 1, the racking-bench is shown as situated on the floor, or on a level above that of the store cask; and this is the arrangement, I believe, in most breweries. The result is that the column of beer in the pipe, G, and hose, M, constitutes a back pressure by which the filter and the gas-traps at the top thereof may be kept completely filled with beer; but in some breweries the racking-bench is situated on the same floor or level as the cask. In such cask a back pressure sufficient to keep the gas-traps filled with beer should be formed by elevating the hose, M, at a point between the filter and the racking-off bench, a little above the top of the lantern, or by narrowing the capacity of the hose, M, relatively to the capacity of the hose, k, and the air pressure at the cask."

If either of these modes of producing "back pressure," viz. elevating the racking-bench, or simply elevating the outlet hose above the top of the filter, or narrowing the capacity of the outlet hose relatively to that of the inlet hose, and if the forward air pressure at the storage cask, be adequate, the requirements of the claims of the patent in that respect are met. The process described in claim 3 may be considered as part of the entire process of the patent, and refers to a condition which other steps of the process aid in bringing about. The entire process provides for the collection and discharge of gas or air in the filter, or escaping at the commencement of the operation, or which shall escape during the operation. This provision enables the filter to be filled with beer directly after it is turned on from the storage cask, the initial discharge of air, gas, and foam producing a condition of solid beer, or "schwarz," fit for discharge under pressure through the outlet hose to the shipping kegs; the continuity of the solid stream from the storage cask through the filter and out and on to the racking-bench being maintained by the back and forward pressure on the beer in the filter in the way described in that step of the process. No special device for discharging the air and gas is essential to the process. The lantern traps and escape cocks, as described in the specifications of the patent, are suggested as preferable; and the provision for escape of air and gas, both in the receiving and discharge chambers of the filter, would seem more efficient than such a provision only as to the discharge chamber. But one or both carry out measurably that step in the process. So, also, the initial discharge of air, gas, and foam from the filter, followed by the solid stream of beer under pressure through and filling both hose and filter from storage cask to racking-bench, would, under favorable conditions, be sufficient to allow of the almost continuous flow of the beer, without further disturbance from escaping gas, and render unnecessary a provision for further escape of gas during the filtering operation. But whether there were such provision, or not, or whether such further provision should become useful or important, or not, the operation successfully conducted, as described, with the initial discharge alone of the air and gas, would be a carrying out of the process of the patent.

This statement of what are conceived to be the essential features and characteristic operation of the process of the patent in suit

brings us to the consideration of the alleged infringement thereof by the filtering apparatus admitted to have been used by defendant. From a careful study of the expert evidence on both sides, the drawings and exhibits, including the model of defendant's filter as used by him, the conclusion has been reached that the process of filtering beer, as practiced by defendant, is substantially that of the patent in suit, and therefore an infringement of complainant's right. We find in defendant's apparatus and process, that the beer to be filtered is drawn from the cask under a pressure exceeding atmospheric pressure, and that the same is conducted to and through a filtering apparatus in which that pressure is maintained during the filtering operation; that the air and gas in the filter at the commencement of the filtering operation, or that entering the filter along with the beer, and separating from it at the commencement of the operation, are collected and carried off at the top of the filter, and through the hose connected therewith, to the racking-bench, for discharge there into a trough; that, this obstacle to keeping the filter full of beer during the filtering operation having been removed, it is maintained in that full condition, so as to make a solid and continuous stream of beer from cask to keg, by a forward and back pressure upon the beer in the filter; and that the beer is discharged from the filter under pressure. This is substantially what is set forth in the first claim of the patent in suit. The fact that defendant still uses isinglass for fining his beer in the cask, and also practices a refrigeration not contemplated in the Stockheim process, does not make the method employed less an infringement, though it may be that the conditions thus produced make some of the devices contemplated in the entire Stockheim process less necessary than they otherwise would be, and therefore have enabled defendant to dispense with them. The cooling of the beer, for instance, may have made the escape or liberation of gas in the filter, after the filtering operation has begun, less likely to occur than with the unrefrigerated beer with which the Stockheim process was originally concerned. Nor is it necessary, in order that the process of the patent should be employed, that there should be a provision for carrying off from the filter gas that may escape therein after the filtering operation has been going on. As we have shown before, the initial discharge of gas, by which it was possible for the filter to be filled, and that full condition maintained by the forward and back pressure, was a carrying out of the process of the patent, as far as it went. That it was less efficient than the process in its entirety, or that modern conditions allowed certain precautions in the process to be dispensed with, does not militate against the position assumed. And yet it may be noted in this connection that Mr. Uhlmann, in his testimony, says:

"I asked the foreman whether he had ever had occasion to open the cock in connection with the outlet pipe on top of the filter, except when he commenced the operation, as I had seen. He said: 'Yes; sometimes once or twice in a day, whenever the beer foams at the racking-bench; sometimes not at all.' He only opened it when the beer foamed, because there must be no foam in the filter."

But whether we consider this as sufficient proof that air or gas was carried off from the filter and out of the line of discharge into

the keg after the preliminary discharge of air and gas in commencing the operation, and after the filter had been filled with solid beer, or not, we are of opinion that the air and gas carried off at the commencement of the operation should be considered as carried off "during the filtering operation," within the meaning of the first claim, as much as though it had occurred after the filter had been filled with solid beer by the preliminary removal of air and gas. In a general way, what we have just said applies to the same feature of claim 2. The process, in its entirety, rests upon all the claims, though each separate claim may describe the process from a somewhat different point of view from that of the others. Claim 3, in our opinion, is the broadest, in that, though it may be said to describe a part only of the entire process, it explains what seems to us the essential condition requisite to a successful operation of the process of filtering beer under pressure greater than atmospheric pressure, without material loss of its carbonic acid gas. That condition existing after the preliminary expulsion of gas and air from the filter, it should be kept full during the filtering operation, so as to maintain a continuous and solid stream of beer from cask to keg, by means of forward and back pressure upon the beer in the filter, as described in this claim and the specifications. As we think has been shown, certain steps of the process (as, for instance, the discharge of gas and air after the filtering operation has been going on) may not be necessary to the successful operation of the process; but the condition just described, of keeping the filter full after the preliminary expulsion of gas, by forward and back pressure, is a condition absolutely essential to the process, however practiced, and is an end aimed at in the other steps of the process. This leading thought of the inventor, however obvious it may now seem, entered into no other filtering device, so far as the evidence discloses,—at least, in such fashion that its importance as a governing condition of the filtering operation might be understood. That this condition should have existed by accident in any process other than Stockheim's, or have been produced without its importance being recognized and proclaimed, cannot affect Stockheim's claim. It may well have been that, before the Stockheim process was explained, some one may have filtered highly-charged beer under pressure successfully; the filter having been kept full of beer the while. But, so far as the evidence discloses, no one recognized that as the essential condition of a successful operation, or explained its function as a step in the process. One who accomplishes a result by a process which is only partially or not at all understood by him has invented nothing, and cannot deprive another, who afterwards discovers and proclaims the true principle of the operation, of the rights of an inventor.

In the Weidner-Gutsman circular, there is shown a cut representing a filter made by Weidner, in every respect like the defendant's filter, except that it has on the top of the outlet, just after it leaves the filter, a lantern trap and escape cock like that suggested in the Stockheim process patent. It seems to be admitted by defendant's counsel that they considered the Weidner filter, so constructed, though in every other respect like that used by defendant, an in-

fringement of Stockheim's patent. If that be the case, we have no difficulty in saying that the mere dispensing with this lantern trap and escape cock, and substituting therefor the method of discharging air and gas through the top of the filter at the same place where the lantern was placed, as practiced in defendant's filter, does not so alter the process as to avoid infringement.

The defendant's counsel has argued with great vigor that all the steps in the process are old, and that practicing them, or any of them, is within the right of the defendant or others. This is true, if, in practicing them, the process of the patent in suit is not employed; for it is well settled that a process, all the steps of which are old, may be new and patentable, when, co-operating with each other, they produce a result that is new and useful. In this respect, a process is like a patentable combination of old elements, and the philosophy of each is the same. It would seem as if defendant's counsel, in his exceedingly able argument and brief, had confounded the "back pressure," spoken of and described in the specifications and claims of the patent, with the pressure that had been used in various old operations, having for its object the retaining of carbonic acid gas in the receiving and shipping vessel. This is not the "back pressure," as the court understands it, to which the specifications and claims refer. That to which they refer was intended to produce, and does produce, a pressure on the filter which tends to keep the filter full, and prevents the escape of gas from the beer in the filter. It was not intended, and does not operate, to prevent the escape of gas from the beer while in the receiving vessel. It was pressure on the filter, and not in the receiving vessel, that played so important a part in Stockheim's process.

The defendant also, in his brief, insists that the initial discharge of air and gas in the filter provided for by the Stockheim invention is merely the displacement of air and gas in the filter by the entry of beer, such as takes place in every vessel when being filled with a liquid, and that therefore so old and simple a suggestion could not be the subject of invention. But the Stockheim invention was not precisely this, but, as a step in his process, it consisted in the venting of gas and air escaping from the beer, and the keeping of the filter full afterwards; thus preventing the formation of free surfaces, and the consequent escape of gas. The means employed for this step in the process, it is true, may be old; but, in connection with the other steps of an entire process, it is entitled to the consideration given it by Stockheim.

In view of the premises, it is hardly necessary to extend the limits of this opinion by a more detailed discussion of the essential features of the process embodied in the patent in suit, as they may affect the question of infringement. It remains, therefore, only to say that, in the opinion of the court, the process and apparatus used by defendant, as proved or admitted in this suit, invade the domain of Stockheim's invention, and infringe the patent of complainant. Let there be a decree entered for complainant as prayed for in the bill, but for actual damage, without increase, and for the appointment of a master.

FORD et al. v. BANCROFT et al.

(Circuit Court of Appeals, First Circuit. October 10, 1899.)

No. 251.

PATENTS—INFRINGEMENT—MACHINE FOR MAKING WOVEN CANE WORK.

The Morris patent, No. 401,050, for a machine for inserting diagonal strips in woven cane work, while on its face covering a pioneer invention for automatically doing the work, is not entitled to the broad construction accorded to such patents; the machine described having failed to accomplish the result intended, and no practical machine embodying the invention having ever been constructed. *Held*, also, not infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

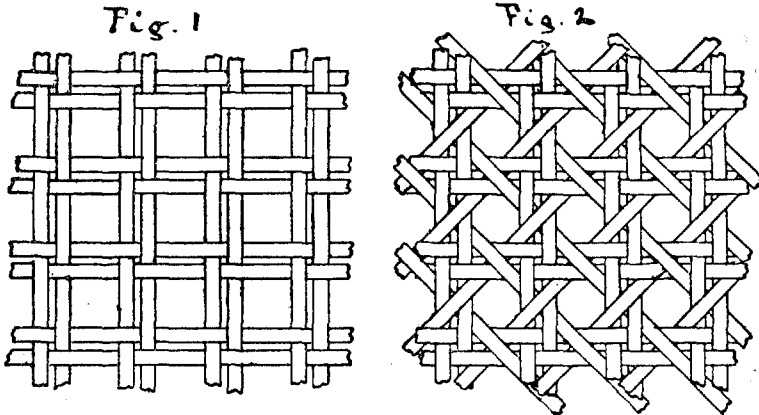
For opinion in circuit court, see 85 Fed. 457.

William D. Baldwin and Loyd B. Wight, for appellants.

Frederick P. Fish and Guy Cunningham, for appellees.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

COLT, Circuit Judge. This appeal relates to patent No. 401,050, issued to Henry B. Morris April 9, 1889, for a "machine for inserting diagonal strips in woven cane work." The invention, in the words of the patentee, "is for a machine for automatically inserting diagonal threads or strips in a prepared foundation mat." The foundation mat of woven cane work, and the completed fabric after the insertion of the diagonal strip, are illustrated in the following figures:



The Morris patent, as appears from the specification, covers a complete automatic machine, composed of several groups of instrumentalities, namely, "improved means for inserting diagonal threads into a woven fabric, improved means for feeding the fabric to the mechanism for inserting the diagonal threads, and improved devices for severing the threads at proper length." The chief feature of the Morris invention relates to the dies which separate the strands

of the foundation fabric, and open a passage through which a diagonal strand may be passed. The inventor says:

"I conceived the plan of using a straight needle, and of opening a path through the foundation fabric for said needle by elevating and depressing the proper strands so that the needle might follow the course to be occupied by the diagonal thread. In carrying out this idea, I constructed a pair or set of separator bars furnished with separators, or, as I call them, dies for elevating and depressing the proper portions of the mat."

The patent was granted April 9, 1889. Morris conceived the invention in the winter of 1886-87, and between that time and the date of the patent he made several sets of separators for the purpose of experiment. Some time after the patent was issued, he constructed a machine, which proved to be structurally weak, and was abandoned. A second machine was completed in the winter of 1891-92. On March 17, 1892, this machine was operated in the presence of two of the complainants, Ford and Johnson, and of Henry G. Dunlap, at Geneva, N. Y. Morris and his son, Edmund, testify that the machine worked fairly well. Dunlap testifies that he told Ford that it "would never do the work practically," but "that it might be improved and worked down fine enough to make the work all right." The complainants Ford and Johnson are not called as witnesses, and we have not the benefit of their evidence as to the operativeness of this machine. Two days after this examination of the machine, on March 17, 1892, the complainants entered into a contract with the Morris Weaving Company, to whom the patent was issued as assignee of Morris, for the purchase of the patent; and about the same time Morris and his son entered into the employment of the complainants, and have since continued in their employment. This contract contained the following provision:

"It is further understood and agreed that the party of the second part shall pay to the party of the first part the sum of \$5,000 upon the execution and delivery of these presents, and the balance of the twenty thousand dollars (\$20,000) as follows: That when in the opinion of H. B. Morris or Edmund Morris, in behalf of the party of the first part, and of Henry G. Dunlap, or some other expert appointed by the party of the second part, the machine has been developed and perfected under the letters patent aforesaid so as to be commercially useful, that the parties of the second part shall pay to the parties of the first part fifteen thousand dollars (\$15,000) cash: * * * provided that, if the experts of the two parties hereto shall not be able to agree as to when said machine has been so perfected, then, upon the demand of the experts of either party, a third party shall be chosen by the experts of both parties, who shall be a mechanical expert, and both parties hereto agree to abide by the decision of the majority of the three arbitrators thus appointed as to whether the machine has been so perfected at that time as to be commercially useful; and the parties of the second part agree to use all reasonable diligence in perfecting the machinery described and claimed under the said letters patent."

This machine was taken from Geneva to Chicago, and then to Michigan City, where the complainants carry on their business of manufacturing cane goods. The machine was then taken apart, and an attempt was made to build a third machine. This last machine was never completed. The separators used in the second machine and in the last partially constructed machine were different from

those described in the patent. Although the Morris Company, by its contract with the complainants, was to be paid \$15,000, provided a practical and commercial machine could be constructed, the effort to build such a machine was abandoned. The reason given by Morris for suspending work on the machine (that, in view of the low price of making the fabric by hand, coupled with the fact that the contract called for the payment of royalties to the Morris Company, "he doubted" whether "the machine could be made at that time commercially operative or useful") is hardly satisfactory. It appears that he and his son continued their efforts to produce a machine for doing this work, and that they succeeded in designing a successful machine. A patent for this machine was applied for September 27, 1893, and was granted July 10, 1894. This was the first successful automatic machine for the insertion of diagonal strands in open cane work. Subsequently, in 1895, the son, Edmund Morris, was granted a patent for another machine. Both these last patented machines operated upon entirely different principles from the machine in suit. Both proved to be practical and useful, and machines embodying these patents were at once adopted, and are now operated by the complainants.

In the Morris patent, in suit, a continuous channel or shed is opened in the foundation fabric for the passage of a straight needle, by means of separator bars which, when brought together, elevate and depress the proper strands. But the difficulty is that the attempts by the inventor, assisted by others, and under the most favorable circumstances, to embody this fundamental conception of the patent in a practical, useful machine, have been wholly unsuccessful. Whether the defect in the machine is owing to the absence of means to properly register the foundation fabric so as to hold the strands in proper position for the insertion of the diagonal strand when the separators are brought together, or to the shape of the projections on the separators, or to the use of a hollow needle, or, as seems to be the case, to all these circumstances combined, the fact is that the machine has proved a failure, and that the inventor and his son subsequently solved the problem by designing another machine operating on a different principle. Neither Morris nor any subsequent inventor has succeeded in the construction of a practical machine on the principle described in the patent in suit. In the defendants' machine the bars or separators and the needle are very different in construction and mode of operation from those described in the Morris patent. The bars do not open a continuous channel or shed for the passage of the needle by bringing the bars together, and so depressing and elevating the proper strands in the foundation fabric. On the contrary, their principal function is to crowd down the strands around the conical registering spurs of the lower bar, and to cause the strands to lie in a correct position above the sliding pins in the lower bar. When the needle is pushed forward, its point reaches the sliding pin just as the pin has been raised by a cam bar and has elevated the warp strands above the level of the fabric. The defendants' machine uses a straight, slender, solid needle with an eye in its point, which will separate the

strands by passing through the fabric with an up and down motion imparted by the sliding pins rising and falling in its path, which pins co-operate with the needle to effect the separation; and the diagonal strand, having been threaded into the eye of the needle, is inserted into the fabric by drawing the needle back between the separated strands.

The defendants are charged with infringing the first, fourth, and fifth claims of the patent. The first claim is as follows:

"(1) In a machine for inserting diagonal threads in warp fabrics, the combination, substantially as hereinbefore set forth, of the separators for opening a diagonal passage in the fabric, means for actuating the separators, the needle which carries the diagonal thread through said passage, and means for actuating the needle."

The fourth claim is for the combination of the separators, needle, and feed rollers. The fifth claim is for the combination of the separators with a longitudinal groove, needle, and feed rollers.

We do not think the defendants' machine infringes these claims, for the reason that the separators and needle in their machine are widely different in construction and mode of operation. Upon this point we agree with the language of the court below:

"We do not find in the respondents' machine either the complainants' channel, or their needle, or the equivalent of either, or anything which performs the function of either. The complainants' channel, so important for the rapid driving of a straight needle, could find no equivalent in respondents' machine, unless the complainants' patent includes every form of separation of the warp and weft strands, for the passage of any form of needle, by any form of separating device; and, under the circumstances to which we have referred, the art of weaving, and its kindred arts, forbid giving so broad a monopoly to complainants."

Where a patent represents a marked advance in the art (for example, where an inventor for the first time accomplishes a certain result by organizing several groups of instrumentalities into a single automatic machine, as in the Morley patent for sewing shank buttons to a fabric, or in the Reece patent for a buttonhole sewing machine), such a patent is called a "pioneer"; and the courts, in its construction, have adopted a liberal rule with respect to equivalents. *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299; *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 61 Fed. 958, 10 C. C. A. 194. Upon paper the Morris patent resembles the Morley and Reece patents, but there the similarity ends. The Morley machine solved the problem of automatically sewing a shank button to a fabric. The Reece machine solved the problem of an automatic buttonhole sewing machine. Both were practical and useful machines, and each, in a sense, revolutionized the particular branch of the art to which it relates. While the Morris patent describes a machine of the same type, it did not solve the problem of automatically inserting by machinery a diagonal strip in open cane work. No practical machine embodying the invention has ever been constructed. The successful solution of the problem was subsequently attained by the inventor and his son in a patented machine constructed on a different principle. If the Morris machine had proved to be practical and useful, it is doubtful whether the defendants'

machine could be held to be an infringement upon any recognized rule of equivalents, in view of the radical difference between the two structures. But, the Morris machine having proved a practical failure, it is manifest that the defendants' machine cannot be held to infringe. The decree of the circuit court is affirmed, with costs.

THE CARRIER DOVE.

(District Court, D. Washington, N. D. November 27, 1899.)

1. SEAMEN—WAGES—COMPUTATION OF TIME.

Seamen whose terms of service end at the same hour of the day at which they commenced work are not entitled to payment of wages both for the day on which they commenced and that on which they completed their service.

2. SEAMEN—WORK ON SUNDAYS.

Seamen who are required to work on Sunday in discharging the vessel because the port is open and without facilities, and the work can only be done in calm weather, are entitled to extra pay; such work not being required because of peril to the ship, but to save possible expense incident to delays.

This was a suit in admiralty by seamen against the schooner Carrier Dove to recover a balance claimed to be due them as wages.

M. M. Madigan, for libelants.

W. H. Gorham and John K. Brown, for claimant.

HANFORD, District Judge. The libelants, having made a voyage from Puget Sound to St. Michael, were, on the return of the vessel, discharged and paid off by a shipping commissioner; but they have nevertheless brought this suit to recover a balance which they claim to be due them as wages. It appears from the evidence that they all went on board and entered the service of the ship at about 8 o'clock in the morning, and their services ended at about the same hour of the day; and the commissioner, in computing the amount due them, allowed only one day to cover the two fractional days on which their services commenced and ended. The libelants claim a full day's wages for the day on which they were discharged, on the ground that each day commences at midnight, and that their time in the vessel, whether at work or not, from midnight until 8 a. m., should be compensated, and nothing subtracted for the time between midnight and 8 a. m. the first day. If it is true that a working day commences at midnight, then the libelants did not render a full day's time on the first day of their services, and they have no right to complain if the amount subtracted from that day's wages is equal to full pay for the services rendered on the day of their discharge.

The libelants also claim compensation for work performed at St. Michael in discharging cargo on Sunday. The shipping articles which they signed contain a clause providing that the "crew is to work whenever and wherever, at any time of the day or night, Sundays or holidays, as directed by the master." This contract, however, adds nothing to the legal obligation of the crew to work whenever and wherever, at any time of the day or night, Sundays or holi-

days, the master may require them to work. It is the duty of seamen to obey the master so long as their contract remains to be performed, and the master is the sole judge as to the necessity for requiring them to work at night or on Sundays or holidays. But, on the other hand, it is the duty of the master to treat his men fairly; and he should not require them to work overtime when the ship is in port, and there is no stress of weather, or dangers menacing the vessel, requiring extra exertions. A defensive plea is made to the effect that the harbor at St. Michael is but little better than an open roadstead. There being no wharf or dock upon which freight can be discharged, cargoes have to be landed by the use of lighters, and in rough weather it is impracticable to work. This creates an urgency to work when the weather is fine, and when lighters can be obtained, and, the claimant insists, justifies work on Sundays. There is, however, an important difference between necessity occasioned by perils menacing the ship, and mere urgency to hasten her departure from a port in order to avoid losses incident to detention. Mariners are required to make all exertions which may be necessary at any time to save the ship from threatened destruction or injury, without compensation in addition to their stipulated wages; but if required to work on Sundays or legal holidays, in handling cargo when the vessel is in port, merely to save expenses, or to increase the profits of the voyage, the sailors are justly entitled to share in the benefits of their own labor, by being paid extra wages for such extra work. *The Lakme* (D. C.) 93 Fed. 230. I award to each of the libelants, except P. B. Gill, who did not work on Sunday, for their Sunday work at St. Michael, the sum of \$3 and costs.

THE TREFUSIS.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1899.)

No. 840.

SALVAGE—AMOUNT OF AWARD—REVIEW ON APPEAL.

Under section 11, Act March 3, 1891, creating the circuit courts of appeals, such courts are governed, in reviewing decrees in admiralty, by the provisions of law then in force and applicable to such review by the supreme court; and under Act Feb. 16, 1875 (18 Stat. c. 77), restricting such review to matters of law, a decree for salvage services cannot be altered, for the reason that the amount awarded is excessive, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case.

Appeal from the District Court of the United States for the Southern District of Florida.

Wilhelmus Mynderse, for appellant.

J. M. Phipps and Harrington Putnam, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. In this case we affirm the decree of the district court. The appellant has assigned six errors. The last three relate to complaints made by the appellant against the salvors for want of skill, care, and energy in rendering the salvage services.

The district court examined these complaints carefully, and reviewed the evidence relied on for their support, and found that they were not sustained. If we should hold that this finding on this issue is not binding on us, we would be constrained, by the testimony contained in the record, to concur in it. It is clear to us that these complaints are not supported by the proof in the case. The other three errors assigned present only a question as to the reasonableness of the amount of the salvage allowed. The findings of the district court recite that:

"The value of the vessel and cargo has been stipulated to be \$171,000, and, under the circumstances of the case, it is considered that \$12,500 would be a fair and just salvage, not unnecessarily burdensome upon the property, nor rewarding the salvors extravagantly, but simply compensating them for their labors and risk, and giving a fair bonus in accordance with the well-accepted rules of salvage."

The decree is for the sum of \$12,500, together with the costs incurred in the case. In the case of *The Connemara*, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751, Mr. Justice Gray, in delivering the opinion of the court, quotes this language of Chief Justice Marshall, used in the case of *The Sybil*, 4 Wheat. 98, 4 L. Ed. 522:

"It is almost impossible that different minds contemplating the same subject should not form different conclusions as to the amount of salvage to be decreed and the mode of distribution."

Judge Gray proceeds to show that before the passage of the act of February 16, 1875, the supreme court had full jurisdiction to reverse decrees in admiralty upon both facts and law, but that even then the amount decreed below was never reduced unless for some violation of just principles, or for clear and palpable mistake or gross overallowance; that by the act last mentioned the authority to revise any decree in admiralty of the circuit court is limited to questions of law, and the findings of fact by that court are equivalent to a special verdict, or to facts found by the court in an action at law when a trial by jury is waived; concluding that:

"Since the act of 1875, in cases of salvage, as in other admiralty cases, this court may revise the decree appealed from for matter of law, but for matter of law only; and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case."

By the act to establish the circuit courts of appeals, approved March 3, 1891 (with certain exceptions not necessary to note), this court has final jurisdiction of appeals in admiralty cases. Section 11 of the act last referred to provides:

"And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals or writs of error provided for in this act and in respect of the circuit courts of appeals."

It is clear that the services rendered in this case to the steamship *Trefusis* were salvage services. In the then condition of the wind and waves, the position of the ship did not involve serious present peril, but manifestly did involve imminent peril. The district court finds that from this position of threatened peril "the ship was rescued

without injury, and the cargo replaced without any loss whatever, ready to continue her voyage and earn her freight, with comparatively slight detention." From a careful consideration of the whole case made by the record, we are not prepared to hold that the award cannot be justified by the rules of law applicable to the case. Therefore the decree of the district court is affirmed.

THE ASSYRIA.

DERNIER v. H. BAARS CO.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1899.)

1. SHIPPING — CONSTRUCTION OF CHARTER PARTY — COMMENCEMENT OF LAY DAYS.

The object of providing in a charter party for one clear day after notice of the readiness of the vessel to receive cargo before the lay days shall commence is to allow the charterer such time for preparation, and, unless made so by the terms of the charter or custom of the port, Sunday is not to be counted as such a day, and, where notice of readiness is given on Saturday, the lay days do not commence until Tuesday.

2. SAME—COMPUTATION OF LAY DAYS.

Where a charter party provided that a cargo of lumber should be loaded by the charterer, and should be "furnished" at the average rate of 50,000 superficial feet per running day, the lay days for loading are to be computed on the amount actually loaded, and not upon the amount delivered to the vessel for loading, a part of which was not actually loaded.

3. SAME—DEMURRAGE.

Where, after a cargo was loaded, the master refused to sign the bill of lading presented by the charterer, on the ground that it was incorrect, but, after several days' delay, altered and signed the same, the charterer cannot be charged with demurrage for the time so taken.

Appeal from the District Court of the United States for the Northern District of Florida.

The H. Baars Company, now called the Pensacola Land & Lumber Company, on the 6th of June, 1896, chartered the British bark *Assyria*, then lying in the harbor of Ship Island, to carry a cargo of resawn pitch-pine lumber from Pensacola, Fla., to Buenos Ayres, South America. The charter party, among other things, contained the following provisions: "The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo of resawn pitch-pine lumber, under and upon deck; and the said party of the second part agrees to pay to the said party of the first part, or agents, for the use of the said vessel for the voyage aforesaid: For lumber under decks, (\$14 ⁵⁰/₁₀₀) fourteen and one-half dollars, United States gold, per thousand superficial feet, inch measure, intake survey; for lumber delivered from on deck, two-thirds of the above rate,—all without primage,—earned and payable in cash on proper delivery of cargo at port of destination, in United States gold coin, or its equivalent in other gold coin, without discount or allowance; charterers to have the privilege of shipping pickets and [or] palings at half rate of freight for small stowage only. Vessel to proceed in ballast, and with all possible dispatch, direct to the port of loading, to enter upon this charter. Vessel to load at such safe wharf and [or] wharves and [or] anchorage as directed by charterers or their agents. Cargo to be furnished at port of loading at the average rate of not less than (50M.) fifty thousand superficial feet per running day, Sundays excepted. Cargo to be discharged at port of destination at the average rate of not less than (25M.) twenty-five thousand superficial feet per running day, Sundays excepted. Lay days to commence after one clear day from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of

the second part or agents; and that, for each and every day's detention by default of the party of the second part or agents, (\$91.84) ninety-one ⁸⁴/₁₀₀ dollars United States gold per day, day by day, shall be paid by the party of the second part or agents to the said party of the first part or agent. Should the captain order more cargo than the vessel will take, the expense of returning same to the mill to be paid by the vessel. Captain to open hatches whenever practicable during the voyage, to ventilate cargo. Charterers or their agents to appoint and pay the stevedore to load the cargo; do the towage of the ship (viz. channel towage, inward and outward, if at Mobile, harbor removals, and outward towage to sea); take ship's ballast from alongside at such safe place or wharf as they may direct; supply dogs and chains; and to pay wharfage, tonnage, custom-house and quarantine dues (but not fumigation or other special charges), harbor master's fees, consular fees, and pilotage in and out (all at port of loading), at two dollars (\$2.00) per load of fifty cubic feet of cargo laden. If required by consignees at Buenos Ayres, vessel is to discharge in the Riachuelo (or Boca) river, at a wharf designated by them, they paying all Boca charges inward and outward, unless vessel loads outward cargo in the Riachuelo (or Boca) river, in which case vessel to pay her own outward charges. Consignees to pay all lighterage required to enable the vessel to reach the wharf, and wharfage until discharged. The cargo to be received and delivered within reach of the vessel's tackle, at the port of loading and discharge. The bills of lading to be signed as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading,—if in vessel's favor, in cash, less insurance; if in charterer's favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage. Charterers' responsibility to cease when vessel is loaded and bills of lading are signed. * * * The custom of each port to be observed in all cases, when not otherwise specifically expressed in this charter."

The vessel arrived in Pensacola harbor from quarantine at Ship Island on June 19, 1896, and on the same day reported to the H. Baars Company her readiness to receive cargo. On receipt of this notice the president of the H. Baars Company suggested to the master of the vessel that a portion of her ballast should be discharged, with a view to carrying a larger cargo of timber, and to this the master consented. The master proceeded to discharge the ballast on a lighter furnished by the H. Baars Company, but on the 22d of June he was stopped by the health officers of the state of Florida, and his vessel was sent back to quarantine to finish discharging ballast. The expenses of the vessel to quarantine and return were paid by the H. Baars Company. On the 26th day of June, the vessel returned to her loading berth in the harbor of Pensacola, and on the 27th day of June, which was a Saturday, the master again gave notice to the H. Baars Company of the vessel's readiness to receive cargo. On the same day the libellant began delivering cargo to the vessel, and during the week following delivered large quantities of lumber and timber loaded on lighters, a part of which was stowed on board. On the 7th day of July a severe storm arose, which drove the lighters, which had not been unloaded, away from the vessel's side, and upon the beach, scattering the lumber along the shore. A portion of this lumber was lost. A portion was recovered, and redelivered to the vessel. In the storm the vessel also received damage to such an extent that it was found necessary to discharge her cargo and make repairs. These repairs, and the reloading of the cargo that had been in the vessel at the time of the storm, were completed about the 29th of July, on which day the master served notice upon the H. Baars Company that his vessel would be again ready to receive cargo on the 4th day of August. On the 14th day of August the master served notice on the H. Baars Company that his lay days were out. On the 19th day of August the final delivery of the cargo was made, and on the next day a clear bill of lading was presented by the charterers to the master, who refused to sign the same, claiming that the bill of lading showed excess of pieces of cargo; that it did not have the words "linear" and "superficial" inserted; and that it contained no notice of protest for demurrage. The master continued to refuse to sign the bill of lading up to the 27th of August, when he signed the same, inserting therein all the matters that he had insisted upon. Thereupon the vessel was cleared by the charterers, and sailed for

Buenos Ayres. During the time the vessel was loading the charterers delivered to the ship, on lighters, lumber, including that blown away and scattered during the storm, to the amount of 1,013,775 feet. There was actually stowed aboard the vessel cargo to the total amount of 817,222 superficial feet. Upon the vessel's arrival at her port of destination, the master refused to deliver the cargo to the consignee, unless he was paid the sum of \$551.04, which he claimed was due to the vessel as demurrage which accrued at Pensacola. The consignee, as agent of the charterers, paid the amount under protest, and the charterers' consignors refunded the same.

Under a well-proved custom prevailing in the port of Pensacola, the term "resawn pitch-pine lumber," referring to cargo to be furnished under a charter party, includes sawn square timber of the sizes furnished by the charterers in this case. The record contains the evidence of two witnesses, and there was nothing shown to the contrary, that, by the custom of the port of Pensacola, Sunday is not a clear day for the preparation or delivery of cargo.

Immediately on the vessel's clearance, the H. Baars Company filed a libel against the Assyria, setting forth the facts, claiming to recover, among other things, (1) the damage resulting by the wrongful indorsement of demurrage on the bill of lading, amounting to \$551.04; (2) the extra harbor fees and towage which charterers had been compelled to pay because of the return of the vessel to quarantine, and the value of the use of the lighter detained during the said return, \$98.80. H. W. Dernier, claimant of the bark Assyria, filed a cross libel to recover (1) for the detention of the vessel going to, remaining at, and returning from, quarantine, six days, \$551.04; (2) six days' demurrage, \$551.04; (3) for detention of the vessel eight days after she was loaded, \$730.32; (4) cost of discharging at Buenos Ayres, arising from charterers shipping timber instead of lumber, \$200; (5) to recover disbursements made by claimant to charterers for dogs lost and broken, and other small incidents.

On the hearing, the district court decreed as follows: "(1) That the claimant, H. W. Dernier, pay to the libellant, the H. Baars Company, the sum of one hundred and seventeen and $\frac{89}{100}$ (\$117.89) dollars, as and for the damages sustained by the said libellant by reason of the return of the bark Assyria to quarantine to discharge ballast. (2) That the libellant and respondent, the H. Baars Company, pay to the claimant and cross libellant, H. W. Dernier, master of the British bark Assyria, the sum of eight hundred and seventy-one and $\frac{93}{100}$ (\$871.93) dollars, as and for the damages sustained by the said claimant and cross libellant as master of the said bark Assyria, by reason of the detention by the said libellant and cross respondent of the said bark Assyria after the said bark was laden. And it is further ordered that the costs of these proceedings, taxed at one hundred and thirty-six and $\frac{65}{100}$ (\$136.65) dollars, be paid as follows: That the libellant and respondent, the H. Baars Company, pay thereof the sum of ninety-seven and $\frac{76}{100}$ (\$97.76) dollars, and that the claimant and cross libellant, H. W. Dernier, master as aforesaid, pay thereof the sum of thirty-eight and $\frac{88}{100}$ (\$38.88) dollars,"—from which decree both parties have appealed.

W. A. Blount and A. C. Blount, for Pensacola Land & Lumber Co.
Ben C. Tunison, for Dernier.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge, after stating the case as above, delivered the opinion of the court.

By a provision in the charter party, the custom of the port is to be observed in all cases when not otherwise specifically expressed in the charter party. The charterers contracted to furnish the vessel in the port of Pensacola a full and complete cargo of resawn pitch-pine lumber. By the well-proved custom in the port of Pensacola, resawn pitch-pine lumber included all kinds of sawn pine lumber and square pine timber. It was therefore clear that the charterers had a right to deliver, as they did, pine square timber as a part of the cargo of the vessel, and all contentions of the claim-

ant based upon the alleged wrongful substitution of square timber for boards and planks must fall.

It seems equally clear, considering the proved custom in the port of Pensacola and all the provisions of the charter party, that the clear day which was to follow notice, and to precede the commencement of the lay days, as provided in the charter party, meant more than a calendar day, and, while not necessarily a working day, yet a day which could be lawfully utilized by the charterers to prepare cargo; and as Sunday, the 28th day of June, was not such a day, the lay days should be held to have commenced to run on Tuesday, June 30th. The charter party expressly provides that the lay days which were to be allowed for loading and unloading cargo were not to include Sundays. The object of giving one clear day after the vessel was ready to receive cargo was unquestionably for the purpose of allowing the charterers time to prepare cargo for delivery. Sunday was not a day during which this work could be done. See *The Unionist* (D. C.) 48 Fed. 315, where the subject is further discussed.

The number of lay days for loading cargo was, by the terms of the charter party, made to depend upon the amount of cargo furnished the vessel, one day being allowed for every 50,000 superficial feet. The contention on the part of the libellant is that the lay days were to be determined by the amount of proposed cargo delivered to the vessel, though not actually stowed aboard, while, on the other hand, it is claimed that the lay days depend upon the cargo actually stowed. The language of the charter party is, "the cargo to be furnished at the port of loading, at the average rate," etc. It otherwise provides that all the labor and expense of loading were to be furnished by the charterers, who were to appoint and pay the stevedore to load the cargo; and that with the loading the master and crew of the vessel had no concern, except to pay the stipulated price at the rate of \$2 per load of 50 cubic feet of cargo laden.

From this it seems clear that the intention of the contract was that the cargo should be loaded at the rate of 50,000 superficial feet per running day, and that the number of lay days was to depend upon the cargo loaded, rather than upon the proposed cargo delivered by the charterers practically to themselves, for the purpose of eventually loading the same. The vessel could have no interest in lumber that the charterers might prepare and get ready, but not eventually load. As, by the terms of the charter, the whole business of loading was in the control of the charterers, who could delay or dispatch as they willed, we hold that the term "cargo to be furnished" means, in this charter party, cargo to be loaded, and the lay days must be determined by the quantity of cargo loaded.

In *Guerard v. The Lovspring* (D. C.) 42 Fed. 856, and in *Baldwin v. Timber Co.*, 142 N. Y. 279, 36 N. E. 1060, charters similar to the one under consideration, and containing a provision for the charterers to do the stowing, were construed to the effect that cargo was not furnished to the vessel until the same was actually stowed on board by the charterer. By the proof as well as the stipulation in the record, 817,222 feet were actually stowed aboard the vessel,

and that quantity, at 50,000 feet per running day, gave 17 days for the number of lay days to be allowed the charterers for loading. The lay days commenced on Tuesday, June 30th, and, excluding Sundays, six had passed when the storm occurred, July 7th. After the storm, the lay days again commenced to run on August 4th, and the 17 lay days expired Saturday, the 17th day of August. The cargo was finally delivered, and the bill of lading presented to the master of the vessel for signature, on August 20th. The libellant admits that 20 days, excluding Sundays, were taken in loading the vessel, and we therefore find that at the time of clearance the vessel was entitled to 3 days' demurrage.

After the bill of lading was presented to the master for signature, he delayed several days before signing the same, and for this delay the vessel also claims demurrage. The reason given for the delay by the master was that therein the cargo was not correctly described, nor was there any protest for demurrage. As the master, after a week's delay, corrected the bill of lading in these respects, and then signed and delivered the same, we are unable to see any reason why he did not do so without delay; and, certainly, there is no good reason to charge the charterers with the delay the master took to deliberate. There is evidence in the record tending to show that the master was waiting to consult owners and obtain money to pay the vessel's expenses, but it is not very material.

The claimant in the court below, in his cross libel, claimed that in the account rendered by the H. Baars Company for loading the vessel, and which account was paid by the claimant, there were overcharges for manifest, harbor master's fees, chains lost, dogs lost and broken, and expenses for stamps and rafts, in all amounting to \$33.20. These expenses were not properly chargeable to the vessel, because, under the terms of the charter party, the charterers were to load the vessel, and pay wharfage, tonnage, custom-house, quarantine, and harbor master's fees, etc. The account was settled by the master, apparently without objection, and in a subsequent account for readjustment of charges, which was settled by the libellant, no mention is made of these charges; but as these matters were clearly overcharges, and as in this case the accounts between the parties are generally adjusted, the claim for \$33.20 should be allowed.

Following the views herein expressed, the account between the parties is as follows: The vessel owes the libellant \$98.80, extra expenses of the vessel on her second trip to quarantine; \$551.04, amount of demurrage paid in Buenos Ayres. The libellant owes the vessel \$275.52, three days' demurrage, at \$91.84 per day; and the further sum of \$33.20, overcharges for dogs, chains, etc. The balance due libellant is \$341.12, for which amount, with interest at 5 per cent. per annum from August 29, 1896, the libellant should have a decree. The decree appealed from is reversed, and the cause is remanded, with instructions to enter a decree for the libellant for the sum of \$341.12, with interest at 5 per cent. per annum from August 29, 1896; the costs of this court to be paid by the appellee and cross libellant, and the costs of the district court to be paid one-half by each party.

MURPHY v. PAYETTE ALLUVIAL GOLD CO., Limited.

(Circuit Court, D. Oregon. December 12, 1899.)

No. 2,594.

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—SUFFICIENCY OF PETITION.

In an action in a state court, based on a number of claims, which in the aggregate, but not separately, exceed \$2,000, and some of which, as shown by the complaint, were assigned to the plaintiff, a petition for removal on the ground of diversity of citizenship must, in connection with the other parts of the record, show the citizenship of plaintiff's assignors; and, to effect a removal, it must appear that the requisite diversity of citizenship exists between defendant and such assignors, as well as between plaintiff and defendant.¹

2. REMOVAL OF CAUSES—AMENDMENT OF PETITION IN FEDERAL COURT.

When a petition for removal, in connection with the record in the cause, fails to disclose grounds for removal, the docketing of the cause in the circuit court of the United States does not deprive the state court of jurisdiction, and the federal court has no power to grant leave to amend the petition by stating facts that show that the cause was in fact removable.

On Motion to Remand to State Court.

Zera Snow, for plaintiff.

W. A. Cleland, for defendant.

GILBERT, Circuit Judge. Motion is made to remand this cause to the circuit court of the state of Oregon for Malheur county, whence it was removed to this court. The plaintiff sued upon several causes of action, one of which arose in his own favor, and four of which were assigned to him by others. The amount involved in the first cause is not sufficient to confer jurisdiction, but the sum of all the demands exceeds \$2,000. The petition for removal alleged that the plaintiff was then, as well as at the commencement of the action, a citizen of the state of Oregon, and that the defendant was at said dates an alien corporation created under the laws of Great Britain and Ireland. The complaint had set forth the facts concerning the four assigned causes of action, and the names of the respective assignors, but neither in the complaint nor in the petition was there any averment concerning the citizenship of such assignors. After the motion to remand came on for hearing, an application was made on behalf of the defendant for leave to file in this court an amended petition showing that the citizenship of the assignors of the assigned claims was such that the case was one for removal. There can be no doubt that upon the record, together with the petition which was filed in the state court, no cause for removal was presented, and that the jurisdiction of the state court could not be thereby devested. It was necessary to show affirmatively that the citizenship of the assignors of the assigned claims was diverse from that of the defendant, or that they were not aliens. In *Parker v. Ormsby*, 141 U. S. 81, 85, 11 Sup. Ct. 913, 35 L. Ed. 656, the court said:

"The authorities we have cited are conclusive against the right of the plaintiff to maintain this suit in the court below, unless it appeared that the original

¹ For diverse citizenship as ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249, and, supplementary thereto, note to *Mason v. Dullagham*, 27 C. C. A. 298.

payee, Lamb, could have maintained a suit in that court upon the note and coupons. Consequently, it was necessary that the record should, as it does not, disclose his citizenship."

But it is contended that inasmuch as, in fact, the citizenship of the assignors was such that the case was properly removable, their citizenship can now be shown by an amended petition filed in this court. This contention leads to the inquiry, what is the power of this court to permit amendments to the petition for removal after the cause has been docketed herein? In *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144, the right of the circuit court to amend the petition was denied in a cause which had been removed on the ground of diverse citizenship, on a petition which alleged the citizenship of the parties at the time when it was filed, only, and not at the time of the commencement of the action. The court said:

"For the only mode provided in the act of congress by which the jurisdiction of the state court of a controversy between citizens of different states can be divested is by presenting a petition and bond in that court showing, in connection with the record, a case that is removable. The present motion, in effect, is that such amendment of the record may be made in the circuit court as will show that this case might have been removed from the state court,—not that, in law, it has ever been so removed."

In *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249, the court affirmed the rule of *Crehore v. Railway Co.*; and in *Graves v. Corbin*, 132 U. S. 572, 590, 10 Sup. Ct. 202, 33 L. Ed. 469, it referred to that case as one in which it had been held—

"That where a suit is entered upon the docket of a circuit court as removed on the ground of the diverse citizenship of the parties, and was never in law removed, no amendment of the record made in the circuit court can affect the jurisdiction of the state court, or put the case rightfully on the docket of the circuit court as of the date when it was so docketed."

In *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 691, 14 Sup. Ct. 540, 38 L. Ed. 318, the court defined the limit of the power of the circuit court to permit amendments to the petition, and said:

"Such amendments may be allowed when, and only when, the petition, as presented to the state court, shows upon its face sufficient ground for removal."

In *Powers v. Railway*, 169 U. S. 92, 101, 18 Sup. Ct. 267, 42 L. Ed. 676, may be found the latest expression of the views of the court upon that subject. The court there said:

"A petition for removal, when presented to the state court, becomes part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends, because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction; and, if it does, the circuit court of the United States cannot allow an amendment of the petition, but must remand the case."

The court then proceeded to say:

"But if, upon the face of the petition, and of the whole record of the state court, sufficient grounds for removal are shown, the petition may be amended in the circuit court of the United States, by leave of that court, by stating more fully and distinctly the facts which support those grounds."

The present case does not come within the rule so declared. It does not appear upon the face of the petition or of the record in

the state court that a ground for removal was shown. It was shown, it is true, that the cause was one between an alien and a citizen of a state, and that it involved an amount sufficient to confer jurisdiction, but those facts were not sufficient. The claims sued upon, as shown by the complaint, were assigned claims. The suit was one of which this court had no cognizance, unless it might have been prosecuted herein if no assignment had been made. Such being the nature of the cause of action, the citizenship of the assignors was just as essential to be averred as was the citizenship of the plaintiff or of the defendant. The record is wholly silent upon that subject. The case is not one of a defective averment which may be aided by amendment. It is a case of the entire omission of an essential allegation. Upon the authorities above cited, it is clear that this court is powerless to permit the proposed amendment. The motion to remand will be allowed.

UNG LUNG CHUNG et al. v. HOLMES.

(Circuit Court, D. Oregon. December 22, 1899.)

No. 2,556.

1. CONTRACT—CONSTRUCTION.

Plaintiffs leased certain hop yards from defendant, which they agreed to cultivate for a share of the crop. The contract provided that, if the market price should be 8 cents per pound or over, and not more than 14 cents, plaintiffs should receive three-fourths of the proceeds, and, if over 14 cents, they should receive two-thirds. At the same time a contract was made by which a certain quantity of the crop was sold to a third party for 10 cents per pound. *Held*, that such contract determined the proportion to be received by plaintiffs as to the quantity sold, regardless of the market price.

2. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—HOW DETERMINED.

The amount in controversy for jurisdictional purposes "is the sum claimed by plaintiff in his complaint in good faith, where he is entitled to recover such sum, provided the evidence sustains his allegations, and the court is not deprived of jurisdiction because his own evidence may not entitle him to recover the jurisdictional amount, where it is not of a character to impeach the good faith of his claim."¹

On Motion for New Trial.

Woodward & Palmer, for plaintiffs.

Richard Williams, for defendant.

GILBERT, Circuit Judge. This cause was tried before a jury, who found a verdict for \$1,549.96 for the plaintiffs, upon which judgment was rendered. The defendant now urges as grounds for a new trial that the court erred in construing the contract which was sued upon, and that the cause was one which did not involve a controversy concerning an amount sufficient to confer jurisdiction upon the court. The contract sued upon was one whereby the defendant leased to the

¹ Jurisdiction of circuit courts as determined by the amount in controversy, see note to *Auer v. Lombard*, 19 C. C. A. 75, and, supplementary thereto, note to *Shoe Co. v. Roper*, 36 C. C. A. 459.

plaintiffs certain hop yards, to be by them cultivated, for which they were to receive compensation out of the product which they raised. It was stipulated that the plaintiffs should receive all the hops in the event that the market price thereof was less than 6 cents per pound; if the market price was 6 cents or over and under 8 cents, they were to receive five-sixths of the hops; if 8 cents and over and under 14, they were to receive three-fourths of the hops; if 14 or over, they were to receive two-thirds of the proceeds of the hops. The contract contained a reference to another contract, which was entered into at the same time, between the plaintiffs and the defendant on the one part and Lilienthal Bros. upon the other, and declared that the said last-mentioned contract should be carried out according to its terms. That was a contract whereby Lilienthal Bros. agreed to purchase 37,500 pounds of the hops which the plaintiffs might raise on said leased premises, and pay for the same the sum of 10 cents per pound. It was proven on the trial that at the time when the plaintiffs had raised the hops, and had the same cured and ready for delivery under this contract, the market value was about 15 cents per pound. The question arose whether the plaintiffs were entitled to receive as their share three-fourths of the hops upon the basis of a market price of 10 cents per pound, or whether they were entitled to only two-thirds of the price which they were sold for, under the provision in the contract that, if the market price was 14 cents and over, that should be their proportion of the proceeds. The court ruled that, inasmuch as the contract with Lilienthal Bros. was entered into at the same time with the contract between the plaintiffs and the defendant, it became a part of the original agreement, and that thereby the price of 10 cents per pound for 37,500 pounds of the hops to be raised was fixed and made specific, and that that provision controlled the more general provisions of the agreement. No error is now perceived in that ruling. The principal question presented is that of the jurisdiction of the court. The amount sued for in the complaint was \$2,363.52. The plaintiffs alleged that they were entitled to \$2,812, which was three-fourths of the price obtained for the 37,500 pounds of hops; that of the remainder of the hops raised the defendant sold 18,791 pounds at 21 cents, realizing therefor \$3,946.11, two-thirds of which, amounting to \$2,630.74, belonged to the plaintiffs; and that the plaintiffs had been paid only the sum of \$3,079.72. The defendant, in his answer denied that the current price of the 18,791 pounds of hops was any greater sum than 15 cents. On the trial the defendant testified that he had sold the 18,791 pounds in England at a gross price of 19½ cents per pound, against which there were charges for freight, insurance, commission, etc., amounting to \$660.89. This testimony was elicited by the plaintiffs, and was all their evidence upon that point. It was not denied that the sale of the hops was conducted by the defendant, and that the return thereof was made to him, and that no return or any information whatever had been given to the plaintiffs of the price received. If there had been no countercharges to the gross sum for which the hops were sold in England, the plaintiffs would have been entitled to a judgment on the evidence for \$2,210.85. The defendant contends that the plaintiffs, upon their own evidence,

proved that the amount in controversy was less than \$2,000, that there was no conflicting evidence upon that subject, and that, therefore, under the authority of *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729, and *Wilson v. Daniel*, 3 Dall. 401, the court was without jurisdiction to further proceed with the hearing; that in an action *ex contractu* it is the plaintiff's legal cause of action as shown by the evidence that determines the question of the jurisdiction, or, in other words, that, if the evidence offered on the trial in such an action proves that the plaintiff is entitled to recover less than the jurisdictional amount, the court thereby becomes divested of its jurisdiction. The authorities do not sustain this contention. It is held that the true test is whether or not the plaintiff has in good faith stated a cause of action which is within the jurisdiction of the court. In *Black*, Dill. Rem. Causes, § 52, it is said:

"The amount in controversy is the sum thus claimed by the plaintiff in good faith, without regard to the fact that some of his counts or causes of action may prove to be invalid, or merely formal (provided they are not obviously fictitious or exaggerated), or that he may not be able, on the trial, to prove so much as he claims, or that the amount actually at issue cannot be ascertained until the evidence is in."

In the present case there is nothing to indicate the absence of good faith upon the part of the plaintiffs in claiming that the amount due them exceeded \$2,000. They had nothing to do with the sale of the hops in England. In drawing their complaint, they seem to have been guided by the market price of hops at the time when the sale was supposed to have been made. The defendant had afforded them no information of the sale. In his answer filed on June 12, 1899, he denied that he had made the sale. The evidence was that the hops had been sold on April 8, 1899, although there was no evidence that the defendant had received returns of the same until after the date when he made his answer. The plaintiffs could have known nothing of the charges for costs, insurance, and commissions which so largely reduced the net result. The defendant made no effort to show that the plaintiffs knew of these countercharges, and made no attempt to impugn the bona fides of the plaintiffs in laying their demand as stated in the complaint.

In *Schunk v. Moline Milburn & Stoddard Co.*, 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255, an action was brought in the circuit court on two notes amounting in the aggregate to over \$2,000, of which \$1,664.04 was not then due. The action was commenced by attachment, which the plaintiff contended was authorized by a local statute for a debt not yet due. The circuit court sustained the plaintiff's contention, and entertained jurisdiction of the cause. The supreme court affirmed the ruling of the circuit court, and in the course of the opinion used the following argument:

"Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by demurrer, would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense—and a good defense, too—would not affect the question as to what was the amount in dispute."

In *Shoe Co. v. Roper*, 94 Fed. 739, the circuit court of appeals for the Fifth circuit held that, where an action is based on several accounts, the amount of the accounts in the aggregate is the amount in dispute, and when it exceeds \$2,000 the court is not deprived of jurisdiction, if it is shown that one of the accounts in fact was never assigned to the plaintiff, thereby reducing the amount remaining below the jurisdictional limit. The court said:

"The fact that some defense may be made, or is, in fact, made, which will make the recovery fall below the jurisdictional amount, does not defeat the jurisdiction of the court."

In *Peeler's Adm'x v. Lathrop*, 1 C. C. A. 93, 48 Fed. 780, the same court said that "the matter in controversy, which determines the jurisdiction of the circuit court in suits for the recovery of money only, is the amount demanded by the plaintiff in good faith." This was said in a case in which the amount claimed by the complainant was \$4,900, but in which it had been shown "that the complainant had only been able to prove up about \$1,200."

In *Pickham v. Manufacturing Co.*, 23 C. C. A. 391, 77 Fed. 663, the court disposed of the objection to the jurisdiction in these words:

"It is a sufficient answer that the declaration alleged, and the accompanying statement of the account showed, a balance due of \$2,610, and that the recovery was for a less sum only by reason of the counterclaim set up for recoupment, of which, beyond the sum of \$400, it does not appear that the complainant had knowledge before bringing the action."

In *Riggs v. Clark*, 18 C. C. A. 242, 71 Fed. 560, the jurisdiction was challenged on the ground that by the stipulation of the parties made before the hearing, and for the purposes thereof, it appeared that less than \$2,000 was in controversy. The court said:

"Nor is the jurisdiction defeated upon its subsequently appearing upon the trial, or by the complainant's concession, that she was not entitled to so much as was claimed."

In *Jones v. Machine Co.*, 27 C. C. A. 133, 82 Fed. 295, the court said:

"Jurisdiction of the case was not lost by reason of the finding that the goods converted were worth less than the jurisdictional amount, since it does not appear, nor is there shown reason to believe, that the value was overstated in the declaration for the purpose of conferring jurisdiction."

The decisions above quoted are not in conflict with *Barry v. Edmunds* or *Wilson v. Daniel*. The language in the latter case that, "where the law gives no rule, the demand of the plaintiff must furnish one, but, where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded," was used in reference to the cause of action as made in the declaration, and not to that which was evidenced on the trial. The motion for a new trial will be denied.

PACIFIC LIVE-STOCK CO. v. HANLEY et al.

(Circuit Court, D. Oregon. December 22, 1899.)

No. 2,577.

1. EQUITY PLEADING—MULTIFARIOUSNESS.

A bill by which complainant asserts his right to the flow of the waters of a river to his lands, and seeks to restrain their diversion, is not multifarious because a number of persons are joined as defendants, and alleged to have separately diverted water from the river.

2. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.

In such a suit it need not appear, to give a federal court jurisdiction, that the amount involved as to each defendant exceeds the jurisdictional amount, the matter in controversy being the injury to complainant's property, to which, it is alleged, all of the defendants contribute, and for which they are chargeable jointly.¹

3. EQUITY PLEADING—GENERAL DEMURRER TO BILL.

A general demurrer to a bill for want of equity will not lie where the facts alleged are sufficient to show that complainant is entitled to relief; if the allegations are not sufficiently definite and certain, the objection should be taken by special demurrer.

On Demurrer to Bill.

L. B. Cox, for complainant.

Mitchell & Tanner, for defendants.

GILBERT, Circuit Judge. The complainant, a corporation of California, seeks by its bill to enjoin numerous defendants, citizens of Oregon, from diverting the waters of Silvies creek, in Harney county, in the state of Oregon. The bill alleges that the complainant is engaged in the business of buying, selling, and raising cattle, sheep, and horses; that it is the owner of large tracts of land in the county of Harney, in the state of Oregon, situated in and about the region lying between the forks of Silvies river and Malheur Lake, and adjacent to those forks, which lands are described as nearly level, sloping gently towards the south, watered by the Silvies river, a sluggish stream, with low banks, and, through numerous sloughs, minor channels, and swales, connected with the main channels of the river and its forks; that the waters of said river, when not obstructed or diverted, in their natural flow spread over and irrigate and sub-irrigate the complainant's lands, and produce thereon abundant and valuable crops of wild grass. The bill then sets forth the steps whereby the complainant obtained title to its lands at various dates, beginning with the year 1874, and avers that a portion thereof was acquired as desert lands, a portion as swamp and overflowed lands, a portion as university, agricultural, college, and indemnity school lands, and the remainder under the public land laws of the United States. The bill alleges that in 1874 one of the complainant's predecessors in interest entered into the possession of the lands which lie between the forks of Silvies river and Malheur Lake, together with

¹ For jurisdiction of federal courts, as determined by amount in controversy, see note to *Auer v. Lombard*, 19 C. C. A. 75, and, supplementary thereto, note to *Shoe Co. v. Roper*, 36 C. C. A. 459.

some adjacent lands, and placed thereon a large number of cattle, and that the business of stockraising was by him and by his successors in interest consecutively continued; that in 1885 its grantors built a dam in the main channel of the West Fork of Silvies river, and diverted a large part of the waters of the main channel into said branch, and built another dam lower in the said branch, thereby diverting into it all the water naturally flowing in said branch, and the water which had been diverted thereto by the first dam, and since said date the complainant and its grantors and predecessors have kept and maintained said dams, and thereby diverted large quantities of the water from Silvies river; that in the year 1885 other dams were built by the complainant's said predecessors in interest in the main channel of the West Fork of said river, causing thereby the waters of the channel to overflow its banks, and spread over the complainant's lands; that during all the time the complainant and his predecessors in interest have been in possession of said lands they have, during each year, mowed and cured a large part of the native wild grass growing on said lands, and used the remainder of said grass for pasture, and have enjoyed each year the flow of water in said Silvies river, its forks, branches, sub-channels, sloughs, and swales, and have distributed the water by means of said dams. The bill proceeds to allege that the value of said lands, with said water upon them, exceeds \$200,000, and the value of their natural use to the complainant is \$20,000 per annum, but that without the use of the water thereon the total value of the lands would be no greater than \$10,000, and that the complainant would be unable to continue its said business; that the complainant is entitled to have the waters of Silvies river flow down its main channel, and through the forks, branches, minor channels, sloughs, and swales, over and upon said lands, as the same have been wont to flow, and would now flow, if not obstructed or diverted, and that all the flow of the water of said river is necessary for such purposes, and that the complainant is entitled to have a thousand inches of the waters of said river flow through a certain ditch constructed by one Homer B. Mace, to whose rights the complainant succeeded. The bill then alleges that, notwithstanding the complainant's rights, the defendants have wrongfully entered upon the channels of said river above the lands of the complainant, and have wrongfully constructed, and are now wrongfully maintaining, dams in said channels and ditches leading therefrom, all of which dams and ditches are specifically described in the bill; that thereby the waters in the main channel and in the forks of said river have been impounded and diverted entirely from the channels, and have been wastefully distributed over a large area of country, whereby the water has become lost, and the complainant has been deprived of the use thereof. The prayer for relief is that the defendants be enjoined from diverting any of the waters of Silvies river, or of the East or West Forks thereof. The defendants demur to the bill upon the grounds—First, that it is multifarious; second, that it does not appear that the amount involved as to each defendant is sufficient to confer jurisdiction; and, third, that the bill is without equity.

The rule against multifariousness forbids the complainant to unite in one bill several distinct demands against several defendants who have no common point of interest with each other. But if the cause of suit is entire in itself, and the relief sought does not consist in separate unconnected things, all the defendants connected therewith, and to be affected thereby, may be brought into one suit, and it is not necessary that the interest of each defendant shall extend to the whole subject-matter of litigation. The cause of suit presented in the present bill is single, so far as it affects the complainant. The complainant sues to restrain the diversion of the water of a certain stream. It brings into the suit as defendants all those against whom it seeks relief. The point of common interest between the complainant and the defendants is the water of Silvies river. The right of the defendants to divert it is the question involved. The complainant asserts its right to the flow of the water as it was before the acts of the defendants had their inception. The question of the rights of the defendants, and each of them, as to the complainant, are proper subjects of adjudication in one suit. In no other way can the extent of their respective interests be satisfactorily determined. The quantity of water diverted by one defendant from the stream may not be sufficient to interfere with substantial rights of the complainant. By the action of all of them, according to the allegations of the bill, the injury which is sought to be remedied is accomplished. I think there can be no question that the relief which is sought against the various defendants may be afforded in one suit. *Mining Co. v. Dangberg* (C. C.) 81 Fed. 73; *Hillman v. Newington*, 57 Cal. 56; *Miller v. Ditch Co.*, 87 Cal. 430, 25 Pac. 550; *Blaisdell v. Stephens*, 14 Nev. 17; *Saint v. Guerrero*, 17 Colo. 448, 30 Pac. 335; *Henshaw v. Canal Co. (Ariz.)* 54 Pac. 577; *Larimer & Weld Reservoir Co. v. Water Supply & Storage Co. (Colo. App.)* 42 Pac. 1020.

It follows from the foregoing view of the relation of the various parties defendant to the causes of suit that the objection which is urged against the jurisdiction, on the ground that it is not shown that the amount involved as to each defendant exceeds \$2,000 exclusive of interest and costs, is not well taken. The liability of the defendants, upon the facts stated in the bill, is not the sum total of a number of individual items, each of which is definitely calculable. The injury is single, and the proportion which each defendant contributes to it is not in the nature of things ascertainable. It may not be demonstrated that any single defendant, because of his diversion of a certain or definite portion of the water, is responsible for that proportion of the damage which is complained of in the bill. The defendants cite and rely upon certain decisions of the supreme court in which it has been held that, in a suit to restrain various state officers from collecting taxes in different counties of the state, the amount in controversy as to each defendant must not be below the jurisdictional limit. Those decisions rest upon grounds which have no application to the present suit. There is no concerted action between state officers in collecting such taxes, and the fact that their rights are to be determined by the construc-

tion which may be given to a single law cannot serve to unify the various and distinct causes of suit that a single taxpayer may have against them. In the case at bar the matter in controversy is the injury to the complainant's property. The sum total of that injury is alleged to be \$190,000. The bill charges that all of the defendants contribute to it. If such is the case, all of the defendants are chargeable as joint trespassers in producing the result, and the amount in controversy is the whole amount involved.

It is contended that the bill is subject to a general demurrer for want of equity, for the reason that it fails to allege specifically and with certainty the dates when the defendants first diverted the waters of Silvies river and appropriated the same, and that it fails to state facts sufficient to show that the complainant's rights are anterior in point of time to such appropriation. On consideration of all the allegations of the bill, I think it sufficiently appears therefrom that the diversion of the water by the various defendants is averred to be subsequent in point of time to the appropriation thereof by some of the complainant's grantors, and the use thereof by the complainant and others of its grantors for the purposes alleged in its bill. Enough is alleged to show such use of the water from the year 1874, and that in 1885 and 1890 various dams and ditches were constructed for further appropriation thereof. The bill asserts the right of the complainant to have all the water flow as it was accustomed to flow before the diversion thereof by the defendants, and charges that, in violation of such right, the defendants have wrongfully entered upon the channels of said river's forks above the complainant's lands, and have wrongfully constructed, and are now wrongfully maintaining, divers dams in said channels, with ditches leading therefrom, whereby the water has been diverted from the channels of the river, and the complainant has been deprived of the use thereof. Enough is alleged to show that the complainant is entitled to relief, as against the acts of the defendants, and a general demurrer for want of equity cannot be sustained. If the allegations of the bill are not sufficiently definite and certain, the defendants' remedy was by a special demurrer. *Wescott v. Wicks*, 72 Ill. 524; *Pogue v. Clark*, 25 Ill. 308; *Chouteau v. Rice*, 1 Minn. 106 (Gil. 83); *Stewart v. Flint*, 57 Vt. 216; *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097; *Tallman v. Green*, 3 Sandf. 437. The demurrer will be overruled.

PABST BREWING CO. v. CITY OF TERRE HAUTE et al.

(Circuit Court, D. Indiana. December 20, 1899.)

No. 9,804.

1. INTERSTATE COMMERCE—STATE LAWS AFFECTING—LICENSE TAX IMPOSED BY CITY.

A city ordinance enacted pursuant to authority conferred by an act of the legislature imposing a license tax of \$1,000 per year on each brewery, depot, or agency of a brewery maintained within the city, no provision being made for the supervision, control, or regulation of such breweries, depots, or agencies, as applied to a depot maintained by a brewing associa-

tion of another state solely for the purpose of storing in the original packages beer shipped into the state until its distribution to customers in the same packages, is invalid, as a tax upon interstate commerce. Such ordinance is not an exercise of the police powers of the state, within the terms of the Wilson act (26 Stat. c. 728), which provides that liquors transported into a state upon their arrival therein shall be subject to the operation and effect of the laws of such state enacted in the exercise of its police powers, but is purely a revenue measure, enacted in the exercise of the power of taxation.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS—QUESTIONS ARISING UNDER FEDERAL CONSTITUTION.

The decision of a supreme court of a state upon the question whether a law imposing a license is enacted under the police power or taxing power of the state is not conclusive upon a federal court when the validity of such law is drawn in question on the ground that it is in conflict with the constitution, laws, or treaties of the United States.¹

In Equity.

S. R. Hamill and L. D. Swayne, for complainant.
Peter M. Foley, for defendants.

BAKER, District Judge. This is a suit by the complainant, on behalf of itself and certain other breweries named in the bill, for an injunction to restrain the enforcement of a certain ordinance of the city of Terre Haute. The city of Terre Haute is governed by, and possesses the powers conferred upon it by the provisions of, an act of the legislature of this state approved March 3, 1899 (Acts 1899, pp. 270-341, inclusive). Among other powers conferred upon it, are the following:

"The common council shall have power to enact ordinances for the following purposes: * * * Occupations. * * * To tax, license and regulate distilleries and breweries, and the depots or agencies established in said city of all breweries and distilleries, but such license shall not exceed the amount of one thousand dollars for each distillery, brewery, depot or agency established in said city. For the purposes of this section jurisdiction is given such city for four miles from the corporate limits."

Acting upon this authority, the common council of the city of Terre Haute adopted an ordinance providing, among other things, that:

"Every person or persons, firm, association, company, or corporation establishing, conducting, or maintaining in said city, or within four miles of the corporate limits of said city, a brewery or breweries, depot or depots, or agency or agencies of breweries, shall pay to said city the sum of one thousand dollars for each such brewery, depot, or agency so established, conducted, or maintained, which sum of one thousand dollars shall be the annual city license fee to be charged to such breweries, depots, or agencies."

The complainant alleges that it is a corporation organized and existing under the laws of the state of Wisconsin, and a citizen of that state, and that it is, and long has been, engaged in the extensive manufacture and sale of beer or malt liquors, and that its principal place of business is situated in the city of Milwaukee, in said state; that for the 10 years last past it has owned and man-

¹ For state laws as rules of decision in federal courts, see notes to Griffin v. Wheel Co., 9 C. C. A. 548, Wilson v. Perrin, 11 C. C. A. 71, and Hill v. Hite, 29 C. C. A. 553.

aged; and still owns and manages, in the city of Terre Haute, a depot or agency, in which, during all of said time, it has been continuously storing and depositing the product of its manufactory; that in the due and ordinary course of its business at frequent intervals it ships from its manufactory aforesaid to its depot in the city of Terre Haute malt liquors in barrels, kegs, and bottles, which are placed and kept in its said depot until the same are removed therefrom, and delivered to its customers in the states of Indiana and Illinois; that it has no brewery, or plant, or manufactory for the brewing or manufacturing of beer or other malt liquors in said city of Terre Haute; that its business, as conducted and maintained in said city of Terre Haute, consists solely in its maintaining a depot in which it stores the product of its brewery, and in the due course of its business it removes it from said depot, and delivers it in the original packages to its customers; that none of the product sold by it is manufactured or brewed in the state of Indiana, but that all of its product which is stored or handled in the city of Terre Haute is manufactured in Wisconsin, and is there put into barrels, kegs, and bottles, and, when thus put up, it is shipped to and stored in its depot in said city of Terre Haute as originally put up, and the same is thereafter removed therefrom, and delivered to its customers in the same original packages; that, in order for it to transport its product from the state of Wisconsin to the city of Terre Haute, and introduce the same therein, it is necessary to have in said city a depot or agency in which to store its product so shipped, so that it may be thereafter removed therefrom, and delivered to its customers; that its depot or agency is used as a place of storage, and for no other purpose whatever, and in transporting its product from the state of Wisconsin to the city of Terre Haute, and introducing the same therein, in order to preserve its said product fit and proper for consumption, it is necessary for it to have such depot or agency in which to keep such product; that it has for the past 10 years conducted its business as aforesaid, and it desires and intends to so conduct its business in the future. The complainant asks for an injunction restraining the defendants from enforcing said ordinance on the ground that the same is void for various reasons set out in the bill, the principal one being that it is in conflict with the commerce clause of the national constitution.

This state possesses plenary power to regulate and control the custody and sale of intoxicating liquors within its territorial limits, and the character and scope of such regulations depend solely upon the judgment of the lawmaking power of the state, provided they do not transcend the limits of state authority by invading rights secured by the national constitution, and provided, also, that such regulations do not operate as a discrimination against the rights of the residents or citizens of other states engaged in foreign or interstate commerce. The right to transport beer from one state and introduce it into another is interstate commerce, the regulation of which has been committed by the national constitution to the congress, and hence a state law denying such right, or substantially interfering with, or hampering the same, is in conflict with the con-

stitution of the United States. The right to ship beer or other intoxicating liquors from one state into another carries with it the incidental right in the consignee or receiver of such goods to sell the same in the original packages, without regard to state legislation. Such was the undoubted state of the law until after the enactment of the act of congress approved August 8, 1890 (26 Stat. 313, c. 728). This statute reads:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent, and in the same manner as though such liquid or liquor has been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The scope and effect of this enactment has been settled by the supreme court in the cases of *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, and *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. The constitutional power of congress to enact the statute in question was upheld, and it was declared to have been the purpose of congress to allow the laws of the state to operate on intoxicating liquors shipped from one state into another, so as to prevent their sale in the original packages in violation of any police law of the state. The police laws of the state, however, do not attach to such liquors while in transit, nor until their receipt and delivery to the consignee or receiver. From the moment of such receipt or delivery, such liquors fall within the police power of the state in the same manner and to the same extent as like liquors of domestic manufacture. The control, by appropriate police regulations, over their place of storage in the state from the time of their delivery belongs to the state, the same as though they were of domestic manufacture. The control and regulation of the depot or agency for the storage of such liquors in their original packages after their delivery at such depot or agency by appropriate police regulations constitute no substantial interference with or hampering of interstate commerce under the above enactment. Whether the depot or agency for the storage of beer, after its delivery at such depot or agency, is owned and controlled by the shipper or by a stranger, would seem to make no difference. The depot or agency for storage is established and maintained for purposes that directly relate to conditions arising after the shipment is completed by the delivery of the goods at such depot or agency. Therefore, when the beer in the original packages is delivered at and placed in the depot or agency, it becomes at once subject to the state police regulation and control, and the depot or agency where it is stored is subject to the regulation and control of the police laws of the state, the same as though such depot or agency were established and maintained for the storage of beer of domestic manufacture. There is no discrimination in the license charged upon a depot or agency for the storage of domestic beer and that for the product of breweries located in other states. Hence the ordinance cannot be adjudged invalid on the ground that it discriminates against the beer

manufactured in other states in favor of beer manufactured in this state.

The controlling question, then, is this: Is the law authorizing the city of Terre Haute by ordinance to impose a license of \$1,000 per annum upon a depot or agency for the storage of beer imported from another state while in original packages enacted as a police or a revenue regulation? The right of the shipper of beer to sell the same in the original packages "shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers." Was the statute of this state authorizing the imposition of the license upon depots or agencies for the storage of imported beers in original packages enacted in the exercise of its police power, or under its power of taxation? If under the power of taxation, it would be invalid as to citizens of other states, even though valid as to citizens of this state. In *Brennan v. City of Titusville*, 153 U. S. 289, 301, 14 Sup. Ct. 832, 38 L. Ed. 719, the supreme court say:

"Because a license may be required in the exercise of the police power it does not follow that every license rests for its validity upon such police power. A statute may legitimately make a license for the privilege of doing a business one means of taxation; and that such was the purpose of this ordinance is obvious, not merely from the fact that in the title it is declared to be for general revenue purposes, but also from the further fact, so far as we are informed by any quotations from or references to any part of the ordinance, there is no provision for any supervision, control, or regulation of any business for which, by the ordinance, a license is required. In other words, so far as this record discloses, this ordinance sought simply to make the various classes of business named therein pay a certain tax for the general revenue of the city."

The court held the ordinance void on the ground that it was enacted under the taxing, and not under the police, power of the state, affirming the doctrine of the case of *Ficklen v. District*, 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601:

"That no state can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on."

The supreme court of this state in *City of Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857, had under consideration an ordinance from which the ordinance now in question is apparently copied, and held that it was valid as an exercise of the police power of the state. The statute under which the ordinance of the city of Indianapolis was enacted is in the same language as that under which the city of Terre Haute enacted the ordinance now under consideration. But the opinion of neither the lawmaking nor the judicial department of the state is determinative of the question whether or not a license is enacted under the taxing or police power of the state. It is the duty of the national courts, whenever a law of the state or an ordinance of a city is drawn in question on the ground that it is in conflict with the constitution, laws, or treaties of the United States, to determine for itself whether such conflict exists, giving the decisions of the state tribunals such influence only as the persuasive force of their reasoning may entitle them to. The case of the City

of Indianapolis v. Bieler, *supra*, is not supported by such force of logical reasoning as to persuade me that it is a sound exposition of the law applicable to the subject. The power to tax is distinct from the police power. The purpose of the former is revenue, of the latter is regulation. Any statute or ordinance enacted under the police power of the state must have some relation to the peace, good order, health, morality, or security of the people. It must contain some provision having reference to the supervision, control, or regulation of some act or thing, which may in some way injuriously affect the peace, good order, health, morality, or safety of society. The ordinance in question contains no provision for any supervision, control, or regulation of the business of handling, storing, or selling beer, nor any provision for the supervision, control, or regulation of the depot or agency in which it is stored. Exacting a license from the owner of the depot or agency where beer is stored does not, so far as the court can see, have any necessary relation to the peace, good order, health, morality, or security of society, in the absence of any provision for the control, regulation, or supervision of such depot or agency. In other words, so far as this record discloses, this ordinance seeks simply to make the depot or agency where beer is stored pay a tax for the general revenue of the city, without any attempt to control, regulate, or supervise either the depot or agency, or the custody or sale of the beer. To say that the ordinance, if invalid as against importers of beer having a depot in this state for its storage in original packages on the ground that the license is a tax, operates as a discrimination against the domestic manufacturer of beer, against whom it may be valid, is no argument, because the state is not bound to tax the domestic manufacturer on his depot or agency; and if it does so while having no power to tax the importer on his depot or agency for the storage of beer in original packages, it acts of its own free will, and is itself the author of such discrimination. *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 32 L. Ed. 292. Let a temporary injunction issue pendente lite.

WESTERN UNION TEL. CO. v. MYATT, State Solicitor, et al.

(Circuit Court, D. Kansas, First Division. November 27, 1899.)

1. STATES—POWER TO REGULATE PUBLIC-SERVICE CORPORATIONS—CONSTITUTIONAL LIMITATIONS.

The power of a state to control public-service corporations and the use of property devoted to public service by provisions for the safety and convenience of the public, and also by restrictions against unreasonable or extortionate charges and unjust discriminations, is well settled; but such power is subject to the constitutional limitations designed to protect owners of property against oppressive action by the state amounting to a deprivation of such owners of their property without compensation, or without due process of law, or to a denial of the equal protection of the laws.

2. CONSTITUTIONAL LAW — DIVISION OF POWERS — LEGISLATIVE AND JUDICIAL FUNCTIONS.

The exercise by a state, either by the legislature directly or by a subordinate board or body to which it has been delegated, of the power to

regulate the conduct of a business affected by a public interest, and to fix for future observance the rates and charges for services rendered therein, is wholly a legislative or administrative function; but, after such action has been taken, the determination of the question whether it transcends the powers of the state, as limited by constitutional provisions, is beyond the province of legislative jurisdiction, and involves the exercise of judicial functions. The two functions are essentially and vitally different, and the legislature cannot place its own enactments beyond the constitutional jurisdiction of the courts; nor, on the other hand, can courts fix rates, or determine whether one rate is preferable to another, but their power is limited to a determination of whether a rate fixed is violative of constitutional provisions, and, if so, to enjoining its enforcement.

2. SAME—KANSAS COURT OF VISITATION.

The court of visitation of Kansas, created by act of January 3, 1899 (Sp. Sess. Laws 1898, c. 28), and given by that act and by chapter 38 of the Laws of the same session general power to regulate the business of railroad and telegraph lines within the state,—among others, the power to classify freight, require the construction and maintenance of depots, regulate crossings and intersections of railroads and the operation of trains, require the use of improved appliances, to prescribe schedules of rates, and to have the same jurisdiction and control over the management of telegraph lines,—is, in the exercise of such powers, a legislative and administrative body; nor is its character as such affected by the fact that it is denominated a court, and provided with the machinery of one, or that it is empowered to conduct an investigation, under the forms of legal procedure, before taking action in such matters.

4. SAME—POWER OF LEGISLATURE TO CREATE COURTS.

Const. Kan. art. 3, § 1, which authorizes the legislature to create courts inferior to the supreme court, and by implication to define their jurisdiction, does not confer power to create courts for the exercise of legislative or administrative functions; and tribunals created under such power are courts only in respect to matters of a judicial nature, and such as are properly incidental thereto.

5. SAME—UNITING LEGISLATIVE AND JUDICIAL POWERS IN SAME TRIBUNAL.

The provisions of the constitution of Kansas designating the separate departments in whom shall be vested, respectively, the executive, legislative, and judicial powers of the state, as construed by the supreme court of the state in harmony with the uniform construction given the similar provisions of the federal constitution, contemplate that each department shall be separate from and independent of the others, and forbid the uniting of such powers in the same officers or tribunal in respect of the same subject-matter; and, under such construction, the act creating the court of visitation, and attempting to vest it with power to make laws and regulations which clearly involve the exercise of legislative functions, and also to pass on the validity of such laws and regulations judicially, and to execute and enforce its own orders and judgments, cannot be sustained as constitutional.

6. SAME—DUE PROCESS OF LAW—PROCEEDING BEFORE ILLEGAL TRIBUNAL.

The act creating the court of visitation being invalid, at least in so far as it attempts to confer upon that body judicial powers in respect of the same matters of which it is given legislative and administrative jurisdiction, a proceeding before that court, in which it is sought to secure a judgment on the reasonableness of rates prescribed by it to be charged by a railroad or telegraph company, would not be due process of law within the meaning of the federal constitution.

7. FEDERAL COURTS—INJUNCTIONS TO STAY PROCEEDINGS IN STATE COURT.

Rev. St. § 720, prohibiting the granting of an injunction by a federal court to stay proceedings in any court of a state except in bankruptcy proceedings, does not apply where the proceedings sought to be stayed are before a body which is not legally a court, and the fact that it is denominated a court, and alleged to be one, does not preclude the federal

court from determining that question, where it has not been authoritatively determined by the courts of the state.¹

8. SAME—JURISDICTION—SUIT AGAINST STATE.

A suit in a federal court by a telegraph company against the members of the court of visitation of Kansas and the state solicitor to enjoin proceedings by defendants to enforce compliance with a schedule of rates established by the state, and alleged by complainant to be invalid because in violation of its rights under the constitution of the United States, is not a suit against the state, within the meaning of the eleventh amendment of the federal constitution, the defendants not being general officers of the state, but officers expressly charged with the duty of enforcing railroad and telegraph regulations and rates under powers specially conferred upon them for that purpose.

9. CONSTITUTIONAL LAW—STATUTE FIXING TELEGRAPH RATES—ENJOINING ENFORCEMENT.

The legislature of Kansas having, by a statute (Sp. Sess. Laws 1898, c. 38), fixed a maximum rate on telegraph messages between points in the state, and charged the court of visitation of the state with the duty of enforcing such rate unless it should judicially determine it to be unreasonable, and it having been adjudged that such court is without judicial power to determine the reasonableness of such rate, a telegraph company, upon a showing that the rate so fixed is below the actual cost of the service, is entitled to an injunction restraining the enforcement of such rate on the ground that its enforcement would operate to deprive it of its property without due process of law, and would be a denial of the equal protection of the laws.

On Application for Temporary Injunction.

The Western Union Telegraph Company is a corporation organized under the laws of the state of New York, and is a citizen of that state. The defendants are citizens and residents of the state of Kansas. Defendants W. A. Johnson, J. C. Postlethwaite, and L. C. Crum are the judges of the court of visitation, a tribunal organized pursuant to the provisions of chapter 28 of the Special Session Laws of 1898 of the state of Kansas, the same being an act entitled "An act creating a court of visitation, declaring its jurisdiction and powers, and providing for proceedings and procedure therein," approved January 3, 1899. A. J. Myatt is the state solicitor, whose office is created and whose duties are defined by the said act. The defendant J. G. Maxwell is the complaining witness in certain proceedings against the telegraph company pending in the court of visitation, and who, by such proceedings, is seeking to enforce the provisions of chapter 38 of said Special Session Laws, the same being an act entitled "An act concerning the transmission and delivery of telegraphic messages, regulating the charges therefor between points within this state, granting the court of visitation jurisdiction of certain matters mentioned herein and prescribing penalties for violations thereof," approved January 6, 1899. Said chapter 28, which creates the court of visitation, so far as it concerns this suit, is substantially as follows: Section 1 creates the court of visitation, denominates it a court of record, and prescribes the qualifications of the judges thereof. Section 2 provides for the election of the judges, and for their appointment pending such election. Section 5: The appointment and subsequent election of a state solicitor, and that "it shall be his duty to appear and represent the state in all actions and proceedings before the court of visitation to which the state is a party." Section 7: The court shall sit at its rooms in the state house, but for good cause may sit in any other place in the state, and shall be deemed in perpetual session. Section 8 defines the power and jurisdiction of the court throughout the state to try and determine all questions as to what are reasonable freight rates, switching and demurrage charges, and other charges connected with the transportation of property

¹ As to restraining proceedings in state courts, see note to *Garner v. Bank*, 16 C. C. A. 90, and, supplementary thereto, note to *Central Trust Co. v. Grantham*, 27 C. C. A. 575.

between points in the state; to apportion charges between connecting roads, determine all questions relating to charges for use of cars, etc.; to regulate charges for part car-load and mixed car-load lots of freight, etc.; to classify freight; to apportion transportation charges among connecting lines; to require the construction of depots, switches, etc., for public convenience; to compel reasonable and impartial train and car service; to regulate crossings and intersections of railroads and regulate the operation of trains over them; to prescribe rules concerning the movements of trains to secure safety to employees and the public; to require the use of improved appliances and methods to avoid accidents and injuries to persons; to restrict railroad corporations to operations within their charter powers, prevent the oppressive exercise thereof, and compel performance of all duties required of railroads by law; to summon juries, as a court of equity, in any case or matter before it, the qualifications of the jurors being prescribed; to exercise other and further powers as are given by the said act or as may be conferred by law. Section 9: The court shall possess full common-law and equity powers as to matters within its jurisdiction; may issue writs and process to compel attendance of parties and witnesses, the production of books, etc.; execute its decrees and orders, including writs of injunction and mandamus, and may appoint receivers to carry its judgments into effect; shall have the same power to punish for contempt as district courts. Section 13 provides that the pleadings shall be a complaint in the name of the state as plaintiff, to be styled an "information" and an "answer of defendant," and prescribes what may be set forth therein. Section 14 makes it the duty of the state solicitor to file information in the name of the state upon receiving sworn information of violation of law on the part of any railroad company. Section 16 provides that the court may appoint a special state solicitor if the regular officer neglects or delays the performance of his duties, and for a forfeiture of the latter's compensation. Section 17: After the return of the citation, no information can be dismissed without the permission of the court, and no compromise, agreement, or stipulation between the state solicitor and any defendant shall be binding upon the court without its approval after being fully advised of the facts. Section 20: The complainant may employ counsel to assist the state solicitor in proceedings on behalf of the state, which additional counsel are to be treated by the state solicitor and the court equally with the state solicitor. Section 21: Any person, corporation, county, etc., interested in any information or complaint shall be made a party to the proceeding. Section 22: Any aggrieved person, corporation, etc., though not a party to the suit, may enter appearance therein at any time on showing that the decree of the court is being violated, and secure enforcement thereof. Section 24 authorizes the court to order the information to be amended so as to bring the entire schedule of rates of the railroad company before it for consideration, if it deems it probably unjust to merely change the rate between the points mentioned in the information. Section 28 provides for such decree at the conclusion of every trial as the pleadings and proofs warrant. After the trial of any action involving the reasonableness of a general schedule of freight charges, the court shall specially find the facts it deems most material, the value of the road and all property used in connection therewith, the actual cost, the amount of capital stock, the bonded and other indebtedness, what part is fictitious or fraudulent, if any, the average yearly revenue, the sources from whence derived, whether they will probably increase or diminish, the average expenses of operation and maintenance, etc. The court shall thereupon enter decree in accordance with its findings and decision, adjudging and decreeing what are reasonable rates for each and every service at issue in the case, and perpetually enjoining the defendant from demanding or receiving any other or different rates. The decree shall embody a complete schedule of the charges adjudged to be reasonable, and the classification of freight necessary for the explanation thereof. Section 29: The court may, as a court of chancery, rehear any order or decree. Section 30: Copies of each order or decree determining what are reasonable charges shall be printed by each railroad company affected, and posted in a place convenient for public use. Section 31: In certain cases, companies owning connecting lines must be joined as defendants, and the hearing and decree shall include the joint rates and apportionment thereof. Section 32: If any company fails to comply with

any order or decree for 30 days after promulgation thereof, the court, upon proof of such failure, and after notice, may order sequestration of the whole or any part of the company's property, owned or leased, and appoint a receiver to take possession and charge of the property, and operate the same, and carry the order and decree into effect, or until the company shall furnish satisfactory security for compliance, in which latter case the accounts of the receiver shall be passed, and the net proceeds of operating the property shall be paid to the company, and the property returned to it. Section 34: Final decrees of the court shall be reviewable by the supreme court in like manner as judgments of district courts. The supreme court may, in its discretion, stay the issuing of any writ or process to carry the decree into effect pending the appeal, but such stay shall not affect the use, conclusiveness, or exclusiveness of any such decree as evidence in any case or proceeding. The time within which the appeal may be taken is prescribed. Section 36: No proceeding to review any decree of the court shall preclude the opening of the same during the pendency of the appeal, but the court of visitation may at any time reconsider the matter, and take into consideration other circumstances not before considered in connection with evidence on which the former decision was based, and enter a new order or decree. Section 37 relates to fees and costs, and provides that the court may employ experts and extra stenographers when deemed necessary, and tax a reasonable allowance for their services as costs. Section 40: Any officer, agent, or employé of a railroad company shall be deemed guilty of a misdemeanor, and punished by fine, of not more than \$1,000, or imprisonment in the county jail for not more than a year, if he shall knowingly demand, collect, or receive a greater compensation for the transportation of persons or property than that fixed by law or by the court, or who shall discriminate in the matter of rates and charges; and the railroad company itself is subject to a penalty of \$1,000, and each day that such violation continues constitutes a separate and additional offense. It is made the duty of the state solicitor to prosecute such offenses, or to recover the penalties by civil action. Section 41 authorizes the recovery of damages by parties injured by the disobedience of any railroad company of the provisions of the act, or of any law of the state, or of any lawful order or decree of the court, together with costs and reasonable attorney's fees; and, if the disobedience is willful, exemplary damages may be awarded, not exceeding treble the amount of the actual damage. Section 42: Whenever it is made to appear that there is a strike by the employés, or part of them, of a railroad company, and that commerce or traffic is being obstructed, or the public inconvenienced, etc., the court shall issue a citation to the corporation requiring it to appear and make answer under oath as to the cause of the strike, its extent, etc., and the precise matter of dispute between it and the striking employés. Upon default of the company the court may make final decree as upon hearing. If answer is made, the matter is tried summarily. If the corporation is found blameless, the court so finds, and the proceedings are dismissed, and thereafter it is unlawful for the strikers to interfere with the other employés of the corporation. But, if the court finds that the corporation is at fault, it shall so find, and enter a decree commanding it to forthwith perform its usual functions as before the strike occurred; and, if the decree is not instantly obeyed in full and in good faith, the court may take charge of the property of the corporation, and operate it through receivers, whom it shall appoint, until the court is satisfied that the corporation is prepared to fully resume its functions. But if, pending the proceeding in court, the corporation shall have come to an agreement with its striking employés, and the court is satisfied that the corporation will abide by the terms of the agreement, then, and only in such case, the hearing of the proceeding may be postponed a reasonable time, or from time to time, while the employés who return remain at work, etc. Chapter 38, pertaining to telegraph companies, is, so far as concerns this suit, substantially as follows: Section 1: The court of visitation shall have the same power, jurisdiction, and control over all questions concerning the regulation of the telegraph service in this state, the reasonableness of charges herein fixed, or to be fixed by any order of said court, and in all matters concerning the regulation, management, or control of telegraph companies, as is conferred upon said court in reference to railroads or railroad corporations in this state; and the same duties are im-

posed with reference thereto upon the state solicitor. Section 2 prescribes a schedule of maximum rates; must not be in excess of 15 cents for the first 10 words (exclusive of address and one signature), and 1 cent for each additional word for transmitting any message between points in the state. Other limitations are made with reference to special reports for newspapers. Section 7 provides for the recovery of \$100 and attorney's fees for each refusal to transmit or deliver any message after the tender of the rate fixed, in addition to actual damages sustained. Section 8 denominates a violation of any of the provisions of this act as a misdemeanor, and imposes a penalty of a fine of not less than \$50 nor more than \$500, and imprisonment in the county jail for not less than 30 days nor more than a year. It is unnecessary to set out the other sections of the act, as the above show the scope of the legislation in question.

The complainant alleges that for a long time it has been the owner and engaged in the operation of many miles of telegraph lines in the states and territories of the United States, and, in connection therewith, many miles of such lines in the state of Kansas; that it has established and maintains about 844 offices within this state for the transaction of its business; that the maximum telegraphic rates prescribed by said chapter 38 are materially less than the actual cost of the performance of the service; that 600 or more suits have been instituted against the complainant in the state courts for its refusal to transmit messages at the legislative rates; that defendant Maxwell tendered to complainant certain messages, and demanded the transmission thereof at said rates, and, upon refusal of the complainant to perform the service at such rates, Maxwell filed a complaint with A. J. Myatt, the state solicitor, and the latter filed an information thereon against the complainant in the court of visitation, caused citation to be issued and served upon it, and is proceeding to enforce the performance of the telegraphic service at the maximum rates prescribed. The complainant attacks the validity of said enactments of the legislature, and claims that the enforcement thereof would operate to deprive it of its property without due process of law, and as a denial of the equal protection of the laws; and this suit is brought to enjoin further proceedings for the enforcement of the maximum rates complained of, and to have the same adjudged unreasonable and void, etc. The cause now arises on an application of complainant for a temporary injunction. The proofs on such application clearly show that the rates prescribed by the law are not only not compensatory, but are materially less than the actual cost of the service. It is not denied by defendants that sufficient proof has been made by complainant in this respect.

George H. Fearons, Rossington, Smith & Histed, L. C. Krauthoff, and Frank Hagerman, for complainant.

A. J. Myatt, State Sol., and A. A. Godard, Atty. Gen., for defendants.

HOOK, District Judge (after stating the facts). The act of the legislature creating the court of visitation and defining its jurisdiction and powers, and the act fixing the maximum rates for telegraphic service, and conferring jurisdiction respecting telegraph companies upon the court of visitation, are parts of the same general body of legislation affecting public-service corporations that was enacted at the special session of the Kansas legislature of 1898. They are, therefore, to be construed together; and, even were this not the case, the latter enactment is, by its terms, dependent upon the act creating the court of visitation. There are certain principles involved in the consideration of the questions arising in this case which have been so clearly and definitely settled that it is unnecessary to review the various decisions of the courts supporting them. They relate to the nature and extent of public control over property affected with a pub-

lic interest, and the character and limitations of the functions employed in and about the exercise of such control. Whenever special privileges, not generally possessed by private persons, are conferred by law upon corporations to enable them to carry out the objects of their organization, and their business and source of profit consists wholly or partly in the service and patronage of the public, their property dedicated to such employment becomes clothed with a public interest, and to the extent of such interest it is subject to public control. The doctrine of governmental control of property and employments devoted to public use is particularly applicable to what are commonly termed "public-service corporations,"—such as railway and telegraph companies,—although it is also applied, though probably in a much more modified degree, to the property of private persons, which, by reason of its use, has ceased to be *juris privati*. So long as property is so employed, the power of control by the public through their proper representatives exists; and such control may embrace not only provisions for the safety, security, and convenience of the public, but also restrictions against unreasonable or extortionate charges and unjust discriminations. This power of control, however, is not absolute, but is subject to certain constitutional limitations, designed for the protection of the owner against oppressive action on the part of the state amounting to a deprivation of his property without compensation, or without due process of law, or amounting to a denial of the equal protection of the laws.

The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered, is wholly a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations, and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by

itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction. As applied to this case, the power of the state to fix or limit the charges of telegraph companies for the transmission and delivery of telegraphic messages is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law and a denial of the equal protection of the laws, and therefore violative of the first section of the fourteenth amendment to the constitution, is a question for the courts. Whatever deprives an owner of the beneficial use of property lawfully acquired and held, or denies him a reasonable compensation for such use, in effect deprives him of the property itself, for, generally speaking, the chief value of property lies in the use and employment thereof; and to require of an owner or class of owners the use of their property for public benefit without reasonable compensation, while others are not subjected to such restriction, is a denial of that equal protection of the laws which is one of the safeguards of the constitution. Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing or prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our jurisprudence. *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or quasi public service, because that is a legislative prerogative, and that the legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different.

In *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970, the legislative act authorized a railroad and warehouse commission to compel common carriers to adopt such rates and charges as the commission "shall declare to be equal and reasonable." The supreme court of the state held that the finding of the commission was final and conclusive, and that the law neither contemplated nor allowed an issue to be made, nor an inquiry to be had, as to their equality and reasonableness in fact. The supreme court of the United States held that, if this were the correct interpretation, and the decision of the state court was conclusive upon that point, the law conflicted with the constitution of the United States,

because it "deprived the company of its right to a judicial investigation under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substituted therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, could not be regarded as clothed with judicial functions, or possessing the machinery of a court of justice." This decision illustrates to some extent the limit of the power of the legislature in respect of such matters. It cannot place its own enactments beyond the constitutional jurisdiction of the courts. On the other hand, as to the province of the courts, it was said in *Reagan v. Trust Co.*, 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054, 38 L. Ed. 1014, 1023:

"The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

In *Railway Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, it was also said that "it is not the province of courts to enter upon the merely administrative duty of framing a tariff of rates for carriage."

In referring to the question whether rates established by the legislature prevent a fair and reasonable return for the employment of capital in a legitimate enterprise, it was said by Foster, J., in *Cotting v. Stock-Yards Co.* (C. C.) 82 Fed. 845:

"It should not be assumed that courts, in deciding this constitutional question, can undertake to fix rates, but merely to decide whether the rates prescribed by the law are in violation of the complainants' constitutional rights."

Judge Thayer, in the same case, said that "the judiciary have no power to prescribe a schedule of maximum rates." (C. C.) 82 Fed. 856.

In the *Express Cases*, 117 U. S. 1, 29, 6 Sup. Ct. 628, 29 L. Ed. 791, 803, the court, in speaking of the action of the trial court in fixing and regulating the terms upon which the railroad company and the express company should do business, said:

"In this way, as it seems to us, the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves. * * * The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."

In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 682, 4 Sup. Ct. 192, 28 L. Ed. 297, the court said:

"A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

In *Railway Co. v. Wellman*, 143 U. S. 339, 344, 12 Sup. Ct. 400, 402, 36 L. Ed. 176, 179, the court said that "the legislature has power to

fix rates, and the extent of judicial interference is protection against unreasonable rates."

In *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 499, 17 Sup. Ct. 900, 42 L. Ed. 243, Mr. Justice Brewer, in delivering the opinion of the court, said:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable,—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future,—that is a legislative act."

The foregoing will serve to illustrate sufficiently the line of demarkation between legislative and judicial functions as respects the subject-matter under consideration. The power to regulate and to limit the charges of those engaged in occupations clothed with a public interest belongs to the state, and is exercised through the legislature, either directly or mediately; but that power is not a power to destroy. Its authority stops at injustice, and under the right to prescribe rates of service it cannot require a corporation or individual engaged in a legitimate enterprise to yield to the alternative of abandoning the occupation, and the lawful employment of property therein, or continuing the same without reasonable and just compensation; and, where this is threatened, the jurisdiction of the courts may be invoked.

What, then, is the nature of the powers conferred upon the court of visitation? It is apparent from even a cursory examination of those parts of the act of the legislature which define the primary powers and jurisdiction of that body that they are largely of a legislative or administrative character, and such as do not pertain to the functions of a court. It is difficult to define the precise difference between those that are legislative and those that are administrative. It is unnecessary, however, to do so in this case, for it is immaterial whether the powers of that court, so called, aside from those that are judicial, are of the one character or of the other, or are a blending of both. A court does not (to use the language of the act) "classify freight," nor "require the construction and maintenance of depots, switches, side tracks, stock yards, cars, and other facilities for the public convenience," nor "regulate crossings and intersections of railroads," nor "regulate the operation of trains" over such crossings and intersections, nor "prescribe rules concerning the movements of trains to secure the safety of employes and the public," nor "require the use of improved appliances and methods to avoid accidents and injuries to persons," nor "apportion transportation charges among connecting carriers," nor "regulate charges for part car-load and mixed car-load lots of freight, including live stock," nor prescribe what rates of transportation of freight and passengers shall be charged. The regulation of such matters is legislative in its character, not judicial. *The Express Cases*, *supra*. Of course, courts of chancery, in the exercise of their equity jurisdiction, may, and frequently do, through the medium of receivers, appointed by them, exercise some of such powers in the administration of property which is the subject-matter of litigation in such courts, and especially where, in order to preserve the value of such property while it is in the possession of the court, it

is necessary to continue the operation thereof, and maintain it as a going concern. But it is not in such sense that these powers were conferred upon the court of visitation. Courts also have the undoubted power to determine some of these matters, if they properly lie in the road to the ultimate adjudication of other existing controversies concerning which the jurisdiction of the court has been invoked; as, by way of illustration, where, in litigation over the destruction of life or property in a railroad accident, it becomes material to ascertain whether the company used proper appliances and methods to avoid such an occurrence. Nor is it to this end that the powers mentioned were conferred upon the court of visitation. The exercise of the powers granted contemplates the prescribing of rules and regulations for future guidance, and the possession of such powers by the court of visitation makes it one of the potential agencies of the legislative department of the state. To use the expression of a learned justice of the supreme court, the court of visitation, in respect of such functions, is "an active, seeking, supervising body; the eye and the activity of the state." As to such powers and duties the court of visitation is not, and cannot be, a court. Practically all of the powers then possessed by the board of railroad commissioners of Kansas, which was purely an administrative body, were conferred upon the court of visitation, and as an evidence of the legislative purpose and intent the then existing laws relating to the appointment, powers, and duties of the board of railroad commissioners were, by act of the legislature, repealed a few days after the passage of the act creating the court of visitation. Both acts were passed at the same legislative session; the latter, by its terms, taking effect March 15, 1899, and the repealing act, by its terms, taking effect the first Monday of April of the same year.

It was argued at the bar on behalf of the defendants that the powers conferred upon the court of visitation are judicial in their character, for the reason that the law contemplates an investigation and consideration on the part of the court before final action is had; and it is particularly recalled that such contention was made with reference to paragraphs 8 and 9 of section 8 of the act, which authorize the court of visitation to "prescribe rules concerning the movements of trains to secure the safety of employes and the public, and to require the use of improved appliances and methods to avoid accidents and injuries to persons." Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice. It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and opinions of men having special knowledge of matters to be affected by proposed legislation constitute in any sense the exercise of judicial functions, or that such committees are judicial tribunals. Nor does it follow that, because the exercise of the powers conferred upon the court of visitation requires the use of judgment and discretion, such powers are judicial in their nature, as that would make every executive act and legislative act requiring judgment and discretion a judicial act. To

use the language of the supreme court of Kansas in *The Auditor v. Railroad Co.*, 6 Kan. 509:

"It certainly could not be so in the sense in which our constitution uses the term, or it would, of necessity, obliterate the lines by which the framers of that instrument sought to keep separate and distinct the three branches of our government."

As was said in *Re Huron*, 58 Kan. 156, 48 Pac. 576, 36 L. R. A. 824:

"Not every one who hears testimony and exercises discretion and judgment in a matter submitted to him is necessarily a judicial officer."

Counsel say:

"The decision of a question which may arise between different railroad companies as to how much of a certain charge each shall have is as much a judicial function as to decide how much of an estate each of the heirs shall receive."

That may be true where there is such a controversy pending in a court between the railroad companies themselves, but that is not the sense in which the power is conferred upon the court of visitation. The intent of the act of the legislature was, not to authorize the adjudication of distinct controversies of that character between contending railroad companies, but, instead thereof, the laying down of a rule in behalf of the state and the public, and the securing of the future obedience thereto by the imposition of fine and imprisonment. Is not that process legislation, and is not the result a regulation or a law?

The fact that the legislature denominated the tribunal a court is not conclusive as to its true character, nor as to the nature of the jurisdiction and powers conferred upon it. That question is not determined by the terminology employed in the act, although the legislative purpose and intent may be evidenced thereby, but it is determined rather by the ascertainment of the essential nature of the jurisdiction and powers themselves. The constitution of the state of Kansas authorizes the creation of courts inferior to the supreme court by act of the legislature, and, by necessary implication, the defining of the jurisdiction of the courts so created. Article 3, § 1. Nevertheless such jurisdiction must, in all essential particulars, be judicial in its character, and the constitutional authority for other courts than those specifically named in the constitution must be so construed and limited. Under the constitution, the legislature may not create a court for the exercise of its own legislative functions, or for the performance of purely administrative or executive duties; and though a tribunal, as constituted by legislative act, may be denominated a court, may possess a seal, and be clothed with the usual and customary vesture of a judicial tribunal, yet its real character is determined by its jurisdiction and the functions it is empowered to exercise. The legislature may create a court of visitation, but it can only be a court in respect of matters of a judicial nature, and such as are properly incidental thereto. It is clear, however, that it was the intention of the legislature in the enactment of the law to confer certain judicial powers upon the court of visitation in respect of the same matters over which that court was authorized to exercise legislative and administrative functions. It was clearly the legislative

intent to confer upon the court of visitation not only the power to prescribe rules and regulations for the government of railroad and telegraph companies in their relations to the public and to each other, but also the power to pass judicially upon the validity of such rules and regulations, to render judgment accordingly, and full power to execute their orders and judgments. By the language of the act under consideration, the court of visitation can prescribe a tariff of rates and charges, judicially determine the reasonableness thereof, and then enforce their judicial determinations in as radical and complete a method as could be devised. Concisely stated, the court of visitation may make laws, sit judicially upon their own acts, and then enforce their enactments which have received their judicial sanction. Can this be done? Can there be vested in one body such a union of powers of the different departments or branches of government, to be exercised respecting the same subject-matter and in the same proceeding? Counsel for defendants contend that in cases where "the duties of the departments are so intermingled and interwoven that it is difficult to determine to which department they belong, and it is absolutely necessary for the administration of justice that the duties of one be performed by the officers of the other, * * * it is within the power of the legislature—and its duty—to provide that the officers of one department shall perform the duties of another; and where this is done, and there is no express prohibition in the constitution against it, it is certainly valid."

Counsel also contend that there is no provision of the constitution of the state of Kansas inhibiting the commingling of legislative, judicial, and executive powers, and the conferring by the legislature of the functions of one department upon the other. If this were in fact the case, the language of Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 136, 3 L. Ed. 162, would be significant. He said:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection. It is the peculiar province of the legislature to prescribe general rules for the government of society. The application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated."

But there is no such omission in the constitution of Kansas. It provides as follows:

Article 1, § 1: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general and superintendent of public instruction," etc. Article 2, § 1: "The legislative power of this state shall be vested in a house of representatives and senate." Article 3, § 1: "The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law," etc.

That, in a broad sense, the powers of one of these departments shall not be conferred upon either of the others, is not only within the

true spirit of these provisions, but also substantially within the letter thereof; and the addition thereto of an express prohibitory declaration, such as is contained in the constitutions of some of the states, that the powers of one department shall not be exercised by another, would add very little to their effect, so far as concerns the question under consideration. The universal doctrine of American liberty under written constitutions requires the distribution of all the powers of government among three departments,—legislative, judicial, and executive,—and that each, within its appropriate sphere, be supreme, co-ordinate with, and independent of, both the others. This doctrine was adopted into the constitution of one state with the declaration that it was “to the end it may be a government of laws, and not of men.” The attendant danger of the encroachment by one department upon the constitutional province of the other is fully as apparent at the present time as when Mr. Madison wrote the forty-sixth and forty-seventh numbers of the *Federalist*. Justice Miller said, in *Kilbourn v. Thompson*, 103 U. S. 191, 26 L. Ed. 387:

“It may be said that these are truisms that need no repetition here to give them force. But, while the experience of almost a century has shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and, it is believed, not always without success. The increase in the number of states, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the federal government, presents powerful and growing temptations to those to whom that exercise is intrusted to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them.”

There is a full accord among elementary writers and publicists who treat of the growth and development of the principles of an enlightened government and the relations between the state and the individual. Dr. Paley says:

“The first maxim of a free state is that the laws be made by one set of men and administered by another; in other words, that the legislative and judicial characters be kept separate.” *Moral Philosophy*, bk. 6, c. 8.

Blackstone says:

“In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative.” 1 Bl. Comm. 269.

Baron Montesquieu writes:

“When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty of the judiciary power if it be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and

oppression. There would be an end of everything were the same man, or the same body, whether of nobles or of the people, to exercise these three powers, —that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." Spirit of Laws, bk. 11, c. 6.

It is true that this is ancient doctrine, but it serves no ill purpose to renew familiarity therewith, especially in times when it is claimed that the complexity of commercial affairs affords sufficient cause to either undermine or openly destroy those safeguards that are deemed so essential to the permanency of a free government.

In the distribution of the powers of government between the three departments the federal constitution is as general in its provisions as that of the state of Kansas. There is the same absence of any positive and specific prohibition against the conferring of the powers of the one upon the other. In *Kilbourn v. Thompson*, supra, it was said:

"It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the exercise of the powers appropriated to its own department, and no other. * * * In the main, however, that instrument, the model on which are constructed the fundamental laws of the states, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of government. It also remains true, as a general rule, that the powers confided by the constitution to one of these departments cannot be exercised by another. * * * The constitution declares that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the congress, or either branch of it, save in the cases specifically enumerated to which we have referred."

In *Dash v. Van Kleeck*, 7 Johns. 477, one of the questions involved was whether a legislative act could be retrospective in its operation, and amount to a legislative interpretation of a pre-existing law, thus in effect combining the exercise of legislative and judicial functions in the passing of the act. Kent, C. J., said:

"It is equally inadmissible to consider the act as declaring how the former statutes were to be construed as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect as any other newly-created statute. But, if it be considered as an exposition of the former acts for the information and government of the courts in the decision of causes before them, it would then be taking cognizance of a judicial question. This could not possibly have been the meaning of the act, for the power that makes is not the power to construe a law. It is a well-settled axiom that the union of these two powers is tyranny. Theorists and practical statesmen concur in this opinion. * * * And, if it be not found in our own constitution in terms, it exists there, in substance, in the organization and distribution of the powers of the departments, and in the declaration that the 'supreme legislative power' shall be vested in the senate and assembly. No maxim has been more universally

received and cherished as a vital principle of freedom. And without having recourse to the authority of elementary writers, or to the popular conventions of Europe, we have a most commanding authority in the sense of the American people that the right to interpret law does and ought to belong exclusively to the courts of justice."

The decisions of the supreme court of Kansas upon the interpretation of the fundamental law of the state in regard to this question and the application thereof to legislative enactments are to the same effect, and in such matters they are binding upon this court.

In *re Huron*, 58 Kan. 152, 48 Pac. 574, 36 L. R. A. 822. This case involved the constitutionality of an act of the legislature conferring upon notaries public the power to commit witnesses for contempt. It was held that, although the taking of testimony is incidental to a judicial proceeding, that duty, as well as the other ordinary duties of such officer, were not judicial in their character, and that the legislature could not lawfully confer upon him the judicial power to attach and punish as for a contempt. The court said that:

"Up to the time of the refusal of the witness, at least, the notary is only an executive officer, and is exercising executive power. There is no such thing as a punishable contempt of executive authority. While an executive officer might be constituted a court, judicial power cannot be conferred on him as merely ancillary to the exercise of purely executive power."

In *re Sims*, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110. There is a decided analogy between this case and the case at bar. The legislature of the state of Kansas enacted a law in aid of the enforcement of the prohibitory liquor law, making it the duty of the county attorney, when informed of any violation of the prohibitory law, to subpoena witnesses to appear before him, to swear such witnesses, examine them, and reduce their testimony to writing; and authorizing him to punish any witness for contempt in disobeying his process or in refusing to answer questions. If the examination disclosed that an offense had been committed, the county attorney was required to proceed with the prosecution of the offender. The law was attacked as being unconstitutional in that it was an attempt to confer judicial power upon an executive officer in respect of matters pertaining to his executive functions. The opinion of the court was delivered by Justice Allen. Separate concurring opinions were delivered by the other justices. In the opinion of the court it is said:

"The single question presented for our consideration is whether that portion of the statute which authorizes the county attorney to punish as for contempt is in violation of the constitution of this state. Nothing is more firmly fixed in the governmental systems of all English-speaking countries than the division of powers between the three great departments of government, the executive, legislative, and judicial. The question before us is whether the legislature has power to confer on an executive officer charged with the duty of searching out violations of the law, inquiring into facts, instituting and carrying on prosecutions for violations of the criminal laws of the state, the power, at the same time, and as ancillary to the performance of his duties as a prosecuting officer, to commit persons to jail as for a contempt of his authority. * * * It is sought to distinguish the case before us from those cited because of provisions in the constitutions of Wisconsin and Indiana with reference to the separation of executive and judicial powers. We think, however, that in our constitution these powers are as clearly separated as though the framers of the constitution had said so in terms. It needs but a suggestion to show that the combination of executive and judicial powers may become tyranny at once.

The advancement in the science of government made in modern times is due to the separation of the three great co-ordinate departments. If the legislature may confer on the county attorney one of the highest and most distinctive attributes of judicial power—that of punishing for contempt—to aid him in ascertaining from witnesses the facts with reference to violations of law, might the legislature not also confer on any attorney the power to examine witnesses in civil cases in the same manner, and to commit them for contempt if they refuse to answer his questions? Might it not also give to any executive officer from the governor down the power to subpoena witnesses to inform his judgment, and to aid him in any executive decision or determination? And, if the rule is established, can it be doubted that the division between executive and judicial offices will be completely broken down, and all constitutional barriers removed from those forms of oppression which have always attended this combination? * * * This is a commingling and confusing of executive and judicial functions in a manner incompatible with the constitution, obnoxious to its whole spirit and to the spirit of free institutions, and the act to that extent is void.”

Johnson, J., after referring to the extent to which there may be an admixture of the functions of the three great governmental departments, says:

“No case has been sustained, however, where the new duties conferred upon an officer were incompatible with those already imposed by such office. * * * It is not within the power of the legislature to make a judge an arbiter in his own cause; and to give an attorney for one of two adverse parties the power to determine the controversy is wholly inconsistent with our system of jurisprudence.”

The Auditor v. Railroad Co., 6 Kan. 500. In this case the act of the legislature under consideration provided that the county clerks of the various counties in which any railroad company had its tracks should constitute a board of assessors for the purpose of assessing the property of the company for purposes of taxation. It also provided for an appeal to the supreme court of the state from the assessment returned to the state auditor. It was contended by the railroad company that the raising of money for the support of the government, and, to that end, taxation, including the preliminary assessment, was purely a legislative power, and that the provision authorizing the appeal was an attempt to confer legislative functions upon a judicial tribunal. The supreme court of Kansas so held, and used the following language with reference to the legislative and judicial departments of the government:

“The two are separate and distinct departments of government, each having its appropriate sphere of action, and each clothed with powers to execute the duties pertaining to its own functions; and when each confines itself within the sphere of its constitutional power there is less danger of that peril pointed out by an eminent jurist when he says, in reference to this matter: ‘There is an inherent and eternal difficulty in confining power of any kind within its proper limits. This general rule holds eminently true in regard to legislative and judicial bodies.’”

In some cases the courts have declined to exercise functions not judicial in their character, which were imposed upon them by legislative act. The judges of the circuit court of the United States for the district of Pennsylvania held they could not constitutionally perform duties imposed by an act of congress passed February 28, 1793, regulating, among other things, claims to invalid pensions, for the reason that the decisions of the courts under the act were subjected to con-

sideration and suspension by the secretary of war, and then to the revision of the legislature. The judges of the circuit court for the district of New York, while holding that the power of the secretary of war and of the legislative department over the decision of the court showed that their action under the law was not of a judicial character, nevertheless proceeded to act as commissioners, and not as a court. The judges of the circuit court for the district of North Carolina held that they could not act judicially under the law, but reserved their decision as to whether they could act as commissioners. The supreme court afterwards held that the judges could not act as commissioners. *U. S. v. Ferreira*, 13 How. 40, 14 L. Ed. 42, and note thereto. In other cases, imposed duties, not judicial in their nature, have been performed with a declaration on the part of the judges as to their true character. Thus, by a recent act of the legislature of the state of Kansas relating to the compilation of the General Statutes of 1897, it was provided that the work of the compiler should be examined by the justices of the supreme court, who should ascertain whether it contained all laws of a general nature then in force, etc., and, if so found, should certify such fact to the secretary of state. The learned justices made the certificate, but stated therein that they deemed it a task which the legislature could not lawfully impose on them. 1 Gen. St. Kan. p. 7. It is true that there are instances where judicial powers are exercised by executive officers and by legislative bodies, and also where courts perform functions that are not judicial in their character, but are of an administrative nature; but this admixture of different powers and duties, where it has been upheld, is, in most cases, no more than is necessary to preserve the relation of the departments to each other, and no more than was contemplated by the constitution of New Hampshire, adopted in 1784, which declares that the three essential powers of government "ought to be kept as separate from and independent of each other as the nature of a free government will admit, or as is consistent with the chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." A division of powers in a general view is what is meant, as is pointed out by Mr. Justice Story. The departments are politically connected, and to some extent they are interdependent, but their functions, being essentially different, are not blended, nor do they occupy a common ground, or exercise concurrent jurisdiction over the same subject-matter.

The legislature cannot enact what the decision shall be in any controversy whereof the jurisdiction of a court has been invoked, nor give validity to a void judgment, nor grant a new trial of an action before a court, nor authorize an appeal by special provision. Its acts, generally speaking, are prospective in their operation, while the jurisdiction of courts is exercised upon past or existing conditions. It is not a proper judicial function to engage in the determination of the validity of contemplated legislative action, or in advance of a controversy arising thereunder, nor to undertake a collaboration with legislative or administrative bodies in the formulation of a schedule of reasonable rates to be charged by public service corporations. Excepting in three or four of the states, the constitutions of which spe-

cifically so provide, courts do not venture an opinion upon legislative enactments until they have come complete from the hands of the legislature, and the application or interpretation thereof properly arises in pending controversies; and in the states where the exception obtains the courts act only upon express invitation, and on most solemn occasions. The act of the legislature creating the court of visitation and defining the powers and duties thereof seems to me to be well within the decisions of the supreme court of Kansas which hold as unconstitutional the conferring of distinct legislative or executive powers and judicial powers upon the same officer, board, or body, especially where the exercise of one of such powers is not merely incidental to the other, but where each is substantial in its character, and relates to the same general subject-matter, and is, therefore, inconsistent with the other. Following the decisions of the highest court in the state, I am therefore constrained to hold that the act of the legislature is violative of the provisions of the constitution of the state of Kansas. Whether the act is, in its entirety, repugnant to the state constitution, or is but partly so, and whether, if the latter is the case, the valid portion of the act may be allowed to stand and be operative as a law, will be adverted to hereafter. The allegations of the bill and the proofs at the hearing show prima facie that the telegraphic rates prescribed by the legislature are unreasonable and confiscatory in that they are less than the cost of performing the service. Their enforcement by the defendants would, therefore, be violative of the first section of the fourteenth amendment to the constitution. It also appears that steps have been taken by the defendants for the enforcement of those rates, as the information filed against the complainant in the court of visitation and the subsequent proceedings show, and that many actions have been commenced in the state courts to recover the penalties imposed by the act relating to telegraph companies. Sufficient appears to show that this court has acquired jurisdiction, and in such case the determination of any question that properly arises cannot be avoided. In *Smyth v. Ames*, supra, it was said that "a party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the courts of the same locality." Although the opportunity should never be sought by a federal court, yet in a cause properly brought and pending therein that court has the right, and it is its duty, if the question arises, to test the validity of an enactment of a state legislature by the provisions of the state constitution as well as by the limitations of the federal constitution. The responsibility of decision as to the former is greatly lessened, however, if the highest court in the state has practically determined the question by its interpretation of the state constitution as applied to analogous cases. Although the act creating the court of visitation may be, for the reasons stated, violative of the constitution of the state in so far as it attempts to confer upon that body judicial powers in respect of the same matters whereof it is given legislative and administrative jurisdiction, it is another question whether the act is in any particular in contravention of the constitution of the United States.

In view of what has been said of the court of visitation and the nature of the various powers conferred upon it, would a judicial proceeding before said court to determine the reasonableness of a body of rates be due process of law, within the meaning of the first section of the fourteenth amendment to the constitution? Due process of law in judicial proceedings means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In legislative proceedings it requires a conformity to the settled maxims of a free government, and an observance of constitutional restraints and requirements. In either case it means that there should be an omission to exercise substantial powers appertaining to the other department. Courts cannot legislate and pass judgment thereon. Legislative bodies, or boards that are constituted as legislative agencies, cannot render judgment upon their legislative acts. In either case neither the proceeding nor the result would be due process of law. In the *Sims Case*, *supra*, Johnson, J., said, with reference to the conferring of power upon a county attorney to punish a witness for contempt in a proceeding before him under the prohibitory liquor law, that it was not within the power of the legislature to make a judge an arbiter in his own cause, and that to give an attorney for one of two adverse parties the power to determine the controversy is wholly inconsistent with our system of jurisprudence. In that case a county attorney was recognized as being the representative of the state. In the case under consideration it seems clear, not that the members of the court of visitation are representative executive officers of the state, but that they are the direct and active representatives of the legislative department. It would certainly be as inconsistent with our system of jurisprudence to empower them to act judicially in matters whereof they had legislative or administrative cognizance as it would be to confer judicial powers upon an executive officer. Judge Cooley says:

"If the legislature is intrusted with apportioning and providing for the exercise of judicial power, we cannot understand them to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but it is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly." *Const. Lim.* 413.

That the important powers of government differing so widely in their essential characters might lawfully be vested in a single board or tribunal, to be exercised upon the life, liberty, or property of a person, is a startling proposition, and it would suggest the inquiry whether our plan of government has not insensibly drifted far away from its ancient moorings. Chief Justice Shaw said, in *Com. v. Essex Co.*, 13 Gray, 239, 253, "Extreme cases are allowable to test a legal principle." Suppose the legislature should repeal the crimes and punishment act of the state of Kansas, and, the state constitution not inhibiting, should delegate to some board or body, or, for that matter, to a single person, the power to formulate new laws, to con-

strue and apply the same as a court, and to execute their judgments, would this be due process of law, under the federal constitution? I think not, and for the reason that it would be repugnant to the underlying, vital principles of our government, state and national. It would not be justice as it is understood of men. The results would comprise legislative judgments and judicial legislation. The protection of the fourteenth amendment to the constitution is not confined to life and liberty, but extends to and includes as well the property of a person. A corporation is held to be a person within the meaning of its provisions. I am therefore of the opinion that a proceeding before the court of visitation, in which it is sought to secure a judgment upon the reasonableness of a body of rates prescribed by it to be charged by a railroad or a telegraph company, would not be due process of law within the meaning of the federal constitution.

It is contended on behalf of defendants that by this suit the complainant is attempting to enjoin a proceeding pending in a state court, contrary to the provisions of section 720 of the Revised Statutes, prohibiting the granting of the writ of injunction by any court of the United States to stay proceedings in any court of a state except where authorized in proceedings in bankruptcy. The error in this contention lies in the fact that it involves an assumption that the court of visitation is a court within the meaning of the section mentioned, whereas whether it is a court or not is one of the vital questions raised for determination in this case. It cannot be said that, because a board or tribunal is denominated a court by the law creating it, all inquiry as to its true character is precluded, and that it must be conclusively assumed to be a court, whether rightly so or not. In *Railway Co. v. Dey* (C. C.) 35 Fed. 866, 871, 1 L. R. A. 744, it was contended that the suit was against the state, and therefore within the inhibition of the eleventh amendment to the constitution. Upon this point Mr. Justice Brewer, then circuit judge, said:

"The defendants claim that they are simply attempting to carry into effect the mandates of the state as expressed in one of its laws; but, if that law be unconstitutional, it is no law, and they have no authority for their actions. This proceeding is a judicial inquiry to see whether they have authority for their actions; whether the law upon which they rely is valid and constitutional, or sufficient to justify the actions which they are taking."

With the qualification that the federal courts "follow the decisions of the highest court of a state in construing the laws of the state, unless they conflict with or impair the efficiency of some principle of the federal constitution or of a federal statute, or a rule of commercial or general law," the true nature of a tribunal created, as well as the true interpretation and effect of the law of the state creating it, is always open to inquiry in a proper proceeding, and the jurisdiction of a court of the United States may not be denied because of an erroneous or unconstitutional assertion making to the contrary.

In *Norton v. Shelby Co.*, 118 U. S. 425, 442, 6 Sup. Ct. 1121, 1125, 30 L. Ed. 178, 186, it was contended that a legislative act, though unconstitutional, may, in terms, create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. The court said:

"That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement: an unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it had never been passed."

It is also contended by the defendants that this suit cannot be maintained because it is, in effect, an action against the state of Kansas, and therefore within the provisions of the eleventh amendment to the federal constitution; also that it is an effort to determine the constitutionality of a state enactment by the injunctive process of a federal court. In support of these contentions the case of *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, is principally relied on. In that case the suit, which was for an injunction, was originally instituted in the circuit court of the United States for the Northern district of Alabama against the state of Alabama, William C. Oates as governor, and William C. Fitts as attorney general, of that state. The purpose of the suit was to prevent the enforcement of an act of the general assembly of Alabama prescribing maximum rates of toll to be charged on a certain bridge, which were alleged by complainants to be unreasonable and confiscatory, and to amount to a deprivation of complainants of their property without due process of law, etc. The act also prescribed certain penalties for failure to observe it, and it was alleged that various indictments were found against them, and that other proceedings were threatened. Subsequent to the filing of the original bill of complaint, A. H. Carmichael, the regular local prosecuting officer of the state, was made a party defendant. The complainants dismissed the cause as to the state, and it was afterwards discontinued as to Oates, who ceased to be governor. Trial was had as to the others, and a perpetual injunction was awarded against the attorney general and local prosecuting officer. On appeal to the supreme court it was held that the suit was, in effect, one against the state, and was, therefore, not maintainable. The supreme court said:

"What is and what is not a suit against a state has so frequently been the subject of consideration by this court that nothing of importance remains to be suggested on either side of that question. It is only necessary to ascertain, in each case as it arises, whether it falls on one side or the other of the line marked out by our former decisions. We are of the opinion that the present case comes within the principles announced in *Re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216."

After explaining the scope of the decision in the *Ayers Case* and of other cases upon which it was based, the court further said:

"But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs; nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. * * * It is to be observed that neither the attorney general of Alabama nor the solicitor of the Eleventh judicial circuit of the state appears to have been charged by law with any special duty in connection with the act of February 9, 1895. In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among

which were *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962, 29 L. Ed. 200; *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; *Reagan v. Trust Co.*, 154 U. S. 362, 388, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; and *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass, to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

It seems to me to be clear that the doctrine announced in *Smyth v. Ames* and the preceding cases to the same effect was not modified by the decision in *Fitts v. McGhee*, and that it is also clear that the case at bar is not a suit against the state of Kansas, within the meaning of the eleventh amendment to the constitution. It will be noticed that in the case at bar the defendants, excepting Maxwell, who is not an officer, are specially charged with the enforcement of the state enactments under consideration, and that they are not otherwise general officers of the state, or charged with the enforcement of all laws generally.

While it is true that ordinarily a suit in equity for an injunction will not lie merely to test the constitutionality of a legislative enactment, it is for the reason that the party has an adequate remedy at law by setting up the alleged defect or unconstitutionality as a defense to any action or proceeding involving the application of the law in question. But it is also well-settled doctrine that, if the established principles and rules of equity as administered in the federal courts, applied to the facts in any case, entitle a party to sue in such a forum, and to obtain therein the process of injunction, when such a suit is brought the court has the undoubted right, as appurtenant to the exercise of the jurisdiction thus obtained, to determine the constitutionality of a state law, and, if the determination is against the validity of the law, to enjoin the enforcement thereof. This suit is within the doctrine announced by Mr. Justice Miller in *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970, approved in *Railway Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, and applied in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

It is also contended that the rates for telegraphic service are not made absolute by the act, and are not binding upon the court of visitation, and that the telegraph company has no cause for complaint, at least until the court of visitation has acted. In *Smyth v. Ames*, supra, the act of the legislature prescribed what was termed the "Nebraska Schedule of Reasonable Maximum Rates," and it delegated

to the board of transportation, a body previously organized under the laws of that state, consisting of certain general state officers, among whom were the attorney general, secretary of state, and state treasurer, the power to reduce the rates on any class or commodity in the schedule of rates fixed in the act whenever to do so seemed just and reasonable to a majority of the board; but it was specifically provided that no change should ever be made by the board so that the rates on any freight would become higher or greater than as fixed by the act. The circuit court of the United States for the district of Nebraska, Mr. Justice Brewer presiding, enjoined the members of the board of transportation and the railroad companies from enforcing or putting into effect the rates prescribed by the act of the legislature, and the decree was affirmed by the supreme court. It will be observed that the situation in that case is analogous to the case at bar. It is provided by section 1 of the Kansas act for the regulation of telegraph companies that the court of visitation is given jurisdiction and control of all questions relating to the reasonableness of the charges fixed in the second section of that act, or to be fixed by any order of that court. In so far as it authorizes a reduction of the maximum rates fixed in the act itself, the case is precisely like that of *Smyth v. Ames*. In so far as it authorizes the court of visitation to raise the rates fixed in the statutory schedule, it was the evident purpose of the legislature that the rates could not be raised unless that body, in the exercise of proper judicial functions, adjudged and decreed that those prescribed by the legislature were unreasonable and noncompensatory. It cannot be said that it was the legislative purpose to prescribe a mere tentative schedule of rates that could be either observed or ignored at the will of an administrative body without the exercise of judicial powers in the determination of their reasonableness. The court of visitation possessing no power to determine the reasonableness of the rates prescribed in the act, the case stands as though the schedule prescribed was that of maximum telegraphic rates, and therefore it is in the same situation as the case of *Smyth v. Ames*.

If it is not within the constitutional province of the legislature to confer upon the court of visitation the power to prescribe a schedule of rates and charges, and also the jurisdiction to determine judicially the validity and reasonableness thereof, and to execute its judgment embodying such determination by sequestration of the property of those upon whom the law operates, what, then, becomes of the statute establishing the court? Is it absolutely void, or may it be sustained in part by the elimination of the features which render it unconstitutional? The universal rule of statutory construction is that a part of an act may, under certain circumstances, be valid without affecting the validity of the remainder, and any independent provision or body of provisions may be dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of the entire act that the legislature would not have enacted that which is within independently of that beyond its power. The valid part, however, must not only be complete in itself, but also in accord with the legislative purpose. It is clear that

those parts of the statute under consideration which confer legislative and administrative functions upon the court of visitation cannot be eliminated, leaving the remainder to stand, for it is apparent that there would be very little for a judicial jurisdiction of the court of visitation to operate upon.

In seeking the purpose and intent of the legislature the inquiry need not be confined to the act itself, but consideration may be given to other statutes, especially those which were passed at the same legislative session, and about the same time. But a few days after the passage of the act creating the court of visitation, the legislature repealed the law which had then been in force for many years establishing and defining the duties and powers of the board of railroad commissioners, which was a board exercising purely administrative duties in aid of and supplementary to the legislative prerogative of fixing rates and the general regulation of railroad service. The powers of the board of railroad commissioners had been previously conferred upon the court of visitation. The repealing act, and the act creating the court of visitation, together with the act relating to telegraph companies, were all enacted at the same session, and about the same time. They are to be construed as *in pari materia*, as composing one body of legislation upon cognate subjects, in order to ascertain the legislative intent. There are grounds, therefore, for claiming that the legislature did not intend to wipe out of existence every board possessing the powers of the former board of railroad commissioners; that the judicial powers attempted to be conferred upon the court of visitation might be dropped out, leaving the remainder of the act to stand, and be operative as a law. As to such a claim it may be said that a board which possesses no judicial powers, but whose powers are entirely legislative or administrative, is styled a court, is without significance. Judicial powers may be conferred without designating the recipient a court. Legislative powers may be delegated and administrative powers conferred, and the recipient may be denominated a court. In neither case does the terminology employed govern, but courts look behind the form and appearance, and determine the character of the board or tribunal by the substance of its jurisdiction and powers. That the act establishing the court of visitation is either wholly void, or void to the extent that it attempts to confer judicial powers upon that body, I have no doubt. It is unnecessary to determine, in this case, whether the court of visitation, though possessing no judicial functions, may still have and exercise the legislative and administrative powers specified in the acts of the legislature.

The conclusions arrived at are substantially as follows:

1. That the proofs adduced in this cause show *prima facie* that the maximum rates for telegraphic service prescribed by chapter 38 of the laws enacted by the legislature of the state of Kansas at the special session of 1898 are less than the cost of performing the service, and are, therefore, unreasonable, and confiscatory; and that the enforcement of such rates, which is threatened, would operate to deprive the telegraph company of its property without due process of law, and would be a denial of the equal protection of the laws.

2. That in the enactment of the law creating the court of visitation of the state of Kansas and defining its powers and jurisdiction, and of the subsequent law extending such powers and jurisdiction to telegraph companies, the legislature attempted to confer upon a single board or body important and substantial legislative, administrative, and judicial powers, to be exercised in the same proceeding, and as to the same subject-matter. It attempted to confer full power to regulate the operation of railroad and telegraph companies, and to prescribe schedules of rates and charges, which power is legislative or administrative in its character. It also attempted to confer upon the court of visitation the power to pass judicially upon its regulations, and the reasonableness of the rates fixed by it, to embody its determinations in decrees, which it was authorized to enforce by the appointment of receivers and the sequestration of the property of the companies.

3. The distinction between legislative and judicial functions is a vital one, and it is not subject to change or impairment either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some subordinate board or agency, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction.

4. That the law creating the court of visitation is in contravention of the constitution of the state of Kansas, which inhibits the conferring of inconsistent legislative and judicial powers upon the same body, to be exercised regarding the same subject-matter.

5. That a proceeding in the court of visitation to determine judicially the validity and reasonableness of a body of rates established by it in the exercise of its legislative functions is not due process of law, within the meaning of the fourteenth amendment to the federal constitution. An active, potential agency of the legislative power of a state cannot be empowered to sit in judgment upon the validity of its own enactments, and to enforce its decrees with reference thereto by the exercise of the extraordinary powers of a court of chancery.

6. The act of the legislature creating the court of visitation and the act extending the powers and jurisdiction thereof to telegraph companies cast upon the officials who are defendants in this suit the special duty of administering and enforcing said laws. Their offices were created solely for such purposes, and such defendants are not general officers of the state, whose duty it is to see to the enforcement of laws generally, and who act only by formal judicial proceedings in the courts of the state. This suit, therefore, is not against the state of Kansas, and hence is not within the prohibition of the eleventh amendment to the constitution of the United States.

7. Whenever it is claimed that the purpose and effect of a writ of injunction granted by a court of the United States is to stay pro-

ceedings in a court of a state, it is competent for the former court to ascertain and determine whether the board or body created by the laws of the state, and before whom the proceedings sought to be enjoined are pending, is in fact and in law a court. The jurisdiction of a court of the United States cannot be denied by an unconstitutional enactment of a state legislature, nor by an erroneous use of terms therein. The court of visitation of the state of Kansas cannot lawfully exercise judicial functions, nor is it a court within the meaning of section 720 of the Revised Statutes of the United States.

The application for a temporary injunction will be granted.

LYON v. TOWN OF TONAWANDA et al.

(Circuit Court, N. D. New York. December 18, 1899.)

1. CONSTITUTIONAL LAW—ASSESSMENTS FOR PUBLIC IMPROVEMENTS—FRONT-FOOT RULE.

An assessment made pursuant to a state law, for grading and paving a highway, which apportions the entire cost of such improvement upon the abutting land according to the front-foot rule, without regard to the size and value of the parcels or the special benefits accruing therefrom, is in violation of the fifth and fourteenth amendments to the constitution of the United States.

2. INJUNCTION—SUFFICIENCY OF BILL.

If it be conceded that a statute providing for assessments on abutting property for street improvements according to the front-foot rule does not necessarily exclude all consideration of benefits, or result in unjust or inequitable assessments, it at least authorizes such assessments; and a bill filed by a property owner for an injunction against the enforcement of an assessment made thereunder is not subject to demurrer, where it alleges that the assessment was in fact unjust and unequal, and made without regard to benefits.

3. EQUITY—LACHES.

A delay by a property owner of four years after the making of an assessment against his property for the cost of street improvements before bringing a suit to enjoin the enforcement of such assessment does not constitute laches which will defeat his right to relief in equity, where no steps were taken to subject the property to sale for such assessment until immediately prior to the commencement of the suit, and where, during most of the time subsequent to the assessment, other suits involving its validity were pending in the courts of the state, and efforts were also being made to obtain relief by legislation.

4. ESTOPPEL—SIGNING PETITION FOR STREET IMPROVEMENT—PRIVITY IN TITLE.

The fact that an owner of property, subject to a purchase-money mortgage, joins in a petition for the improvement of a street upon which such property abuts, does not estop a subsequent owner, who acquires title through a foreclosure of the mortgage, from contesting the validity of the assessment made for such improvement.

5. PRELIMINARY INJUNCTION—GROUNDS—SUIT TO ENJOIN SALE OF PROPERTY.

A suit by a property owner to restrain the sale of his property under an assessment for a street improvement claimed to be illegal is one in which a preliminary injunction is essential to the efficacy of the relief sought, and such injunction should be granted where the bill makes a probable case to entitle the complainant to final relief.

On Motion for a Preliminary Injunction and on Demurrer and Plea to the Bill.

The complainant is a citizen of the state of New York. The defendant, the town of Tonawanda, is a municipal corporation of the county of Erie and state of New York, and the defendant Patten is the supervisor of the said town. The parties are all residents of the Northern district of New York and the jurisdiction of this court is invoked solely upon the theory that a federal question is involved.

The important allegations of the bill may be stated briefly as follows: The complainant is the owner of two parcels of land known as Nos. 59 and 62, situated in the town of Tonawanda and bounding on Delaware street, which is a public highway of said town, connecting the village of Tonawanda and the city of Buffalo. In the year 1893 it was decided to pave said street with vitrified brick at an expense of \$232,791 and in order to pay the said amount the complainant and other owners of land abutting on the said street were assessed, pursuant to chapter 550 of the Laws of New York for 1893, according to the lineal feet fronting on said highway and without reference to the value of the land or the benefit conferred thereon. All the steps required to be taken under said law were taken, except to advertise and sell the property, and thereafter nothing was done until the year 1895 when the legislature passed another act relating to the subject. Chapter 816 of the Laws of 1895. This act creates a town board and provides as follows (section 27): "The said board is hereby authorized and empowered, and it shall be its duty to cause to be assessed the entire expense of the improvement aforesaid upon the several lots or parcels of land fronting or bounding upon that part of the highway so improved aforesaid, and in the manner provided by this statute for making local assessments for raising the expenses of grading and paving of streets; and pursuant to the rules of apportionment and division of the expense herein provided."

By section 30 of the act the expenses of local improvements for paving or macadamizing a highway are assessed "upon the lots fronting or bounding on both sides of that part of the highway in which the improvement shall be made. Frontage assessments shall be apportioned as follows: So much of the expense of the improvement shall be raised from each separate lot or parcel of land as shall be in the same proportion as the entire expense locally assessed, as the number of feet for which the lot shall bound or front upon that part of the street in which the improvement shall have been made, shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment."

Under this law the complainant's lands were again assessed for the paving of said Delaware street upon the basis of foot frontage, as prescribed by both of said acts, namely, "on each of said lots and parcels of land in the same proportion to the entire expense locally assessed as the number of feet for which said lot or parcel of land bounded and fronted upon that part of the street in which the said improvement had been made, was to the aggregate number of feet of frontage or bounds subjected to the entire assessment, which said assessment upon parcel No. 59, now owned by your orator, was \$5,207.16, and on parcel No. 62 was \$5,206.26." These amounts with interest added are respectively \$7,929.30 and \$7,924.74, no part of the same having been paid. The defendant Patten, as supervisor, advertised the said lots for sale on the 14th of September, 1899, and will proceed to sell the same at auction unless restrained by injunction.

The lots assessed for the said pavement are of unequal value, size and depth, are not benefited equally, and "under the terms and conditions and the rule and basis of levying said assessment, it was impossible for the boards and officers making said assessments to levy and apportion said assessments in proportion to the benefits received by each parcel of land assessed to pay for said improvement of grading and paving said street, or in any other way, except in the arbitrary manner and method of assessing in such proportion to the entire expense assessed as the number of feet which any lot shall bound or front upon that part of the street in which the improvement shall have been made, shall be to the aggregate number of feet of frontage or bounds to be subjected to the entire assessment, and that thereby, and unless the sale thereof be enjoined and restrained by the decree of this court, the lands and property of your orator hereinbefore mentioned, will be taken for public use

without just compensation, and your orator will be deprived of his said lands and property without due process of law, contrary to the provisions of the constitution of the United States." The bill further alleges that the said lots will not sell for enough to pay the amounts assessed against them and that the deficit will be levied in a general tax upon the lands of said town. The complainant owns land in said town other than the two parcels bounding on Delaware street as aforesaid which land will thus be subjected to unequal and unjust taxation and in certain contingencies will be sold to discharge said tax, contrary to the provisions of the constitution of the United States. The bill states as a reason for not bringing this action sooner the pendency of various suits and proceedings in the state courts and in the legislature which proved abortive a short time prior to the filing of the bill. The complainant's lands were not advertised for sale and no active steps were taken to collect said assessment until on or about the 1st of August, 1899. The bill prays for a decree declaring the state acts, requiring the assessment for the said pavement to be made by the front-foot rule, to be contrary to the provisions of the constitution of the United States, and enjoining the defendants from collecting the said assessment.

The defendants filed a demurrer with which a plea is united.

The grounds of the demurrer are as follows: First. No cause of action in equity is stated in the bill. Second. The complainant is guilty of laches in not appearing on the return day of the notice given, pursuant to the provisions of the two acts in question, and objecting to the said improvements upon the grounds now stated as invalidating the assessments. Third. The complainant is guilty of laches in not having applied to the town board for relief and in not having taken proceedings provided for by the laws of the state to review the assessments and test the constitutionality of the statutes in controversy. Fourth. The complainant has an adequate remedy at law. Fifth. There is a defect of parties for the reason that the other abutting landowners, as well as the owners of the bonds issued for said improvements, should have been made complainants or defendants.

The plea alleges that in 1893 the Columbia Land Company, the then owner of the complainant's lots, petitioned the town board to make the improvements in question and did not object to the same at any stage of the proceedings, but, on the contrary, consented to the improvements and ratified and confirmed the action of the town board in making the same; that when the assessment was made under the statute of 1895 neither the complainant nor those in privity with him appeared before the board, pursuant to notice, and objected to the assessment roll and no action was taken to review the same, as provided by the laws of New York, and no action was begun to have the same declared illegal until March of the present year; that this delay and inaction upon the part of the complainant and his predecessors amounts to laches which should bar a recovery. The plea was subsequently modified or amended by a stipulation between counsel stating the facts regarding the complainant's title to the land in question.

It thus appears that the Columbia Land Company, at the time the petition for the improvements to Delaware street and the consent to said improvements were filed by said company with the town board, was the owner of said land subject to three purchase-money mortgages; that these mortgages were, in the autumn of 1897, foreclosed and the land purchased at the foreclosure sale by the complainant and two other parties who subsequently conveyed their interest to the complainant, who is now the owner and holder of the legal title to said land.

The demurrer admits all of the allegations of the bill to which the demurrer applies and, as issue was not joined upon the plea, the same being set down for argument, the allegations of the plea must also be taken as admitted. The somewhat anomalous character of the defendants' pleading, combining as it does the characteristics of a demurrer, a plea and an answer, presents the curious spectacle of the defendants admitting certain allegations of the bill to be true and the complainant admitting allegations of the plea to be true which are in irreconcilable conflict with the admitted statements of the bill. However, this situation applies only to some of the minor features of the controversy, the salient facts being admitted on both sides.

The cause was argued on September 23, 1899, at the Buffalo term, but for the convenience of counsel it was not finally submitted until November 14, 1899, many other causes having, in the meantime, obtained a preference.

Tracy C. Becker, for complainant.

John Cunneen, for defendants.

COXE, District Judge (after stating the facts as above). This controversy is presented to the court upon what is practically an agreed state of facts. The fundamental question is whether or not an assessment, made pursuant to a state law, for grading and paving a highway, which apportions the entire cost of such improvement upon the abutting land according to the front-foot rule, without regard to the size and value of the parcels or the benefits derived from such improvement, is contrary to the fifth and fourteenth amendments to the constitution of the United States? If this question has been decided by the courts of the United States it is the duty of this court to follow these decisions, even though the courts of the state may have decided otherwise. The leading authority is *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443. The facts, of course, differ somewhat from the facts in the case at bar, but that the broad principle there enunciated is applicable cannot be successfully controverted. The opinion of the court contains an exhaustive review of the judgments of state and national courts and the opinions of eminent text writers on the subject and reaches conclusions which may be summarized as follows:

First. Abutting owners may be subjected to special assessments to meet the expenses of opening and improving public highways upon the ground that special and peculiar benefits accrue therefrom, and the legislature has a wide discretion in defining the territory to be deemed specially benefited.

Second. The principle underlying special assessments of this character is that the property is peculiarly benefited and, therefore, the owners do not pay anything in excess of what they receive by reason of the improvement. Legislative power is limited by this principle. The protection of private property would be seriously impaired were the rule established that the legislature may assess such property by the front foot with the entire cost of an improvement whether the property is in fact benefited or not.

Third. "The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." Any substantial sum taken from the landowner beyond the exceptional benefit received by him is extortion. Although the legislature may prescribe the rule for the apportionment of benefits, this rule must be one under which it is legally possible that the burden may be distributed justly and equally. While abutting property may be assessed for improvements to a public street in front of it such assessment must be measured by the special benefits accruing to such abutting property, namely, benefits not shared by the general public. The taxing of private property for profits and advantages

which accrue exclusively to the public at large and which confer no benefits upon the property so taxed is taking private property for public use without compensation.

Fourth. Where an assessment is illegal because it rests upon a principle which excludes the consideration of benefits to the land assessed, it is unnecessary for the owner, as a condition of obtaining relief in equity, to pay or tender such a sum as he may concede due upon an assessment properly and legally made.

The case presents considerations of peculiar and extraordinary hardship, but there is nothing to indicate that the court intended to limit the broad principles enunciated to any particular state of facts. At least two of the circuit courts have, since the decision, applied its doctrine to facts closely approximating the case in hand.

In *Fay v. City of Springfield* (C. C.) 94 Fed. 409, the cost of repaving a street in Springfield, Mo., was assessed, according to the front-foot rule, upon lots fronting on the street without regard to the question whether or not the various parcels of land were benefited to the extent of the assessment. The learned district judge, after a careful review of the entire situation, reached the conclusion that the case before him was ruled by the judgment in *Norwood and Baker*. The opinion concludes as follows:

"Equality is equity. And the right of the owner of a lot to have this burden of special tax ratably distributed among the lots benefited, does not depend alone upon the state constitution, exacting equal taxation, but has 'its foundation in those elementary principles of equity and justice which lie at the root of the social compact' (In re Canal Street, 11 Wend. 154-156), and he can, therefore, invoke, for his security and protection, the federal constitution, which prohibits, not only the taking of private property for public use without just compensation, but the deprivation thereof without due process of law, and denies to the state the power to 'deny, within its jurisdiction, the equal protection of the laws.' Following what I conceive to be the ruling of the supreme court in the *Village of Norwood Case*, *supra*, the temporary injunction asked for is granted."

To the same effect is *Loeb v. Trustees* (C. C.) 91 Fed. 37.

It is argued that the *Norwood Case* is inapplicable for the reason that the Ohio statute provided three alternative methods of assessment, namely: First, in proportion to the benefits; second, according to the value of the property; and, third, by the front-foot rule; while the statute under consideration here provides only for the assessment upon the lots fronting or bounding upon both sides of the highway. It is said that the village authorities having adopted the front-foot rule under the Ohio statute necessarily excluded the consideration of benefits received, while in the case at bar the statute permitted the board to consider the benefits to the land and that they may have done so and, thereafter, have fixed upon the front-foot rule as the most equitable method of apportioning these benefits.

It is thought that this construction is contrary to the plain provisions of the law. Section 30 of the act of 1895 makes no reference whatever to any mode of taxation based upon the value of the property or which takes into consideration the benefits conferred. There is no affirmative authorization for proceeding except by the front-foot rule. The section begins with the following provision:

"The expenses of local improvements shall be assessed as follows. For building or repairing sidewalks, by frontage assessment upon the lots in front of which the walk shall be constructed or repaired."

It is argued that because the word "frontage" is here used the elaborate provision for the apportionment of "frontage assessments" found at the end of the section applies only to sidewalks. Such a construction violates several well-known canons of statutory interpretation. It eviscerates the section leaving it ambiguous, if not inoperative, as to the more important subjects treated by it. The section provides that the expenses for paving a highway shall be assessed upon the lots fronting or bounding thereon and then declares that frontage assessments shall be apportioned by the front-foot rule. An assessment upon lots fronting on a highway is "a frontage assessment" to the same extent as if the words quoted had been used. That the front-foot rule does not relate to sidewalks only is manifest from the language of the last clause of the section. The language requiring the assessments to be levied in proportion as the number of feet "bound or front" upon the street probably refers to the local improvements mentioned in all the preceding clauses; it certainly refers to "lots fronting or bounding" on the street, as described in the clause which immediately precedes it. If the legislature had substituted the words "assessments upon lots fronting on the street" for "frontage assessments," so that the sentence in question would read, "assessments upon lots fronting on the street shall be apportioned as follows," there could be no possible pretense for the contention of the defendants. And yet it is thought that this was unquestionably what the lawmakers meant. Any other construction leaves the section without any definite and certain provision regarding assessments for the most important improvements sanctioned by the law. An interpretation which renders an act meaningless or obscure should always be avoided. That the construction here approved was recognized by all as the proper one prior to the rise of this controversy is demonstrated by the fact that the board, acting upon the advice of counsel learned in the law and familiar with all the facts, assessed the complainant's lots according to the front-foot rule.

We have then the fact, alleged in the bill, admitted by the demurrer, conceded in the brief, that the complainant's land was assessed by the front-foot rule under a statute which certainly authorized if it did not command this mode of apportionment.

Why then does not the following language of Norwood and Baker apply?

"It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement without taking special benefits into account, and that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost. * * * Taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation."

The New York law in failing to provide any method for ascertaining and apportioning benefits resembles the Missouri statute consid-

ered in the Fay Case, *supra*, more closely than the Ohio statute. Of the Missouri law the court says:

"As persuasive proof that it was not in the mind or purpose of the framers of the Missouri statute that any such ascertainment should enter into the apportionment, no method whatever is provided therefor; and the ordinance adopted by the city council clearly enough shows that the matter of relative betterments as a basis for the apportionment, was not contemplated or provided for."

But it is argued that though the rule adopted may lead to inequitable results there is nothing to show that this has been the case here. The frontage assessment may have been the most equitable and just that could have been adopted and unless the complainant can show injury he cannot maintain his bill. It is contended that when the legislature adopts a method of apportionment, as in the statute at bar, it decides the proportion in which the land will be benefited.

Assuming that, since the decisions of the United States courts, these questions are open for discussion and that the court may say that the arbitrary front-foot rule is a rule under which special benefits are not necessarily and uniformly excluded, it is thought that the arguments are not availing at the present time. It should be remembered that this question is presented upon demurrer, all the allegations of fact in the bill being admitted. It is true that these allegations are not as specific upon the question now under consideration as they might be, but the bill unquestionably avers that the abutting lots were not benefited equally; that they were of unequal value, size and depth; and that they were unjustly and unequally assessed. Under this allegation the complainant will be permitted to show the facts as they actually exist. For instance, he may be able to prove that the Delaware street pavement was an unquestioned benefit to the village of Tonawanda, the city of Buffalo and to the terminal property, but a distinct disadvantage to the intervening land. It may be shown that the grade was so raised or lowered in front of the complainant's lots as to render them practically worthless for residential or business purposes. It may be shown that some of the property on the line is improved and of great value and other parcels are swamp land, not even available for farming; that some of the lots are 5,000 feet deep and others 500 feet deep; that some are worth \$5,000 and others, of equal frontage, are worth but \$500. Again, the complainant might prove that the grading and paving of the street so interfered with proper drainage that, whereas his land prior thereto had yielded him large profits, it is now under water and valueless. These conditions are, of course, conjectural and are suggested to illustrate the impossibility of determining upon demurrer that benefits to the assessed property were considered under the rule of apportionment adopted by the board.

If the complainant should show that the building of the highway left his property 20 feet below the surface of the street it could hardly be contended that, as to him, the rule "was the most just and equitable that could be adopted." On the other hand, should it appear that the front-foot rule properly and justly distributed the

burden upon the property benefited, the doctrine of the authorities cited by defendants would be applicable.

Counsel for the defendants has shown great diligence in collecting the adjudged cases, and that many of them sustain the propositions for which he contends may well be conceded. No more careful and painstaking exposition of the law from his point of view could be presented. All of these authorities are, however, prior to the cases cited at the beginning of this decision and must yield to the paramount authority. Reluctant as this court is to interfere with proceedings instituted under state authority there is no alternative when those proceedings are prohibited by a tribunal before whose judgments all must bow. After an earnest endeavor to give full weight to all that has been urged in favor of the defendants the court is unable to distinguish upon principle the case at bar from the Norwood Case and the circuit court cases which have applied the doctrine there enunciated.

It is insisted by the defendants that the long delay in seeking redress amounts to inexcusable laches which should prevent any relief from being granted. As the act under which the present assessment was levied was not passed until May, 1895, it is unnecessary, in considering this question, to discuss occurrences prior to that date. This proposition seems too plain for debate and is, it would seem, conceded by the defendants.

As to the assessment in dispute the act of 1895 superseded the act of 1893. "It should be borne in mind," says the defendants' brief, "that the assessment made under the act of 1893 has been abandoned; that the assessment, which defendants are enforcing, is the one made under the act of 1895, * * * so that we are only concerned about the validity of the assessment made under the power last mentioned." The complainant could not, therefore, have attacked the former assessment. The defendants made that course not only unnecessary but impossible; they abandoned the assessment, leaving the complainant with no grievance and no cause of action. But four years are, then, to be accounted for. The bill alleges that the reason this action was not sooner commenced was—First. The pendency in the state court of actions to set aside the assessment. Second. Efforts at various times to procure the assistance of the legislature. Third. An agreement between the landowners and the town authorities to suspend affirmative action on both sides until the decision of the court was announced or until the legislature had passed an act providing for a fair and just apportionment.

The case of Jones against these defendants (158 N. Y. 438, 53 N. E. 280) was not decided by the court of appeals until March 21, 1899. No active steps were ever taken to collect the assessment until about the 1st of August, 1899, and within six weeks thereafter this action was commenced. No laches can be predicated of these admitted facts. The complainant had a right to rely upon the pendency of other proceedings and the understanding on all hands to await their determination. Indeed, it may well be doubted whether, in any event, he was called upon to act until his property was actually threatened. Had he not a right to assume that the defendants would

not attempt to collect an illegal tax and rest upon this assumption until some overt act was committed? If the complainant had begun this suit while all parties were endeavoring to reach a just apportionment he would probably have been denounced as an impertinent and perniciously active interloper who had failed to keep faith with the defendants and who had complicated the situation by an unnecessary and vexatious litigation. One who fires on his adversary during the existence of an armistice should not be encouraged but denounced as an outlaw.

The most cogent argument advanced by the defendants, in the judgment of the court, is based upon the alleged estoppel growing out of the acts of commission and omission of the former owner of the complainant's land. There can be no doubt that the Columbia Land Company petitioned for, consented to and acquiesced in the improvement as originally projected. It is contended that the complainant is bound by these acts and is, therefore, remediless.

The answers are:

First. Even though the complainant was in privity with the Columbia Company, an assent to be assessed under the law of 1893 was not an assent under the law of 1895 with all its changed conditions and additional burdens.

Second. A petition for an improvement is not a petition for an illegal assessment. In all the company's acts there is nothing inconsistent with the theory that it supposed the expense of the improvement would be lawfully and justly apportioned. It did not assent to extortion or to confiscation or to the taking of its property for public use without compensation.

Third. As the law under which the proceedings were instituted was unconstitutional and void the consents given thereunder were inoperative and bound no one. That in the circumstances here, where neither the Columbia Company nor the complainant has received any advantage or retained any benefit under the law, the right to assert its unconstitutionality was not and could not be waived.

Fourth. The essential elements of an estoppel are lacking, there being nothing to show that the defendants relied upon the company's acts or were misled thereby. There is nothing to show that the petition and consent induced the improvement. For aught that appears to the contrary the pavement would have been laid precisely as it was laid if the Columbia Company had never existed. No injury to the defendants or benefit to the complainant followed from these acts.

Fifth. The complainant is not in privity with the Columbia Company. His title is derived from prior purchase-money mortgages and, since he obtained title, he has maintained a position of open and avowed hostility to what he insists is an illegal tax.

Equity recognizes and tolerates estoppels but does not encourage them; she admits them into her domains, but they are usually regarded as undesirable aliens having little in common with the other members of her family. Before saying to a suitor that his rights have been destroyed by his own act a court of equity should be certain

of the rectitude of its position. The general nature of an estoppel is well stated as follows:

"An 'estoppel' may be defined in a general sense to be a preclusion of a person to assert a fact which has been admitted or determined under circumstances of solemnity, such as by matter of record or by deed, or which has, by an act in pais, induced another to believe and act upon to his prejudice. * * * Estoppels must be certain to every intent and are not to be taken by argument or reference." 11 Am. & Eng. Enc. Law (2d Ed.) 387.

It may well be doubted whether the complainant was in privity with the Columbia Land Company. His title was derived from a conveyance prior to the deed to the company. The company held only the equity of redemption and could do nothing to impair the value of a prior mortgage. The complainant's title did not come from or through the company; it came from a source which was paramount, prior and, in a sense, hostile to the company's title.

Mr. Justice Story clearly states the general rule of privity in *Carver v. Jackson*, 4 Pet. 1, 7 L. Ed. 761, as follows:

"The recital of one deed of title in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel and binds parties and privies; privies in blood, privies in estate and privies in law. But it does not bind mere strangers, or those who claim by title paramount to the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed."

See, also, *Oliver v. Piatt*, 3 How. 333, 412, 11 L. Ed. 622, and *Corn-ing v. Nail Factory*, 40 N. Y. 191, 203.

Assuming, however, that the Columbia Company was in privity with the complainant it is thought that the latter is not estopped from maintaining this suit. A similar claim of estoppel was advanced in *Sharp's Case*, 56 N. Y. 257. In overruling the claim Judge Grover made use of language which, in principle, is directly applicable to the case in hand. He says:

"It is insisted by the counsel for the appellant that the petitioner is estopped from denying the power of the board to do the work by having signed the petition asking to have it done. Upon principle, there is no basis for such an estoppel. All that the petitioner did was as a property owner to petition the board to proceed and repave the street in the mode desired by him, as he lawfully might. He made no representation to the board that the signers constituted a majority of the owners of property fronting on the street, or anything to that effect; he had a right to rely upon the performance of its duty by the board, which was upon the presentation of the petition, and before basing any action thereon, to ascertain whether the numbers who had signed were sufficient to confer jurisdiction to act. Signing or presenting it was no assertion of its sufficiency in this respect. It contained a representation that the petitioner owned property fronting upon the street and that he desired, in case a sufficient number of like owners united therein to constitute a majority, that the street should be paved with Nicholson pavement. A party is estopped only when, by his declarations or conduct, he has induced another to act upon the supposed existence of a fact, and would be in consequence injured by showing its nonexistence. There is no such element in this case. The consequence of the doctrine contended for would be to make the assessment valid upon such owners as had signed the petition, while invalid as to all others; leaving the former not only to pay their just portion of the expense, but to contribute as taxpayers to the payment of the portions which should have been imposed upon those who had not signed. The principle contended for, if generally applied, would involve most mischievous consequences. One signing a petition to the commissioners of highways, to lay out a road, would be estopped from showing that the proceedings based thereon were not legal, and hence

the road might be adjudged a legal highway as to him while it was not as to the public generally. The cases calling for its application, it is readily seen, would be quite numerous, and the consequences would create much confusion and hardship."

Upon this branch of the controversy the proposition may be broadly stated as follows: The property of A., who obtains title through the foreclosure of a purchase-money mortgage, is unlawfully assessed for a local improvement in the sum of \$16,000 under an unconstitutional law. When the improvement was first proposed B. held title to the property, acquired subsequently to the date of the mortgage and subject to it. B. petitioned for and assented to the improvement under a prior statute, which, two years after its passage, was superseded, the assessment thereunder being abandoned. By the foreclosure of the mortgage B.'s title was extinguished, A. taking no title from B. In these circumstances is A. estopped from contesting the validity of an assessment made under a subsequent statute? The court is of the opinion that this question must be answered in the negative.

This is one of that class of cases where the granting of preliminary relief is inseparably linked with the final decree. The latter depends upon the former for its efficacy. Without an injunction a judgment in favor of the complainant would be a mere *brutum fulmen*. His property once sold he has no adequate remedy in law or equity and even should he finally succeed it will require years of litigation before his rights are finally restored. He presents a cause of action which, even from the defendants' point of view, is founded upon propositions which are entitled to the most grave and serious consideration. Manifestly it is the duty of the court not to permit the defendants at the outset to accomplish the injury which it is the object of the suit to prevent. The inconvenience to the defendants by the delay is not to be compared to the irreparable injury to the complainant if his property is taken without due process of law. If the defendants finally succeed the sale will be made with the full assurance that the purchaser will receive a valid title. Even if the court entertained a doubt upon the main propositions involved it would still be its duty to maintain the present status until these important questions are finally answered after a trial upon the facts.

Whether the difficulty can be cured by remedial legislation it is not for this court to determine. Both counsel seem to agree that it can be and it is clear that an act providing for a just and equitable reassessment based upon benefits received could not be attacked upon the present lines. The right of the legislature to intervene seems to be recognized by the court of appeals in the Jones Case, and in the Norwood Case, Mr. Justice Harlan says, at page 293, 172 U. S., page 196, 19 Sup. Ct., and page 452, 43 L. Ed.:

"It should be observed that the decree [of the circuit court] did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for

so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property. * * * The decree does not prevent the village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion."

See, also, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682.

It follows that the demurrer and plea must be overruled, the defendant to answer within 20 days.

The motion for a preliminary injunction is granted, the complainant to give a bond in the usual form for an amount that will be fixed upon the settlement of the order.

LAFLIN et al. v. SHACKLEFORD et al.

(Circuit Court of Appeals, Fifth Circuit. December 5, 1899.)

No. 823.

1. PLEADING—AMENDMENT OF BILL OF PARTICULARS.

Under its general power to allow amendment of pleadings, a trial court may, in its discretion, permit the amendment of a bill of particulars attached to the declaration.

2. REVIEW ON APPEAL—RULINGS ON EVIDENCE.

An assignment of error based upon a ruling rejecting an offer of evidence which embraced the entire record and proceedings in a former suit, a large part of which was immaterial and irrelevant, does not raise the question of the admissibility of other portions. Such question could only be presented for review by offering those portions separately, and obtaining rulings thereon.

3. SAME—SUFFICIENCY OF BILL OF EXCEPTIONS.

To enable the circuit court of appeals to review a ruling rejecting evidence, the substance, at least, of the evidence excluded must be incorporated in the bill of exceptions, as is expressly required by rule 11 of the court for the Fifth circuit.

In Error to the Circuit Court of the United States for the Southern District of Florida.

W. H. Baker, for plaintiffs in error.

Edw. R. Gunby, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action on an account for services rendered as attorneys at law, brought by Thomas M. Shackelford and N. B. K. Pettingill, late partners as Shackelford & Pettingill, against Albert S. Laffin and John P. Laffin. Judgment was had for the plaintiffs in the court below for \$2,700, and the defendants bring the case to this court to reverse the judgment.

1. The first assignment of error is that the court erred in allowing the plaintiffs during the trial to amend the bill of particulars attached to the declaration by adding thereto an item "for legal services in the case of Laffin and Laffin against Mary A. Philbrick and others." The bill of particulars as first filed contained an item for a retainer in the suit, but none for a fee for legal services. The declaration, however, claimed \$3,058.25 for and as a reasonable re-

tainer, "and for the labor and professional services of the said plaintiffs." The bill of exceptions shows that the exception was taken to the ruling of the court that the said amendment should be allowed. The allowance of an amendment to the pleadings is discretionary with the court below. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426; *Bullitt Co. v. Washer*, 130 U. S. 142, 9 Sup. Ct. 499, 32 L. Ed. 885. The purpose of the bill of particulars is to amplify the declaration, and to inform the defendant substantially on what the plaintiff's action is founded. A bill which does this is good. *Canal Co. v. Knapp*, 9 Pet. 541, 9 L. Ed. 222. No good reason seems to exist why courts that have the authority to permit the declaration to be amended should not also have the power to allow an amendment to the bill of particulars. The question has been decided by the courts of last resort in many of the states, and the authority to allow such amendment has been uniformly sustained. 3 Enc. Pl. & Prac. (1895) p. 537, and cases there cited. In the case of *Canal Co. v. Knapp*, supra, the supreme court incidentally treats a bill of particulars as amendable. It was in the discretion of the lower court to permit the amendment of the bill of particulars. If the character of the amendment had surprised the defendants, so as to make it unjust to proceed with the trial, on proper application a continuance would have been allowed.

2. The second assignment of error is that the court erred in refusing to permit the defendants to introduce in evidence the record and the proceedings in the case of *Laflin and Laflin* against *Mary A. Philbrick* and others, and to read the same to the jury. On the trial the plaintiffs introduced evidence tending to prove that *Jefferson B. Browne* was the agent and attorney of the defendants, and resided at *Key West, Fla.*, and that at *Browne's* request the plaintiff *Pettingill* went to *Key West*, and was away from *Tampa*, his home, for about one week, during which time he was rendering professional services in the case of *Laflin and Laflin* against *Mary A. Philbrick* and others. While in *Key West*, upon information furnished him by *Browne*, he prepared and filed certain amendments to the original bill of complaint in the case. The testimony previously introduced by the plaintiffs showed that the bill of complaint in the case was prepared by *Browne*, and that, in the opinion of *Browne*, it had become necessary for him to accept the position of the receiver sought to be appointed by the bill. The plaintiffs had been employed to sign the bill as counselors and solicitors for the complainants, and had been paid therefor the sum of \$300. The plaintiffs' testimony tended to show that the sum of \$300 was in full of the claims for services rendered by signing the bill of complaint, having decree entered, injunction granted, and receiver appointed. This bill was filed in the state court, and *Browne* was appointed receiver. Afterwards the case was removed from the state court to the United States court. The plaintiffs further introduced evidence tending to show that the plaintiff *Pettingill* had interviews with the defendants in the city of *New York*, and that professional advice of a general character was given by him. The plaintiffs also introduced evidence tending to show the value of the services rendered by the plaintiffs

to the defendants by introducing as witnesses attorneys at law to testify as experts as to the value of the services rendered. The defendants afterwards, as a part of their testimony, offered in evidence the records and the proceedings in the case of Laffin and Laffin against Mary A. Philbrick and others, including in such records the amendments to the original bill of complaint in said cause prepared and filed by the plaintiff, Pettingill, consisting of about 50 pages, more or less, for the purpose of showing the work and services rendered, to the introduction of which the plaintiffs objected on the ground that the same was immaterial and irrelevant. The court sustained the objection, and ruled that the records and proceedings were not admissible in evidence. To this ruling the defendants excepted. It is true, as contended by the plaintiffs in error, that in an action for legal services the opinion of attorneys as to their value is not to preclude juries from exercising their own knowledge and ideas on the subject. Expert evidence is not the only evidence received in such cases. As in other actions, any material, relevant evidence is received. On all the evidence the case is decided, and the jury is not bound to accept the opinion of the expert witnesses as conclusive. *Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028; *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937. But the rules of procedure in actions where expert evidence is offered, and defendants seek to answer or rebut it, are the same as in ordinary cases. The assignment of error and the bill of exceptions in this case must be tried and construed as in other cases. We find that the defendants offered in evidence "the records and proceedings in the case of Laffin and Laffin against Philbrick and others." The offer is not alone of the 50 pages of amendments to the bill. It is not simply an offer of the record in the cause. The proposition is to read to the jury the whole file of papers, the record and proceedings in the cause, which includes all processes issued, and all papers, motions, and writs relating to the various steps taken by either party in the action. This is offered as a whole. No offer is made of the pleadings alone, the amendment alone, or of such papers from the file as would tend to show what professional services had been performed by the plaintiffs. The question as to the admissibility of these in evidence, or of either of them if offered separately, is not before the court for decision. The question for decision is, does it appear from the bill of exceptions that the court erred in excluding the evidence as offered? The well-established rule is that every presumption is in favor of the correctness of the ruling of the court below. The party complaining must make it appear that an error has been committed. To do this, he must separate relevant and material evidence from that which is irrelevant and immaterial, and offer only the former. If he offers both as a whole, the ruling of the court rejecting it all will not be reversed on appeal. This rule is well applied and expressed in *Wheeler v. Styles*, 28 Tex. 240, the court saying that if the party offered to introduce the whole record, "when but a small part of it was competent, and failed to point out to the court below the part that was competent, this court will not revise the ruling of the court below excluding the whole of the

record." See, also, *Warren v. Wagner*, 75 Ala. 188, 200. It should be noted, also, as a rule of general application, that, where the exception alleges error on the part of the trial court in the rejection of evidence, the substance, at least, of such excluded evidence should be incorporated in the bill of exceptions. This is necessary to enable the appellate court to see whether the evidence was material. In *Livingston v. Cooper*, 22 Fla. 292, is a clear expression of this general rule. Mr. Justice Van Valkenburgh, speaking for the court, said:

"It is a rule of law, well settled, that every presumption is in favor of the correctness of the ruling of the court below; and, in order to induce the appellate court to reverse such ruling, it must appear that an error has been committed. And, when a party fails to bring up the evidence upon which such ruling is based, this court will refuse to consider the exception."

In *Barwick v. Rackley*, 45 Ala. 215, the party had offered in evidence "all the records of said court pertaining to said settlement." No part of the evidence was in the bill of exceptions. The court said:

"The papers and records stated to have been introduced in evidence are merely mentioned by name. As the evidence is not set out in the bill of exceptions, we cannot know whether the probate court decided right or wrong. The rule in such cases is that the appellate court will presume the court below decided right, and affirm its judgment."

The same rule is established by the courts of last resort in many of the states. 3 Enc. Pl. & Prac. 427, § 8, and cases cited in note 2. Rule 11 of this court (31 C. C. A. cxlvi., 90 Fed. cxlvi.) provides that "when the error alleged is to the admission or the rejection of evidence, the assignment of errors shall quote the full substance of the evidence submitted or rejected." This rule cannot be complied with unless the bill of exceptions is in conformity with the practice as here stated. Rule 21 of the supreme court on this point is, in effect, the same as rule 11 of this court. In *Packet Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406, applying the twenty-first rule of that court, the supreme court said:

"A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that, if it had been admitted, it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that, when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions."

The judgment of the circuit court is affirmed.

ALDRICH v. SKINNER.

(Circuit Court, D. Washington, W. D. December 21, 1899.)

1. NATIONAL BANKS—ACTION TO ENFORCE ASSESSMENTS—LIMITATION.

No limit of time having been prescribed by the federal statutes within which an action must be brought to enforce an assessment against a stockholder in an insolvent national bank, such an action is governed, as to limitation, by the statute of the state where it is brought, by virtue of Rev. St. U. S. § 721.

2. SAME—NATURE OF STOCKHOLDERS' LIABILITY.

The liability of a stockholder in a national bank, who has made full payment for his stock, to pay assessments for the benefit of the bank's creditors, is not contractual, but is a conditional liability imposed by law as an incident to ownership of the stock.

3. SAME—LIMITATION OF ACTIONS AGAINST STOCKHOLDER—ACCRUAL OF CAUSE OF ACTION.

A cause of action to recover an assessment from a stockholder of an insolvent national bank does not accrue until the receiver is authorized by law to bring suit therefor, which is not until the assessment has been ordered by the comptroller, and the time fixed for its payment, before it shall become delinquent, has expired.

4. SAME—WASHINGTON STATUTE.

2 Ballinger's Ann. Codes & St. Wash. § 4800, subd. 3, prescribing the limitation of three years for actions "upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument," is applicable only to actions upon contracts, or growing out of contracts, and does not include an action against a stockholder of an insolvent national bank to recover an assessment, which is governed by section 4805, fixing two years as the general limitation for all actions not otherwise provided for.

Action by the receiver of an insolvent national bank for the collection of a shareholder's assessment, pursuant to Rev. St. U. S. § 5151. Heard upon a demurrer to affirmative allegations in the answer pleading the state statute of limitations as a bar to the action. Demurrer sustained.

P. Tillinghast and E. E. Cushman, for plaintiff.
Campbell & Powell, for defendant.

HANFORD, District Judge. The complaint alleges that the Tacoma National Bank, being insolvent, suspended payment and closed its doors on the 4th day of December, 1894, and a receiver was appointed, who qualified and took possession of the assets on the 27th day of December, 1894, and on the 30th day of January, 1899, the comptroller of the currency of the United States, by virtue of the authority vested in him by law, made a second assessment and requisition upon the shareholders of said bank, in order to provide necessary funds to pay the debts of the bank, which assessment upon each and every share of stock of said bank the comptroller ordered to be paid on or before the 1st day of March, 1899, and directed the receiver to take the necessary proceedings, by suit or otherwise, to enforce the individual liability of each shareholder to the extent of said assessment; and the complaint further alleges that at the time of the suspension of said bank the defendant was the owner of and holder of eight shares, and that she has not paid the assessment ordered by the comptroller of the currency against said shares. This action was commenced to collect the assessment upon the defendant's shares on the 20th day of September, 1899. The defendant's answer contains an affirmative defense in the nature of a plea in bar, alleging that the action was not commenced within the time limited for the commencement of such an action by the laws of the state of Washington. The statute of limitations of this state provides as follows:

"Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, * * *. Within three years, * * * 3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument; * * * An action for relief not herein before provided for shall be commenced within two years after the cause of action shall have accrued." 2 Ballinger's Ann. Codes & St. Wash. §§ 4796, 4800, 4805.

The plaintiff sues, in his official capacity, to enforce a liability created by an act of congress; and I regard it as a serious question whether any state law can create a barrier or limitation upon the right of the receiver to collect assessments at the time and in the manner specified in the directions given to him by the comptroller of the currency. It is contended on the part of the defendant that in all cases wherein congress has authorized actions, without specifying any other limitation of time, it is to be presumed that it was intended that the state statutes of limitations should be applicable thereto, by force of section 721, Rev. St. U. S., and this contention appears to be sustained by the reasoning in the opinion by Mr. Justice Brown in the case of *Campbell v. City of Haverhill*, 155 U. S. 610-620, 15 Sup. Ct. 217, 39 L. Ed. 240. I shall therefore assume that the state law must govern. I also agree with the defendant's counsel, and the authorities cited in their brief, on the proposition that the liability of a shareholder, who has made full payment for his stock, to pay assessments for the benefit of the bank's creditors, is not contractual, but is a contingent liability incident to ownership of stock, and created by the law. Therefore the case does not come within the terms of the third subdivision of section 4800, 2 Ballinger's Ann. Codes & St. Wash., which is applicable only to actions upon contracts or liabilities growing out of contracts, express or implied; and it is my opinion that the time within which such an action as this may be commenced in this state is limited by section 4805 to the period of two years after the cause of action shall have accrued.

To determine whether this action is barred by the section of the Code last referred to, it is only necessary to fix definitely the date when the cause of action accrued. The defendant contends that the liability became certain, and the cause of action accrued, at the time of suspension of the bank, or, if not then, at the time when the receiver qualified and took charge of the assets and business of the bank. This position appears to me to be untenable. A cause of action cannot be said to have accrued until it exists as a complete right, which some person, as the owner of such right, or as the representative of others, may enforce immediately by going into court and filing the necessary papers, upon which process may issue, to bring the adverse party within the jurisdiction of the court. It is not true that the statutory liability of shareholders of national banking associations becomes absolute in all cases immediately upon the suspension of the bank. A bank may suspend payment because it has no money on hand to meet the demands of its creditors, nor ability to immediately convert other assets into money; and yet if, when an accounting is had, there is found to be an abundance of assets which may within a reasonable time be converted into money,

so that all of the bank's indebtedness may be paid without an assessment upon shareholders, it would be wrong and unlawful to assess them. If, however, after such an accounting, with such a result, and before payment of the bank's indebtedness, valuable securities should be lost, destroyed, or shrink in value, so that the debts could not be paid in full without assessing shareholders, such a change in the conditions would render an assessment necessary. Considering the nature of the liability, and the purpose of the statute in creating it, it is obvious that it is essential to the right of a receiver of an insolvent national bank to sue the shareholders for assessments that the necessity for an assessment should first be ascertained by an accounting and appraisal of the assets, and the question as to the necessity for an assessment determined by competent authority. The law vests the authority in the comptroller of the currency, and until he orders an assessment the receiver of an insolvent national bank cannot take the first step towards compelling shareholders to pay assessments. In the case of *Kennedy v. Gibson*, 8 Wall. 498-507, 19 L. Ed. 476, the supreme court of the United States decided that:

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. * * * He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholder is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and, if put in issue, must be proved."

The act of the comptroller in ordering an assessment being indispensable as a precedent to the commencement of an action to enforce payment, the time limited for the commencement of such an action cannot commence to run until the assessment has been ordered. As this action was commenced in less than seven months after the assessment became delinquent, and therefore in less than seven months after the cause of action accrued, it is not barred by the statute of limitations. Demurrer sustained.

ALDRICH v. McCLAIN.

(Circuit Court, D. Washington, W. D. December 21, 1899.)

NATIONAL BANKS—ACTIONS TO ENFORCE ASSESSMENT—LIMITATION.

Under the statute of limitations of Washington (2 Ballinger's Ann. Codes & St. §§ 4796-4805), an action against a stockholder of an insolvent national bank to recover an assessment must be brought within two years after such assessment has been made by the comptroller, and has become delinquent.

Action by the receiver of an insolvent national bank for the collection of a shareholder's assessment, pursuant to Rev. St. U. S. § 5151. Heard upon a demurrer to the complaint. Demurrer sustained.

Hudson & Holt, for plaintiff.
T. O. Abbott, for defendant.

HANFORD, District Judge. This is an action to collect an assessment ordered by the comptroller of the currency upon 25 shares of stock of the First National Bank of South Bend owned and held by the defendant at the time of the failure of the bank. The action was commenced more than two years, but less than three years, after the date specified in the order of the comptroller, upon which the assessment became due and payable. Upon the authority of the decision of the supreme court in the case of *Campbell v. City of Haverhill*, 155 U. S. 610-620, 15 Sup. Ct. 217, 39 L. Ed. 240, I hold that actions based upon liabilities created by the laws of the United States, in the absence of any provision fixing a limitation of time for commencing actions thereon in the law which creates the liability, must be commenced within the time limited by the statutes of the state, or such local statutes will constitute a bar. I have just decided, in the case of *Aldrich v. Skinner* (C. C.) 98 Fed. 375, that the cause of action which a receiver of an insolvent national bank has for the collection of an unpaid assessment against a shareholder under section 5151, Rev. St., must be deemed to have accrued at the time when the receiver for the first time has a complete right to commence an action; that is to say, the next day after the assessment becomes delinquent. The third subdivision of section 4800, 2 Ballinger's Ann. Codes & St. Wash., makes three years the limitation of time for commencing "* * * an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." The word "liability" by itself is broad enough to comprehend a shareholder's contingent liability for the debts of a national bank, which the law imposes as an incident to ownership of bank stock; but as the word is associated in this subdivision of the statute with the words "contract," "express," "implied," and "written instrument," I consider that its meaning is restricted so that it stands only for a liability founded upon a contract, or arising out of the breach of a contract. Unless this is so, all actions to recover money, as damages or penalties, are comprehended in this subdivision, and yet it is plain that the legislature did not so intend; for the same section contains six other subdivisions, each specifying a different kind of action to enforce a liability, which must be commenced within the same period of three years. It is my opinion, therefore, that this case does not come within section 4800, fixing the three-years limitation, unless it is to be regarded as an action upon a contract. Furthermore, it seems to me that there is no contract, express or implied, or voluntary assumption of a liability on the part of the defendant, to pay this assessment. A contract must have parties. Two or more minds must meet so as to form an agreement. A promise to bind the promisor must be made to a promisee. A promise made to everybody lacks the element of mutuality essential to give it force as a binding obligation. Therefore I consider that the liability of a shareholder of a national bank to pay an amount equal to the par of his shares of stock is not contractual, but

is a conditional liability imposed by the law as an incident to ownership of bank stock. The right of creditors of an insolvent national bank to have the liability enforced for their benefit does not rest upon any actual or constructive promise made to them by any or all of the shareholders to assume liability. At the time of becoming creditors they may not, and usually do not, know who owns the stock; and yet they are entitled to have the liability enforced, if the assets and resources of the bank are not sufficient to meet their demands, because the liability arises by force of the statute, and is not contractual. *Bank v. Hawkins*, 24 C. C. A. 444, 79 Fed. 51. It is my conclusion that this case comes within the provisions of section 4805, 2 Ballinger's Ann. Codes & St. Wash., and is barred because not commenced within two years after the cause of action accrued. Demurrer sustained.

KELLY v. JUTTE & FOLEY CO.

(Circuit Court, E. D. Pennsylvania. December 21, 1899.)

MASTER AND SERVANT—INJURY OF SERVANT—FELLOW SERVANTS.

The fact that an employé of a corporation having a contract for the building of a bridge is made foreman over a number of the other men engaged in the work does not make him a vice principal or representative of the corporation as to such men, nor change his relation as a fellow servant, where he is himself under the direct orders of two superiors in the work.

This was an action by a servant against a master to recover for a personal injury. On motion by defendant for judgment non obstante veredicto.

E. Spencer Miller, for plaintiff.

Jos. H. Taulane and Richard P. White, for defendant.

MCPHERSON, District Judge. The decision of this motion depends upon the relation that Bennett sustained to the plaintiff. If the relation was that of a fellow servant, the plaintiff cannot recover. If it is that of vice principal, the verdict in his favor should stand.

The facts are undisputed, and I shall not repeat them. No doubt, there is some room for difference of opinion concerning the conclusion that ought to be drawn, but to my own mind it seems sufficiently plain that Bennett was a fellow servant. I think two reasons support this view: First. The enterprise itself—the building of a bridge over the Schuylkill river—was a single undertaking, not varied or extensive enough to admit of distinct departments, and therefore all persons employed upon it in a subordinate capacity were fellow servants. Second. Bennett's authority was so limited, he was himself so much under orders,—having at least two superiors in the particular work committed to his care,—that I cannot regard him as directly intrusted with the exercise of the corporate power of control and management. He was third in rank from the corporation,—a subordinate himself; and the fact that he was also the foreman of a gang of workmen, with a certain authority over

them, did not of itself make him the representative of their and his ultimate principal.

The plaintiff argues, also, that the verdict should be supported because the uncontradicted testimony shows that the defendant failed to supply the plaintiff with a safe place and a safe appliance; his contention being that, although the court instructed the jury otherwise at the trial, the instruction was erroneous, and that the verdict is therefore right, even if it rests upon a wrong foundation. I am unable to agree that the ruling was mistaken. I am still of opinion that the defendant fulfilled its duty to furnish a safe place and a safe appliance. If either became unsafe, it was because of Bennett's failure to inspect the derrick, or, perhaps, because of the rigger's failure to bolt the block fast, or of the engineer's negligence in starting the engine too soon. But, whoever may have caused the place or the appliance to become dangerous, he was a fellow servant; and, in the present state of the law, his negligence does not make the master liable.

Judgment will be entered for the defendant, notwithstanding the verdict.

WESTERN ASSUR. CO. OF TORONTO, CANADA, v. DECKER.

(Circuit Court of Appeals, Eighth Circuit. November 27, 1899.)

No. 1,209.

INSURANCE—CONSTRUCTION OF POLICY—PROVISION FOR APPRAISEMENT OF LOSS.

Under an insurance policy providing that in case of loss, and a disagreement as to the amount thereof, each party shall appoint an appraiser, and the two shall select an umpire, and appraise the loss, and that no action shall be maintained on the policy until after the insured shall have fully complied with such provision, the insured discharges his obligation in that regard when he appoints an appraiser in good faith; and where the appraisement falls through without his fault he is not required to propose the selection of other appraisers, but may resort to the courts to have his damages assessed.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Nebraska.

W. W. Morsman, for plaintiff in error.

J. H. Broady, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This was an action on a policy of fire insurance which contained the following provisions:

"Said ascertainment or estimate [of loss] shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided. In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers then, together, shall estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. The

parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expenses of the appraisal and umpire. No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 12 months next after the fire."

A special verdict of the jury found that there was a loss under the policy, and that the company and the insured were unable to agree on the amount of the loss, and that they each, acting in good faith, selected an appraiser as provided for in the policy. These appraisers, each acting in good faith, were unable to agree upon an umpire and were likewise unable to agree upon the amount of the loss, and finally abandoned all effort to agree on either. After it was definitely ascertained that the appraisers had abandoned all effort to agree, and would do nothing further in the premises, the company did not appoint another appraiser, or request the insured to do so, and the insured brought this suit on the policy, and recovered judgment, and the company sued out this writ of error.

The contention of the company is that, when the arbitrators failed to agree, it was the duty of the insured to propose a new selection of arbitrators, and that, not having done so, and not having appointed an arbitrator the second time, he cannot maintain this action. The terms of the policy are satisfied when the insured, acting in good faith, appoints an appraiser. If the appraisal falls through by disagreement of the appraisers without any fault of the insured, he has discharged his covenant, and satisfied the requirements of the policy, and may then resort to the courts to have his damages assessed. "If the appraisal failed without the fault of the insured, the failure would not be any impediment to their right of recovery if they could maintain their suit on other grounds." *Insurance Co. v. Traub (Md.)* 35 Atl. 13, 16. And the supreme court of North Carolina, in *Pretzfelder v. Insurance Co.*, 21 S. E. 302, say "that, where the arbitrators, or a majority of them, failed to agree upon an award, the plaintiff (unless he is shown to have acted in bad faith in selecting his arbitrator) is not compelled to submit to another arbitration and another delay, but may forthwith bring his action in the courts." One of the fundamental and essential constitutional rights of the citizen is the right to appeal to a court of justice for a redress of his grievances. One of the chief ends of government is to secure this right to the citizen. While some of the courts hold that the citizen may, by contract, bargain away this right, the agreement to do so will not be extended by construction or implication. Even if a second appointment of arbitrators was required by the terms of the policy, there is nothing in the policy, as contended by the defendant in error, which imposes on the insured the obligation to be the first to propose another selection of arbitrators and appoint a second arbitrator. The terms of the policy relating to the appointment of appraisers are that the loss shall "be ascertained by two competent and disinterested appraisers; the insured and this company each selecting one." There is not a line or a word in the policy making it the duty of the insured any more than of the company to demand an appraisal and appoint an appraiser. The policy in suit in

the case of *Kahnweiler v. Insurance Co.*, 14 C. C. A. 485, 67 Fed. 483, 32 U. S. App. 230, provided that, if the company and the assured were unable to agree upon the amount of the loss, "the same shall then be submitted to competent and impartial arbitrators, one to be selected by each party." In that case, as in this, the company contended that it was the duty of the insured to take the initiative, and demand an arbitration, and appoint an arbitrator. That case was exhaustively argued by able counsel, and, after a full consideration of the adjudged cases, this court said:

"Each party is entitled to demand a reference, but neither can compel it, and neither has the right to insist that the other shall first demand it, and shall forfeit any right by not doing so. If the company demands it, and the insured refuses to arbitrate, his right of action is suspended until he consents to an arbitration; and if the insured demands an arbitration, and the company refuses to accede to the demand, the insured may maintain a suit on the policy, notwithstanding the language of the twelfth section of the policy; and, where neither party demands an arbitration, both parties thereby waive it. The clause is to be construed the same as if it read, 'Upon the request of either party.' These words, or their equivalent, are commonly found in similar clauses in policies of fire insurance, and they are necessarily and plainly implied in this policy."

The judgment of the circuit court is affirmed.

SANBORN, Circuit Judge (dissenting). The contract of appraisal in this case is not an agreement to arbitrate all the rights of the parties, but the simple provision, usual in policies of fire insurance, that any difference arising between the parties as to the amount of loss or damage to the property insured shall be submitted to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of loss or damage only, and shall not determine the question of the liability of the company; and that, until 60 days after such an appraisal is made and such an award is obtained, the loss shall not be payable, and no action upon it shall lie against the company. Such an agreement presents no question of ousting the jurisdiction of the courts. It simply provides a convenient and reasonable method of ascertaining the amount of loss or damage without expense to the government or resort to the courts. It is a valid, legal contract, and it makes the appraisal and award a condition precedent to the payment of any loss, and to the maintenance of any action. *Hamilton v. Insurance Co.*, 136 U. S. 242, 255, 10 Sup. Ct. 945, 34 L. Ed. 419; *Scott v. Avery*, 5 H. L. Cas. 811, 823, 855; *Gasser v. Sun Fire Office*, 42 Minn. 315, 319, 44 N. W. 252; *Levine v. Insurance Co. (Minn.)* 68 N. W. 855, 860; *Chippewa Lumber Co. v. Phoenix Ins. Co.*, 80 Mich. 116, 44 N. W. 1055; *Zalesky v. Insurance Co.*, 102 Iowa, 613, 619, 71 N. W. 566, and cases there cited. There are two forms of this stipulation for appraisal,—one in which it is provided that there shall be an appraisal "upon the written request of either party," and under this form, if neither party seasonably demands an appraisal, both parties waive it, and an action can be maintained without it; and another, which provides, as in the case at bar, that in every case of disagreement as to the amount of loss or damage an appraisal and award must be made before any liability matures

and before any action can be maintained, and under this form of contract the appraisal and award is a condition precedent without any request from either party; the burden is on the insured to procure the award, and, until he either does so, or makes every reasonable endeavor to do so, nothing is due him under the policy, and he can maintain no action. This marked difference between policies in which the appraisal is to be made "upon the written request of either party" and those in which it is agreed that the appraisal must be made before any insurance will become due and before any action can be maintained seems plain upon its face, and it is well sustained and illustrated by the adjudications. Thus, in *Nurney v. Insurance Co.*, 63 Mich. 633, 30 N. W. 350, the appraisal was to be made "upon the written request of either party," and the supreme court of Michigan held that the request was optional with either party, and that, as neither party made it, an action could be maintained without an appraisal. But in *Chippewa Lumber Co. v. Phoenix Ins. Co.*, 80 Mich. 116, 44 N. W. 1055-1057, the stipulation for an appraisal omitted the words, "upon written request of either party," and simply made an appraisal a condition precedent to the maturity of the liability and to the maintenance of an action as in the case at bar. Neither party demanded an appraisal, and the supreme court of Michigan held that the burden was on the insured to procure the appraisal, and said:

"The policy in the present case provides that the amount of loss or damage shall be submitted to arbitration. The right to arbitrate is not made conditional upon the written request of either party."

In *Adams v. Insurance Co.*, 70 Cal. 198, 201, 11 Pac. 627, the facts were the same. Neither party had requested an appraisal, and the supreme court of California held that no suit could be maintained.

In *Thorndike v. Association* (Mass.) 16 N. E. 747, 748, no appraisal, or request for an appraisal, had been made under a stipulation that whichever party used a wall should pay to the party who built it the market value of the part used, "such market value, at the time of such use, to be ascertained by the appraisal of two or more competent builders." The supreme court of Massachusetts held that no action could be maintained until an appraisal was procured, or wrongfully prevented by the lessor. It said:

"Until an appraisal by builders, or until something done by the defendant to prevent or to avoid it, the defendant was in no such default as to entitle the plaintiff to maintain an action upon the agreement. The contract did not make it the duty of the defendant to go forward, and appoint appraisers of its own motion, independently of the plaintiff's concurrence, and without any request to that effect from him."

I am aware that this view is not in accord with that expressed in *Kahnweiler v. Insurance Co.*, cited in the opinion of the majority, but it seems to be reasonable, and to be well sustained by authority.

The exact question in this case, however, is whether an insured, who has done nothing under an absolute stipulation that an appraisal shall constitute a condition precedent to an action except to appoint an appraiser at the request of the insurer, can recover on the policy without an appraisal or award simply because

the two appraisers have failed to agree on an umpire. In *Hamilton v. Insurance Co.*, 136 U. S. 242, 255, 10 Sup. Ct. 945, 34 L. Ed. 419, Mr. Justice Gray, in delivering the opinion of the supreme court, declared this to be the rule which should govern this and all like cases:

"Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. *U. S. v. Robeson*, 9 Pet. 319, 327, 9 L. Ed. 142."

The contract in this case made an appraisal and award a condition precedent to the maturity of the liability of the insurance company and to the maintenance of this action. It cast the burden of procuring this appraisal upon the actor,—the insured,—because the company was not required to act or to pay until this appraisal was procured, and the insured had the option to procure it, or attempt to procure it, and to press his claim or to abandon it. Under the rule of the supreme court just cited, the insured was required to procure the appraisal and award, or to "show that he has done everything on his part which could be done" to obtain them, before he could maintain his action. In my opinion, the mere appointment of an appraiser who could not or would not agree with his associate upon an umpire, and whose disagreement necessarily prevented the appraisal and award, fell far short of a compliance with this rule. The insured might have revoked his appointment, and have appointed another appraiser. He might have caused his appraiser to propose a number of unexceptionable men as umpires, and to request the appraiser of the company to choose from them. He might have caused his appraiser to request his associate to propose such men, and permit him to choose. He might have requested the insurer to agree with him upon other appraisers. These are but the ordinary means to choose an umpire which would occur at once to every one who really sought to secure a choice, and I am unable to believe that, without resorting to any of them, or taking any action to procure the appraisal other than the appointment of an inactive appraiser, the insured has done all that he could do to bring about the appraisal and award. This view is not without the support of authority. *May, Ins.* § 496b; *Altman v. Altman*, 5 Daly, 436, 438, 439; *Davenport v. Insurance Co.*, 10 Daly, 535, 539; *Wolff v. Insurance Co.*, 50 N. J. Law, 453, 14 Atl. 561, 562; *Carroll v. Insurance Co.*, 72 Cal. 297, 302, 13 Pac. 863; *Hood v. Hartshorn*, 100 Mass. 117, 121; *Levine v. Insurance Co. (Minn.)* 68 N. W. 855, 860. *May*, in his work on Insurance, in section 496b, says:

"If the contract provides for arbitration, and the appraisers severally appointed by the company and the insured fail to agree on a third, this does not justify suit. The insured should propose a new selection of appraisers."

In *Altman v. Altman*, 5 Daly, 436, 439, arbitrators had been appointed, and failed to agree upon a third, under a stipulation for an appraisement, and Chief Justice Daly delivered the unanimous opin-

ion of the court, in which he announced the rule affirmed by the supreme court in *Hamilton v. Insurance Co.*, supra. He said:

"It does not follow that, because two arbitrators selected could not agree upon a third, that an arbitration was impossible. If they could not agree, it was for the plaintiff, before resorting to this action, to propose to the defendant the selection of two others in place of those who could not agree upon a third. * * * The arbitration and award is a condition precedent to the plaintiff's right of action, and he cannot maintain it unless he shows that he has done all in his power, and that it is on his part impossible to carry the arbitration into effect."

In *Davenport v. Insurance Co.*, 10 Daly, 535, 539, the contract was the same in effect as that in the case in hand. Two appraisers had been appointed, they had failed to agree upon a third, and the insured had then brought his action. The court held that it could not be maintained, and dismissed it. In the opinion, which was without dissent, the chief justice said:

"In the present case I do not think that the plaintiff has complied with the rule above referred to, which requires him to do everything in his power to have the agreement carried into effect, and the damage ascertained in the mode provided for in the contract. Having been notified by the appraiser selected by him of the failure of the two selected to agree upon a third as an umpire, it was his duty at least to propose to the defendants that they should select new appraisers, that the condition precedent might, in good faith, be complied with."

In *Wolff v. Insurance Co.*, 50 N. J. Law, 453, 14 Atl. 561, 562, the fact that two appraisers had been appointed under a stipulation of the policy similar to that under consideration, but had gone no further, and made no award, was held to be fatal to the action.

In *Carroll v. Insurance Co.*, 72 Cal. 297, 302, 13 Pac. 863, the supreme court of California held that a complaint on a policy containing a stipulation for an appraisal stated no cause of action, because it neither pleaded an award nor the fact that a fair award had been prevented by the fraudulent conduct of the insurer.

In *Hood v. Hartshorn*, 100 Mass. 117, 121, a case in which three arbitrators had been appointed, but had failed to agree, under a stipulation in a lease to the effect that the lessee should receive from the lessor the amount found by them to be the value of his improvements, the supreme judicial court of Massachusetts said:

"In the present case no appraisers are named, but each party is to act in their selection. If, then, one set of appraisers fail to agree, or if they act in such a manner as to render them obviously unfit to decide the matter, another appointment should be made; and a fair interpretation of the contract requires the lessee to use all reasonable efforts in his power in order to obtain suitable appraisers who will agree. He must continue to act till he puts the lessor in the wrong, or else makes it manifest that no suitable persons can be obtained to do the service within a reasonable time, which can hardly be supposed."

In *Levine v. Insurance Co.*, 68 N. W. 855, 860, Judge Mitchell, delivering the opinion of the supreme court of Minnesota, and speaking of the contract for an appraisal, under consideration here, said:

"The law also, undoubtedly, is that under such a provision, if an award is set aside for misconduct of the arbitrators, not participated in or caused by the insurer, the agreement for an appraisal still remains in force, and

a new appraisalment, unless it has become impossible, would still be a condition precedent to a right of action on the policy unless waived. *Hiscock v. Harris*, 80 N. Y. 402; *Carroll v. Insurance Co.*, 72 Cal. 297, 13 Pac. 863; *Hood v. Hartshorn*, 100 Mass. 117; *Thorndike v. Association* (Mass.) 16 N. E. 747; *Davenport v. Insurance Co.*, 10 Daly, 535."

If the misfeasance of the arbitrators which is not caused by the insurer leaves the appraisalment still a condition precedent to the maintenance of an action, why does not their nonfeasance?

These authorities and the reason of the case have convinced me that this action cannot be maintained without a violation of the express contract of the parties, and that the judgment below should be reversed: (1) Because the appraisalment was a condition precedent to the action, the burden was on the insured to procure it, and he neither did so, nor made any active, earnest effort to do so; and (2) because the failure of the appraisalment was not caused by any fault or default of the insurer, and hence there was no cause of action against it on that account, and there was none on the policy, because the insured had not procured the appraisalment, and had not been prevented from procuring it by any fraud or misconduct of the company.

CITY OF SANTA CRUZ V. WAITE.

(Circuit Court of Appeals, Ninth Circuit. December 4, 1899.)

No. 505.

1. MUNICIPAL BONDS—AUTHORITY TO ISSUE—REFUNDING BONDS.

A statute authorizing cities to refund their "outstanding indebtedness, evidenced by bonds and warrants thereof," gives a city no power to issue bonds for the purpose of paying bonds of a water company secured by mortgage on its property, which the city has since bought subject to the mortgage.

2. SAME—ESTOPPEL BY RECITALS.

Act Cal. March 1, 1893 (St. 1893, p. 59), authorizes the governing bodies of cities and towns, other than cities of the first class, having outstanding indebtedness evidenced by bonds and warrants, to submit to the electors the question of refunding such indebtedness, and provides that the notice of the election shall recite the indebtedness proposed to be refunded. Acting under such statute, the mayor and council of a city submitted the question of issuing bonds for the refunding of a certain indebtedness specified in the notice of election, a portion of which the city had no power, under the statute, to refund, and on a favorable vote the officers issued a series of bonds, which they sold on credit, and which were resold by the purchasers, who became insolvent, by reason of which the city received nothing from the issue. *Held*, that inasmuch as the city council could only act, in calling the election and prescribing the notice therefor, by order, resolution, or ordinance, which, by the statutes of the state, are required to be made matters of public record, the statute charged all purchasers of bonds issued thereunder with notice of the facts shown by such record in regard to the character of the indebtedness to refund which they were issued; and that the officers of the city, under the implied authority given them to issue the bonds on a favorable vote, had no power to make recitals therein which would relieve the purchasers from the effect of such notice, or estop the city from proving by such records the invalidity of the bonds.

3. JURISDICTION OF FEDERAL COURTS—ACTIONS ON MUNICIPAL BONDS.

The owner of municipal bonds, or coupons therefrom, containing a direct promise to pay, may maintain an action at law in a federal court to

recover judgment thereon, where the requisite jurisdictional facts appear, although, under the laws of the state, such bonds or coupons are payable only out of a special fund which the statute requires the officers of the defendant to create by the levy of taxes for that purpose; nor is the plaintiff required to show that they have performed their duty in that regard.

Gilbert, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of California.

John Garber and Carl E. Lindsay, for plaintiff in error.

Chickering, Thomas & Gregory, and Wm. Thomas, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The constitution of California provides for the classification of municipal corporations. The plaintiff in error (defendant in the court below) is, and was at all the times mentioned in the record, a municipal corporation of the fifth class, organized and existing under and by virtue of a statute of the state of California, approved March 31, 1866 (St. 1865-66, p. 547), entitled "An act to incorporate the town of Santa Cruz," and an act supplemental thereto, approved March 11, 1878, entitled "An act to reincorporate the city of Santa Cruz" (St. 1878, p. 189). The present is an action at law to recover the amount alleged to be due on 9 refunding bonds and 282 interest coupons attached to the same and to other refunding bonds, alleged to have been issued by the city of Santa Cruz on the 16th day of April, 1894, under and by virtue of an act of the state of California approved March 1, 1893, and entitled "An act to amend an act entitled 'An act to authorize the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' approved March 15, 1883" (St. 1893, p. 59). While the suit directly involves only the amount alleged to be due upon the bonds and coupons mentioned, it necessarily involves the validity of the entire issue under that act, consisting of 360 bonds of \$1,000 each, purporting to have been issued at the same time. It appears from the findings of the court below that on February 26, 1894, the city of Santa Cruz had an outstanding bonded indebtedness of \$271,000, or thereabouts, and was also the owner of certain waterworks, and necessary appurtenances thereto, including land, water rights, etc., theretofore purchased by it from the City Water Company of Santa Cruz, a private corporation. The waterworks and appurtenant property were subject to a mortgage, which had been placed thereon by the City Water Company of Santa Cruz for the purpose of securing an outstanding bonded indebtedness of that corporation in the sum of \$89,000 and interest thereon. On the said 26th day of February, 1894, the common council of the city, deeming it for the best interests of the city to refund its bonded indebtedness under the provisions of the act of March 1, 1893, adopted an ordinance, which was duly approved by the mayor, providing for a special election to be held in the city of

Santa Cruz on the 13th day of March, 1894, at which there should be submitted to its qualified electors the question of refunding the outstanding bonded indebtedness of the city. The indebtedness which it was thus proposed to refund was described in the ordinance as consisting not only of certain bonds of the city, amounting to the sum of \$271,000, but also "eighty-nine (89) first mortgage bonds (with interest thereon from November 1, 1893) of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (\$1,000) dollars each, and bearing interest at the rate of six (6) per cent. per annum, payable semiannually, and are secured by a mortgage or deed of trust upon the property known as the 'City Waterworks of Santa Cruz,' executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company of New York, as trustee, party of the second part therein; and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the City of Santa Cruz of the property known as the 'City Waterworks,' and now are, a valid lien and charge upon the said property known as the 'City Waterworks,' and became thereby a part of the bonded indebtedness of the city of Santa Cruz." More than two-thirds of the qualified electors of the city voted at the special election thus called in favor of the proposition to refund the then outstanding bonded indebtedness, as described in the ordinance, and thereafter, to wit, on March 26, 1894, the common council of the city passed, and its mayor approved, an ordinance for the purpose of carrying into effect the will of the electors as expressed at the election. This ordinance provided for the issuance of 360 interest-bearing bonds of the city of the denomination of \$1,000 each, and also directed that said bonds should be signed by the mayor and city clerk, and should contain the following recitals:

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city, and issuing bonds therefor, and providing for the payment of the same under, and in pursuance of, and in conformity with the provisions of an act of the legislature of the state of California, 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city of town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893, and in pursuance of and in conformity with the constitution of the state of California and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz voting at a special election duly and legally called and held and conducted in said city, as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been duly canvassed, found, and declared in the manner and as required by law; and it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened, and performed in legal and due form, and as required by law."

The ordinance further directed that such bonds should, after public notice inviting bids therefor, be sold to the highest bidder, for not

less than their face value, in United States gold coin, to be paid on delivery at the city treasurer's office in the city of Santa Cruz. The bonds were offered for sale, but there were no bidders for them; and on April 16, 1894, the date to which the common council of the city had regularly adjourned, there were present William T. Jeter, assuming to act as mayor, and J. Howard Bailey, F. J. Hoffman, E. G. Green, and F. W. Lucas, assuming to act as the common council, of the city. At this meeting, a proposition, theretofore made by the firm of Coffin & Stanton, to take all of the bonds, was accepted, upon condition that satisfactory security for its faithful performance by Coffin & Stanton be furnished. This proposition was dated February 27, 1894 (the day after the adoption of the ordinance calling the election), and was, in substance, one by which Coffin & Stanton were to purchase the refunding bonds at par value, less 3 per cent., without the payment of any money at the time of their delivery, or giving any other consideration therefor than their promise to take up the outstanding bonds which were to be refunded, and forward the same, "from time to time, to the city, for cancellation." On April 23, 1894, the said Jeter, assuming to act as mayor, and the said Bailey, Hoffman, Green, and Lucas, assuming to act as the common council, of the city, publicly met, pursuant to adjournment, and without protest from any one accepted and approved a bond presented by Coffin & Stanton for the faithful performance by them of the agreement contained in the proposition mentioned, and thereupon directed the city clerk of the city to deliver to that firm the entire issue of the refunding bonds referred to. The bonds were, in accordance with this direction, delivered to Walter Stanton, of the firm of Coffin & Stanton, on April 24, 1894, and thereafter Coffin & Stanton sold the same to various parties, from some of whom the plaintiff below (defendant in error here) claims title to the bonds and coupons sued on. The plaintiff is only the nominal owner of these bonds and coupons, the same having been assigned to him for the purpose of collection only. Coffin & Stanton never complied, in whole or in part, with the agreement under which the bonds were delivered to them, and the city of Santa Cruz never received any benefit whatever from their sale; the entire proceeds thereof having been appropriated by Coffin & Stanton, who are insolvent. The bonds are under the seal of the defendant city, contain the recitals set out, and are signed: "Wm. T. Jeter, Mayor of the City of Santa Cruz. Attest: O. J. Lincoln, City Clerk." They were so signed on the 16th day of April, 1894, on which day Jeter's successor to the office of mayor duly qualified.

The court below held—and rightly held—that the act of March 1, 1893, afforded no authority for the issuance by the city of Santa Cruz of any bonds for the purpose of refunding the indebtedness of the City Water Company, which was a private corporation. The court further held that, as the bonds issued by the city under that act for that purpose were in no way segregated from others of the same issue, the plaintiff could only be permitted to recover by sustaining his contention that he was a bona fide purchaser without notice of this infirmity in the bonds, and as such was protected by the recitals contained therein. This contention the court below sus-

tained, and accordingly gave judgment for the plaintiff. (C. C.) 89 Fed. 619.

The federal courts have always protected with a firm hand the rights of bona fide creditors of municipal corporations, uniformly holding that the bonds issued by such corporations under granted power, negotiable in form, are valid in the hands of a bona fide holder, notwithstanding irregularities in their issue, or even in the non-performance of prior conditions, where the determination of the facts of such performance are by the law left to the determination of the municipal officers, and they incorporate in the bonds which are put upon the market proper recitals of such performance. The obvious reason for this is that, where the law under which such securities are authorized to be issued commits to the municipal representatives the determination of the conditions precedent, and those representatives recite upon the face of the bonds such performance, common honesty demands that the municipality be estopped to deny the truth of the recitals as against the bona fide purchaser of the bonds. But it is equally well settled that where the power to issue such bonds did not exist, or where the law under which they are issued requires certain facts to be made a matter of record, open to the inspection of every one, there can be no implication that it was intended to leave such facts to be determined by the officers charged with the duty of issuing the bonds, and conclude by their recitals contrary to the facts so recorded. *Sutliff v. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360. It is, as a matter of course, not denied that every purchaser of a municipal bond is charged with notice of the law under and by virtue of which it is issued. In the present case that law is found in the statute of March 1, 1893 (St. 1893, p. 59), the first and second sections of which are as follows:

"Section 1. That whenever any incorporated city or town, other than cities of the first class, in this state, has an outstanding indebtedness, evidenced by bonds and warrants thereof, the common council, board of trustees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as 'serials,' one fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed one thousand dollars, nor less than one hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston, or Chicago. Interest upon the same shall not exceed six per cent. per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or other governing body, to the highest bidder, for not less than their face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one

fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.

"Sec. 2. Whenever sufficient money is in the funding fund, in the hands of the treasurer, to redeem one or more of the outstanding bonds proposed to be refunded, he shall publish once a week for two weeks in some newspaper of general circulation published in such city or town, if there be any, a notice to the effect that he is prepared to pay such bond or bonds (giving the number thereof), and if the same are not presented for redemption within thirty days after the first publication of such notice, the interest on such bonds will cease. He shall, at the same time, deposit in the post office a copy of such notice, inclosed in a sealed envelope with the postage paid thereon, addressed to the owner or owners of such bond or bonds at the post office address of such owner or owners, as shown by the record thereof kept in the treasurer's office. If such bond or bonds are not presented within the time specified in such notice, the interest thereon shall then cease, and the amount due be set aside for the payment of the same, whenever presented. All redemption of bonds shall be made according to the priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the treasurer shall proceed to cancel the same by indorsing on the face thereof the amount for which they are received, the word 'Cancelled,' and the date of cancellation. He shall also keep a record of such bonds so redeemed, and shall make a report of the same to the common council, or other governing body of such city or town, at least once a month, accompanying the same therewith by the bonds which have been taken up and cancelled."

It will be noticed that there is in this act no express grant of power on the part of the municipal authorities to issue any bonds. There is an implied power; but the implication is, not to issue bonds for any and all purposes, but refunding bonds, with which to take up the outstanding bonds and warrants of the city, provided a majority of the qualified electors of the city should so vote upon the submission of the question to them in the mode described by the act. Whether the then outstanding indebtedness of the city should be refunded or not was not left to the determination of the municipal authorities, but they were, by the statute, empowered to submit that question to a vote of the qualified electors of the city, specifying in the notice of election the indebtedness to be refunded, together with all details of the proposed issue. The power thus conferred on the mayor and council could only be exercised at a meeting of the municipal board. Such bodies can only act by order, ordinance, or resolution, as every one is bound to know. Wesson v. Saline Co., 20 C. C. A. 227, 73 Fed. 919; 15 Am. & Eng. Enc. Law, pp. 1028-1030, and cases there cited. In the present instance the action of the mayor and council was by ordinance, as appears from the findings of the court below. Such ordinance was a part of the public records of the city, which, by its charter, are required to be kept "in large, well bound, uniform, and suitable books." St. 1875-76, p. 203. The indebtedness of the city, thus evidenced by its outstanding bonds and warrants, and proposed to be refunded by the issuance of other bonds, the act of March 1, 1893, authorized the mayor and common council of the city to specify, together with the details of the proposed issue, and submit the question refunding the specified indebtedness, upon the designated terms, to the qualified electors of the city for determination. In the event the majority of the votes should be in favor of the proposition, then the municipal authorities were impliedly empowered to issue refund-

ing bonds therefor, but for no other purpose. The public record which the act of March 1, 1893, taken and read, as it must be, in connection with the charter of the city, required to be made by order, ordinance, or resolution, disclosed to all the world the specific indebtedness that it was proposed by the municipal authorities to refund, and in respect to which the qualified electors of the city were called upon to vote. The officers impliedly charged with the issue of such refunding bonds were not in any manner authorized to make any certificate or representation to prospective purchasers in respect to the character of the indebtedness evidenced by outstanding bonds or warrants of the city in lieu of which the refunding bonds were authorized to be issued. On the contrary, the statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness proposed to be refunded, together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued. The notice of election directed by this act to be prescribed by the mayor and common council of the city occupies substantially the same position that the resolution did in the case of *Lehman v. City of San Diego*, which was lately before this court, and is reported in 27 C. C. A. 668, 83 Fed. 669. The present case is, we think, clearly within the doctrine of that case and of *Sutliff v. Commissioners*, supra, and *Dixon Co. v. Field*, supra, and kindred cases, and must be ruled by them.

Entertaining these views, it is not necessary to decide any other point made and argued by counsel, except that as to the jurisdiction of the court. We have no doubt of the existence of jurisdiction. In support of the point made on behalf of the plaintiff in error against it, it is argued that the action is substantially a proceeding in the nature of an application for a writ of mandamus to compel the officers of the city to perform the duty of levying and collecting the necessary taxes for the payment of the bonds, which, without the issuance of such writ, and judgment in favor of the plaintiff, could not be enforced. The action is one at law upon certain bonds and coupons containing a promise on the part of the defendant to the suit "to pay to the bearer, for value received," so many dollars. The amount in controversy exceeds \$2,000, and the requisite diverse citizenship is alleged and found to exist. Conceding that under the constitution and laws of California the bonds and coupons sued on could only be paid out of the special fund provided for by the act under which they were issued, if the act and bonds be valid,—questions raised and contested in the suit,—no presumption can be indulged that there are no moneys in the fund provided for. On the contrary, if the act be valid, the presumption is the other way, to wit, that the taxes provided for were levied by the officers charged with the duty of levying them, and that the moneys so raised were in the fund. It was not, therefore, as argued by counsel for the plaintiff in error, necessary that the complaint should show the levy of such taxes, and the existence of moneys in the special fund. In such

cases, where the plaintiff recovers, and there are no moneys in the fund out of which an execution issued upon the judgment can be satisfied, and this because of the refusal of the proper officers to levy the taxes, the federal courts will issue a writ of mandamus in aid of its already acquired jurisdiction. This is quite distinct from an original proceeding for the issuance of a writ of mandamus, which it is well settled cannot be maintained in the federal courts. *Heine v. Commissioners*, 19 Wall. 655, 22 L. Ed. 223; *Bath Co. v. Amy*, 13 Wall. 244, 20 L. Ed. 539; *Board v. Aspinwall*, 24 How. 376, 16 L. Ed. 735; *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Riggs v. Johnson Co.*, 6 Wall. 166, 18 L. Ed. 768; *Walkley v. City of Muscatine*, 6 Wall. 481, 18 L. Ed. 930; *Board v. McMaster*, 15 C. C. A. 353, 68 Fed. 177; *Keene Five-Cent. Sav. Bank v. Lyon Co. (C. C.)* 90 Fed. 523; *Wilson v. Knox Co. (C. C.)* 43 Fed. 481; *Shepard v. Irrigation Dist. (C. C.)* 94 Fed. 1.

The judgment is reversed, and cause remanded to the court below, with directions to enter judgment for the defendant on the findings

GILBERT, Circuit Judge (dissenting). I am unable to agree with the majority of the court in holding that the city of Santa Cruz is not estopped to dispute the validity of its bonds. The outstanding indebtedness which, under the authority of the act of March 1, 1893, the city attempted to refund, comprised a bonded indebtedness of the city amounting to \$271,000, and a liability for \$89,000 upon the first mortgage bonds of the City Water Company of Santa Cruz, which had been issued by that company before the purchase of its property by the city, and the payment of which had been assumed by the city. The power to refund the city's own bonded indebtedness was clearly within the letter and the spirit of the act. The \$89,000 of the first mortgage bonds of the water company, while it represented an outstanding indebtedness of the city, for which it was liable, and for the payment of which it might have borrowed money under proper proceedings therefor, and the refunding of which was within the spirit of the provisions of the act, was, nevertheless, not evidenced by the city's "bonds and warrants," and was, therefore, not within the letter of the law. To that extent the proposed application of funds which were to be realized upon the sale of the refunding bonds was illegal. The case presented is not a case where, either by the constitution or by the statute of the state, the city lacked the power to refund its indebtedness. The invalidity of the refunding bonds resulted from the proposed misapplication of a portion of the proceeds thereof. The underlying principles which are involved must not be permitted to become obscured by reason of the fact that the city of Santa Cruz was, by its agents, defrauded of the proceeds of the refunding bonds, and never, in fact, received any portion thereof. The real question is whether a city, after procuring money on its bonds, which were issued for an unlawful purpose, but which the city certified were issued for a purpose which was lawful, and for which statutory authority existed, can deny its obligation as against an innocent purchaser. The case comes precisely within the principles announced in *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed.

363. In that case the city of Ottawa contended that its bonds were void for the reason that they had been issued for a loan which was not for a municipal purpose, but for a donation to a private corporation in no wise connected with, or under the control of, the city. In that case, as in this, the ordinances of the city disclosed the purpose for which it was proposed to borrow money upon the city's credit. The court said:

"The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation, by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is, therefore, estopped, by its own representations, to say, as against a bona fide holder of the bonds, that they were not issued or used for municipal or corporate purposes."

In the present case the opinion of the majority of the court seems to have been influenced by the fact that by the charter of the city of Santa Cruz a public record of its ordinances is required to be kept in books accessible to the public, and by the further fact that the city officers, who were impliedly authorized to issue the refunding bonds, were not expressly empowered to make any certificate or representation to prospective purchasers in respect to the character of the indebtedness for the payment of which the refunding bonds were issued. As far as the first consideration is concerned, it is sufficient to say that the charters of all municipal corporations require similar public records of their proceedings, and that such was undoubtedly the case with the city of Ottawa; yet in *Hackett v. Ottawa* the court deemed that fact immaterial to the question which was before it, held that a purchaser of bonds was not bound to inspect such records, and disposed of the case upon the general principles of estoppel applicable to all cases. Neither can any distinction between that case and the case at bar be predicated upon the fact that the act of March 1, 1893, under which the refunding bonds of the city of Santa Cruz were issued, conferred no express power upon the officers of the city to certify to any particular fact in connection with the proceedings on which the bonds were issued, or to make any recitals whatever upon the bonds. The proceedings were had under a statute that not only conferred authority to refund the bonded indebtedness, but imposed a duty upon the city to determine whether the occasion had arisen to refund, and, if so, to determine wherein the bonded indebtedness consisted, and the nature and amount thereof. Under this authority the city determined that the water company's bonds were a portion of its bonded debt, and, as such, subject to be refunded. The officers of the city of Santa Cruz who executed the refunding bonds were the officers whose duty it was

to issue them. Before doing so, they were obliged to determine for themselves that the antecedent steps had been taken which were indispensable to the issuance thereof, and they were empowered by an ordinance of the city to recite upon the bonds the facts usually recited upon such instruments,—the facts upon which the purchaser was authorized to proceed, and on which he might rely, as was done in the *Ottawa Case*. The bonds were executed under the seal of the city, and were signed by the mayor and the city clerk. These were the officers whose duty it was to sign such instruments. Said the court in *Town of Coloma v. Eaves*, 92 U. S. 484, 488, 23 L. Ed. 579:

“At some time or other it is to be ascertained whether the directions of the act have been followed, whether there was any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met.”

The bonds in question in the present case contain the recital that they were issued “for the purpose of refunding the bonded indebtedness of said city,” in pursuance of the act of March 1, 1893, “and in pursuance of, and in conformity with, the constitution of the state of California, and the ordinances of the city of Santa Cruz, and in pursuance of, and in conformity with, a vote of more than two-thirds of all the qualified electors of said city,” etc., and contained the certificate “that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened, and performed, in legal and due form, and as required by law.” Here is a distinct certificate that the bond was issued for the purpose of refunding the bonded indebtedness of the city. This recital was expressly authorized by an ordinance of the city before the bonds were issued. It was a representation of fact, and not of law. In that respect the case stands upon a ground entirely distinct from that which controlled decision in the cases which are relied upon by the majority of the court to sustain their conclusion in this case, viz. *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360, and *Sutliff v. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318, 37 L. Ed. 145. In those cases there was absence of statutory authority for the issuance of the bonds. In *Dixon Co. v. Field* it was ruled that under the constitution of Nebraska there must be authority of law by statute of the legislature for every issue of bonds in aid of a railroad or other internal improvement. In the absence of such statute, it was held that bonds were issued without warrant of law. The court said:

“All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law.”

In *Sutliff v. Commissioners* it was held that, where the constitution and the statute of a state forbid a county to issue bonds to an

amount such as will make its indebtedness exceed a certain proportion of the assessed valuation of its taxable property, and the statute provides that semiannual statements, showing the total amount of the county's debt, shall be published and entered upon the public records of the county, a purchaser of a bond issued in excess of the constitutional and statutory limit is charged with the duty of examining the record; and the county is not estopped by a recital in the bond that all the provisions of the statute have been complied with. In both cases the question was one of the preliminary authority to take the initial step towards the issuance of the bonds. The question of the existence of that authority was referable to the constitution and the statutes, and in the Sutliff Case to a public record, which the statute expressly required, and to which it directed attention. The fact is not overlooked that incidentally in the opinion in *Dixon Co. v. Field* it was said that:

"Where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals, and to make them conclusive."

What was meant by this language of the court is indicated by the decisions which are cited to sustain it. It was not meant that, before such recitals might bind the corporation, the statute must first in words have defined the powers of municipal officers to decide preliminary questions, and have recited the language of the representations which the bonds might contain. It was meant that, wherever it might be inferred from statutory authority that the officers whose duty it was to execute such instruments were to determine for themselves for their own guidance that the preliminary steps had been taken, or that the conditions of fact existed upon which they might proceed, and that they were to act thereupon, their recital of those facts should be conclusive. Thus, in *Marcy v. Township of Oswego*, 92 U. S. 638, 23 L. Ed. 748, cited by the court in *Dixon Co. v. Field*, it was said that:

"Where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the bona fide holder of the bonds against the municipality; and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive."

Of similar import are the remarks of Mr. Justice Bradley, speaking for the court, in *County of Warren v. Marcy*, 97 U. S. 104, 24 L. Ed. 977, and the decision of the court in *Oregon v. Jennings*, 119 U. S. 74, 92, 7 Sup. Ct. 124, 30 L. Ed. 323, in which it was held that by virtue of the statutory authority to the supervisor and the clerk of the town to sign the bonds it was implied that they were the persons intrusted with the duty to decide, before issuing the bonds, whether the conditions determined at the election existed. The ruling in *Hackett v. Ottawa* has not been modified by any subsequent decision of the supreme court. It was expressly approved in *Ottawa v. Bank*, 105 U. S. 342, 26 L. Ed. 1127, where it was held that the purchaser of bonds was relieved from the duty of taking notice of

the provisions of ordinances whose titles were recited in the bonds "by reason of the representation upon the face of the bonds that the ordinances provided for a loan for municipal purposes." It was impliedly approved in *Sherman Co. v. Simons*, 109 U. S. 737, 3 Sup. Ct. 502, 27 L. Ed. 1093, and in *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760. In the latter case the bonds contained the recital that they were issued by virtue of a certain designated act of the legislature, "as well as by virtue of a resolution of the city council ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription." The court said:

"As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value, having no notice of the nonperformance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them, they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature."

In the United States circuit court of appeals the same doctrine has been applied. In *Risley v. Village of Howell*, 12 C. C. A. 218, 64 Fed. 453, the question arose whether a bona fide purchaser of bonds was chargeable with notice, and defeated in his right to recover, by the fact that an ordinance referred to in the bonds, and mentioned as an ordinance of a certain date, misappropriated the bonds to an unlawful use. The court held that, inasmuch as the common council had authority to issue bonds of the nature of those which were involved in the suit, the defendant was estopped from setting up the fraudulent conduct of its own officials in misapplying the proceeds thereof. In *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272, the bonds in the controversy recite that they were issued for the purpose of refunding the "bonds, warrants, or floating debt" of the city. It was held that the corporation was estopped from defending an action by an innocent purchaser on the ground that the warrants or bonds which they were issued to satisfy were void, or that the debt which they were issued to pay was fictitious. In *City of South St. Paul v. Lamprecht Bros. Co.*, 31 C. C. A. 585, 88 Fed. 449, it was held that the issuance of bonds containing the recital that they were "authorized by" a certain act of the legislature estops a municipality from tendering proof that they were issued in the construction of a bridge, a portion of which was outside the corporate limits.

In *Jasper Co. v. Ballou*, 103 U. S. 752, 26 L. Ed. 422, it was said:

"There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law' for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended."

In the case at bar the city of Santa Cruz, by its ordinance adopted at the institution of the proceedings on which the bonds were issued,

by the election notice which was issued and published, by the vote of its citizens at such election, and by the recitals which its bonds contained, declared that the outstanding obligation of the city which was evidenced by the water bonds, which it had assumed to pay, was a portion of the city's bonded indebtedness, which it might refund under the act. Through all the transactions culminating in the delivery of the bonds it is clear that the officers of the city acted in the utmost good faith. There was no fraud, misrepresentation, or concealment. They honestly believed the refunding of the bonds of the water company to be within the purview of the statute, and, if they had ever received the proceeds of the refunding bonds, they would doubtless have applied them to the discharge of that obligation. I submit that the city is estopped to deny its liability, and that the judgment of the circuit court should be affirmed.

IN RE RHOADS.

(District Court, W. D. Pennsylvania. December 18, 1899.)

No. 81.

1. BANKRUPTCY—DISSOLUTION OF LIENS—VOLUNTARY AND INVOLUNTARY CASES.

Bankr. Act 1898, § 67f, providing that liens obtained through legal proceedings against an insolvent debtor "at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," is to be interpreted as applying to voluntary as well as involuntary cases, such a construction being in accordance with the general purpose and policy of the act; and especially in view of the fact that section 1, cl. 1, declares that "a person against whom a petition has been filed" shall include a person who has filed a voluntary petition."

2. SAME—CONSTRUCTION OF STATUTE—CONFLICTING CLAUSES.

As between the two subdivisions, "c" and "f," of section 67 of the bankruptcy act, relating to the effect of an adjudication of bankruptcy upon existing liens upon the property of the bankrupt acquired through legal proceedings within four months prior to the filing of the petition in bankruptcy, the former must give way in all cases of contradiction or irreconcilable conflict between them, and subdivision "f" must prevail, as being the later expression of the legislative will.

3. SAME—DATE OF LIEN.

Where a creditor holding a note with warrant of attorney enters judgment thereon, and levies on the debtor's property, the latter being then insolvent, and within four months thereafter the debtor files his voluntary petition in bankruptcy, the lien acquired by such levy is dissolved by the adjudication in bankruptcy, notwithstanding the fact that the note was given more than four months before, and at a time when the maker was solvent, and even before the enactment of the bankruptcy law.

4. SAME—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

Bankr. Act 1898, § 67f, providing that an adjudication of bankruptcy shall dissolve liens obtained through legal proceedings against an insolvent debtor within four months prior to the filing of the petition in bankruptcy, though it applies to proceedings on debts contracted before the passage of the law, does not impair the obligation of existing contracts, since it affects only the remedy on the contract, not the contract itself.

In Bankruptcy. On review of questions certified by W. R. Blair, referee in bankruptcy.

W. W. Wishert, for lien creditor.

Chandler, McGill & Cunningham, for trustee in bankruptcy.

John S. Lambie, for unsecured creditors.

BUFFINGTON, District Judge. This certificate raises the question of the validity of an execution lien claimed by one Baum against the proceeds of the personal property of Rhoads, the bankrupt. The facts of the case are: On March 16, 1898, Rhoads borrowed from Baum \$1,000, and gave him a note at one day, containing a warrant of attorney to confess judgment. On November 20, 1898, one Jamison entered a judgment against Rhoads in the state court, and issued execution thereon. By virtue of such execution the sheriff levied on the goods in Rhoads' store, and closed it. Baum learned what Jamison had done, and on November 23, 1898, had judgment entered on the note given to him by Rhoads, issued execution, and placed his writ in the sheriff's hands. By virtue thereof, under the Pennsylvania practice (1 Troub. & H. Prac. par. 1063), he then, and then only, acquired a lien on Rhoads' personal property. On November 28, 1898, the latter filed a petition in bankruptcy, and on December 20, 1898, was duly adjudged bankrupt. A receiver was appointed by the court, who took possession of the personalty so levied upon, subject to such lien as this court should thereafter determine the execution creditors had, sold the property, and realized a fund sufficient to pay Baum's execution, if the lien thereof be held valid. On distribution the referee held the lien was void, and, at request of Baum, has certified the question for the opinion of the court.

Baum's lien was not obtained until November 28, 1898, five days before the petition was filed, and Rhoads was insolvent when it was so obtained. Under section 67, cl. "f," of the bankrupt act, which provides "that all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same," Baum's lien is void, unless the clause does not apply to voluntary cases, or its provisions are modified by some other section. After careful examination of the act and the conflicting decisions thereon, we are of opinion this clause covers both voluntary and involuntary cases. This conclusion is warranted both by legislative definition and by the clearly expressed general purpose of the act. Analysis of its provisions shows that its aim is to avoid preferences created after a debtor is insolvent, and enforce an equal distribution of the insolvent estate among creditors. Acts of an insolvent at variance with such object are by the law made acts of bankruptcy, and warrant the court taking possession of the estate of such insolvent and distributing it on the principle of equality the debtor has sought to defeat by preference of particular creditors. Thus, section 3, cl. "a," provides:

"Acts of bankruptcy by a person shall consist of his having * * * transferred, while insolvent, any portion of his property to one or more of his

creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final distribution of any property affected by such preference vacated or discharged such preference."

Moreover, section 60a, defining preferred creditors, viz.: "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class,"—shows that equality among creditors of the same class is the prime object of the law. If it be conceded, as we think it must be, that such is the case, how can this purpose be more effectually thwarted than by putting it in the power of the bankrupt to make or unmake preferences at will? If this clause only applies to involuntary cases, then an insolvent, by filing a voluntary petition, removes from the ban of this provision certain preferences, which, by allowing his creditors to file a petition against him, he can thereby subject to such provision, and so avoid. A construction so hostile to the general intent of the act, we could only accept under stress of language permitting no other. It will be noted that in the section defining preferences there is an absence of express provision or implication that such preference shall either be created or affected by the voluntary or involuntary character of the subsequent petition. Moreover, the indifferent character, so to speak, of petitions, in that regard, is shown by the first provision of the bill (section 1, cl. "1"); and when congress has declared that the term "a person against whom a petition has been filed" shall include a person who has filed a voluntary petition," is a court not alone warranted, but impliedly bound, to follow the spirit of such construction, when substantially the same language, viz. "the filing of a petition in bankruptcy against him," is used in clause "f"? To do otherwise is to sacrifice clear legislative intent to mere literalism.

But it is said such construction renders clause "c," § 67, of no effect. Suppose such be the fact. While it is the duty of courts to so construe a statute as to give every part effect, yet cases will arise where irreconcilable provisions exist, and courts are powerless to harmonize them. Such is the case in hand. It is quite clear either that clause "c" was inadvertently left in the bill after clause "f" was added, or that congress intended the act should be strengthened by the broader and more drastic provisions of the latter clause. Whether they are contradictory in every respect, it is not here necessary to decide. In some they are. Clause "c" provides that liens of a certain character shall be void, under certain specified conditions, while clause "f," in effect, provides that all the liens embraced by clause "c" shall be void, without reference to any conditions, save insolvency of the debtor, and their being obtained within four months. Where there is conflict, which clause shall prevail? In the case of *Attorney General v. Chelsea Waterworks Co.*, Fitzg. 195, followed in *Townsend v. Brown*, 24 N. J. Law, 88, it was held that, where the proviso

of an act of parliament is directly repugnant to the purview, the proviso shall stand, and be a repeal of the purview, as it speaks the last intention of the lawmaker; and in Puffendorf's Rules (page 152, Potter, Dwar. St.), it is laid down that:

"When we meet with a seeming repugnancy in the terms, conjectures are necessary to work out the genuine sense, by reconciling it, if possible, to those terms that seem to be repugnant. But if there be a clear, evident repugnancy, the latter vacates the former. This rule applies to the making of laws, rules, and contracts."

Now, clause "f" is not only the latest expression of the legislative will, but it is also in harmony with the general purpose of the act to avoid preferences obtained after insolvency, and an express inhibition against, and a declaration of the unlawful character of, liens which clause "c," if it sustains, does so only by implication, and not by express provision. We are therefore of opinion clause "f" must, where there is conflict, prevail, and that it is the law governing liens obtained within four months prior to the filing of the petition, through legal proceedings against an insolvent debtor. The views here expressed are supported by *In re Richards* (C. C. A.) 96 Fed. 937, and (D. C.) 95 Fed. 258; *Manufacturing Co. v. Mitchell*, 1 Am. Bankr. Rep. 701; *In re Moyer* (D. C.) 93 Fed. 188; *In re Francis-Valentine Co.*, Id. 953. This clause being applicable to the present case, its terms are plain. By it, the test of the validity of Baum's execution lien was the insolvency of the debtor when it was obtained. That the note was given more than four months prior to the petition in bankruptcy, and the maker was then solvent, are immaterial, under this clause. Nor does the fact that it was given prior to the passage of the bankrupt law relieve the lien obtained after the passage of the act from the effects of its provisions. The act does not impair the obligation of existing contracts, and hence is not open to constitutional objection on that ground, but simply affects the remedy to enforce such contracts. "The difference between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529.

The bankrupt act of 1867 differed widely from the present one in regard to preferences. Thus, in *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568, it is said:

"To bring the case of a judgment and execution or attachment within the thirty-fifth section of the bankrupt act, several things must concur: (1) The debtor must have procured the judgment, and attachment of his property. (2) He must have procured them within four months next prior to the filing of the petition in bankruptcy by or against him. (3) He must have been insolvent, or contemplating insolvency, at the time, and he must have procured the judgment and execution with a view to give a preference to the judgment creditor. (4) The creditor must have had a reasonable cause to believe that the debtor was insolvent, and that the judgment and execution were given in fraud of the provisions of the bankrupt act."

But the present act contains more stringent provisions. By clause "f," congress has made facts, not intentions, the test of execution lien validity. These facts are the date of the lien, and the then in-

solvency of the debtor. The language is clear, and, though its enforcement invalidates liens which we have through our professional careers enforced and regarded as matters of course, if not, indeed, of right, yet we must recognize the fact that congress, in the exercise of express constitutional warrant, has now said that all such execution liens, when obtained against an insolvent debtor within four months of bankruptcy, are invalid. The plain language of the act the referee has held to mean what it says, and rightly so; for there is no safer canon of statute interpretation than that, where the terms of a statute are plain, there is no room for a construction which makes them obscure.

In re KINDT.

(District Court, S. D. Iowa, E. D. January 18, 1900.)

BANKRUPTCY—VERIFICATION OF PETITION BEFORE BANKRUPT'S ATTORNEY.

An adjudication in voluntary bankruptcy will not be set aside on the ground that the notary public who took the verification of the petition and schedule was the bankrupt's own attorney, when it is not shown that he was attorney of record for the bankrupt in any litigation then pending in the court, although he subsequently appeared as attorney of record for the bankrupt in the bankruptcy proceedings.

In Bankruptcy. On review of ruling of referee in bankruptcy.

Ely & Bush, for bankrupt.

Isaac Petersberger and Charles H. Hubbell, for contesting creditors.

SHIRAS, District Judge. From the certificate of the referee it appears that the petition for adjudication and the accompanying schedules were sworn to by the bankrupt before N. D. Ely, a notary public in and for Scott county, Iowa; and, the adjudication in bankruptcy having been entered, one W. W. Humphrey, a creditor of the bankrupt, appeared in the proceedings and moved to set aside the adjudication on the ground that the notary before whom the affidavits to the petition and schedules were taken was a member of the law firm of Ely & Bush, which firm appeared as the attorneys of record for the bankrupt. The referee refused to set aside the adjudication of bankruptcy entered in the case, holding the objection urged to be not well taken, and thereupon the objecting creditor has brought the question before this court for review.

In the strict equity practice the general rule seems to be that affidavits taken before an attorney of record will be deemed to be defective, but this rule, in the majority of the cases, is held to apply only to attorneys of record; that is, to persons who at the time the affidavit was taken before them then appeared as attorney of record for the litigant in whose interest the affidavit is offered. In the present case it does not appear that when the affidavit to the petition and schedules was taken there were pending in the court any proceedings in which Ely & Bush appeared as attorneys of record for the bankrupt, and as is stated in 1 Enc. Pl. & Prac. 331, note:

"The rule, however, applies only to affidavits made before an attorney in a suit pending, and not to those preparatory to the commencement of one. *Vary v. Godfrey*, 6 Cow. 587; *Willard v. Judd*, 15 Johns. 531; *Hallenback v. Whitaker*, 17 Johns. 2. * * *

As I gather the facts from the record certified up, the affidavit to which exception is taken was one which was made to the papers preparatory to the initiation of the proceedings in bankruptcy, and at that time N. D. Ely, the notary, was not an attorney of record for the bankrupt, and he could therefore rightfully administer the oath and certify thereto; and the fact that subsequently he became an attorney of record for the bankrupt would not invalidate his previous action as a notary. The ruling of the referee is affirmed.

In re WEBB.

(District Court, N. D. New York. December 18, 1899.)

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—FALSE OATH.

Where a bankrupt, two years before the filing of his petition, transferred certain property to a creditor, to whom it had been pledged as security for a debt of equal or greater amount, his omission of such property from his schedule of assets does not make his verification of the schedule a "false oath in a proceeding in bankruptcy," such as to forfeit his right to a discharge.

2. SAME—PROPERTY TRANSFERRED BEFORE PASSAGE OF BANKRUPTCY LAW.

A bankrupt's application for discharge cannot be refused on the ground of his having concealed property from his trustee, or sworn falsely to his schedule of assets from which such property was omitted, where it appears that he transferred or disposed of the property before the enactment of the bankruptcy law, although such transfer, if made after the passage of the law, would have been voidable as a preference, or as a fraudulent conveyance.

In Bankruptcy. On motion to confirm the report of the referee recommending a discharge and on exceptions to said report.

Isaac S. Signor, for bankrupt.

John T. Murray, for opposing creditor.

COXE, District Judge. The issues presented have been carefully examined by the referee. His report will be found in 2 Nat. Bankr. N. No. 1, p. 11. The bankrupt is charged with having made a false oath in verifying his schedules with certain property, which, it is alleged, he owned in Iowa, omitted. The referee finds that two years prior to the filing of the petition herein the bankrupt transferred this property to a creditor to whom it was pledged as security for a debt of equal or greater amount and that at the time the schedules were verified the bankrupt had no interest therein. This finding is sustained by the proof. The main accusation against the bankrupt is based upon the alleged fact that he was guilty of a fraudulent disposition of his property with intent to prefer creditors in the year 1896, two years before the passage of the bankruptcy act. It is also argued that in swearing to schedules with the property so transferred omitted he was guilty of taking a false oath. A bank-

rupt is entitled to a discharge unless he has committed one of the offenses punishable by imprisonment, as provided in section 29 of the act, or unless he has, with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account. Section 14. So far as this controversy is concerned the bankrupt is entitled to a discharge unless he has fraudulently concealed, while a bankrupt, from his trustee, property belonging to his estate, or made a false oath in regard to his property. These acts are made offenses by section 29. The property in question was taken upon judgments obtained by two creditors August 21, 1896. The bankrupt's title was extinguished by the sale and no one has ever attacked the transfer in a legal proceeding. It is difficult to perceive what interest the trustee in this matter has in this property. Even though it be conceded that the transfer, if made after July 1, 1898, was fraudulent, it certainly cannot be maintained that the bankrupt, by his conduct in 1896, committed an offense under a law passed two years afterwards. One cannot be convicted of a statutory crime for acts done before the statute creating the crime was passed. Under the act of 1867 the question was often presented and decided in favor of the proposition that no act of the bankrupt committed prior to the passage of the bankruptcy law could bar his discharge.

In *Re Moore*, Fed. Cas. No. 9,751, the court said:

"It must be remembered that this transaction took place in 1863, prior to the passage of the bankrupt act, and although I am well satisfied that the bankrupt at the time of his giving this mortgage was well aware of his insolvency and intended to secure and prefer the debt to Storer, and place his estate beyond the reach of his creditors, acts which are now prohibited by the bankrupt act and which would deprive him of his discharge, if committed subsequently to the passage of this act, yet it is quite clear that the bankrupt law cannot be made to have a retroactive effect and punish a party by refusing him a discharge for acts committed by him prior to the passage of the law. A fraudulent preference or transfer of the debtor's property, by the act, is made an offense for which the punishment prescribed by the act, is a failure to obtain his discharge. To thus punish a party the offense for which the punishment is invoked must have been committed since the passage of and in violation of the law then in force. * * * Neither a fraudulent conveyance made, nor a fraudulent preference given before the passage of the bankrupt act, is good ground upon which to oppose a discharge; and a specification alleging such a conveyance or preference should be stricken out on motion."

In addition to the authorities cited by the referee a number of cases bearing upon this question will be found in *Re Lieber*, reported in the same volume of the *Bankruptcy News* as the case at bar, at page 21. The subject is so fully treated in the report of the referee that further discussion is unnecessary. The report is confirmed and the discharge is granted.

In re SHERIDAN et al.

(District Court, E. D. Pennsylvania. December 16, 1899.)

No. 66.

BANKRUPTCY—PREFERENCES—PLEDGE OF PERSONALTY.

An agreement to pledge personal property as security for a debt is not executed where the goods are not delivered to the creditor, nor set apart and treated as his property; and, where the creditor takes possession of the property a few days before the filing of a petition in bankruptcy against the debtor, the transaction is voidable as a preference, notwithstanding that the original agreement was made more than four months before that time.

In Bankruptcy. The referee in bankruptcy found that a pledge of personal property by the bankrupt to one of his creditors was an unlawful preference under the bankruptcy act, and made an order requiring the creditor, who had sold the goods pledged, to pay over the proceeds to the trustee in bankruptcy. The case is now before the court on the creditor's exceptions to such decision of the referee.

John K. Kane, for exceptant.

Greenwald & Mayer and Charles Biddle, for certain creditors.

McPHERSON, District Judge. The exceptant relies on *Ex parte Potts*, Fed. Cas. No. 11,344, but an examination of that case will show that the decision was upon a different state of facts. One question there was whether a pledge actually made was fraudulent; and it appeared that the alleged bankrupts, when they were admittedly solvent, had assigned to a creditor, as collateral security for advances, several policies of insurance and bills of lading upon a vessel and cargo then at sea. Under such circumstances, it was correctly held that the transfer was not in fraud of creditors. The assignment of the policies was a completed transfer of the debtor's interest in those instruments, and the assignment of the bills of lading transferred the title to the property therein described, without any further act. As to almost all the property then under consideration, therefore, the transaction had been fully executed. One policy or one bill of lading was apparently not transferred until May, when the alleged bankrupts had become "involved" (there was no averment of insolvency in the petition); but as the last advance by the creditor had been made in March, in pursuance of an agreement made in February, the court was clearly right in holding that no part of the transaction was fraudulent. No question of preference arose, whereas here the question is one of preference simply. The goods here were never actually pledged until the exceptant, for the first time, took them into his possession a few days before the petition was filed. Before that time there was a mere agreement to pledge. The goods were never delivered to the exceptant, nor (assuming, for present purposes, that this would have been good against the other creditors) were they even set apart and continuously treated as his property. Under the facts proved, the pledge was not completed until the date of removal. *Lucketts v. Townsend*, 49 Am. Dec. 730, note. This being so, the exceptant's title attached upon

that date, and the transfer created a preference in violation of the act.

The exceptions to the finding of the referee are overruled, and his order directing the exceptant to pay to the trustee the money received from the sale of the goods in question is approved.

In re BECKER.

(District Court, E. D. Pennsylvania. December 16, 1899.)

No. 250.

1. BANKRUPTCY—ASSETS—LIQUOR LICENSE.

Where the laws of the state permit the transfer of a license for the sale of intoxicating liquor, subject to the approval of the buyer by the licensing authority, and such licenses have an actual money value for the purpose of sale and transfer, the right to sell a license of this kind will vest in the trustee in bankruptcy of the licensee, for the benefit of the estate, and the bankrupt will be required to execute the instruments necessary to effectuate the sale.

2. SAME—RECEIVER—SALE OF PROPERTY.

A receiver, appointed by a court of bankruptcy to take charge of the property of a bankrupt pending the election and qualification of a trustee, may be ordered to sell the property, or any part of it, when such a course is necessary for the preservation of its value, or a sale so made by him may be confirmed by the court.

In Bankruptcy. On exceptions to decision and order of referee in bankruptcy.

David Wessels, for bankrupt.

Greenwald & Mayer, for receiver.

MCPHERSON, District Judge. Whatever may be the accurate description of a license to sell intoxicating liquor in Pennsylvania,—whether it be a personal privilege, merely, or a personal privilege and something more,—this much, at least, is certain: it has a money value, varying in different places, and for different reasons. The statutes of the state permit a license to be transferred, subject to the approval of the court of quarter sessions; and I regard it, therefore, as so far property, “which prior to the filing of the petition [a bankrupt] could by any means have transferred,” that the right to sell it (I do not say the right to exercise it) will pass to the trustee. No doubt, there is a clearly visible distinction between a right to property and a mere personal privilege; but I see no abstract reason why some personal privileges may not also come to have qualities belonging usually to property rights alone,—such, for example, as capacity to be transferred, and sufficient attractiveness to make other persons willing to pay money for the opportunity to acquire them. Where, as in the case of a license to sell liquor, these qualities are found to exist in fact, it seems to me that the privilege has ceased to be a privilege merely, and has become, in some sense and in some degree, property also. It can hardly be correct to hold that a bankrupt’s creditors may not avail themselves of the fact that money can be had for the chance of stepping into the licensee’s place,

but that the bankrupt himself may make the same bargain, and put the money safely into his pocket. The license court may or may not accept the buyer as the bankrupt's successor. That is the buyer's affair, and is not decisive upon the point now being considered. He buys a contingency, and buys it with his eyes open; but, in my opinion, the trustee has the contingency to sell, and the bankrupt is bound to execute the instruments necessary to carry out the sale.

In the case now before the court the sale was made, not by a trustee, but by a receiver; and objection is raised to a receiver's power to sell the property of the bankrupt. The objection is based upon the language of clause 3 of section 2, which authorizes courts of bankruptcy to appoint receivers, "for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee qualified." It is argued that this limits the power of receivers, and forbids them to do more than hold possession of the bankrupt's property during a certain interval. I do not think the argument is sound. The clause restricts the power of the court to appoint, confining it to cases of absolute necessity, and then goes on to state the purpose for which the appointment may be originally made. But, after a receiver has once gone into possession, it may become necessary to sell the property for the very purpose of preserving it, or its value,—which is, of course, the essential matter,—either in whole or in part. In such event, I think the court has ample power to order or confirm a sale, either under the power to preserve, implied by clause 3 itself, or under clause 7 of the same section, which empowers the court to "cause the assets of bankrupts to be collected, reduced to money and distributed."

The exceptions are dismissed, and the referee's opinion and order are approved.

In re DE LEEUW.

(District Court, S. D. New York. December 23, 1899.)

BANKRUPTCY—OPPOSITION TO DISCHARGE—CONCEALMENT OF ASSETS.

Although a transfer of property by a bankrupt to his wife, before the bankruptcy, in satisfaction of a debt, may not have been legally sufficient to pass the title to her, yet his discharge cannot be refused on the ground of his having concealed such property from his trustee, or made a false oath in relation thereto, unless it is proved that his contention that his wife was the owner of the property was knowingly false.

In Bankruptcy. On application of bankrupt for discharge.

Certain creditors opposed the bankrupt's discharge on the ground that he had fraudulently concealed assets, the proceeds of 204 shares of stock, which on his part was claimed to have been transferred to his wife some time previous to the filing of the petition in bankruptcy on account of a debt owing to her. The bona fides of the original debt to the wife for money loaned by her to the bankrupt in his business was not denied. She had previously received 15 shares of other stock, but the evidence was insufficient to show that the debt to the wife was thereby canceled.

Eisman & Levy, for bankrupt.

C. De Hart Brower, for creditors.

BROWN, District Judge (after stating the facts as above). I have considerable doubt whether the facts in evidence show a legally consummated gift, or transfer of the 204 shares to Mrs. De Leeuw. But even if not legally sufficient, I am of opinion that the contrary construction and supposition of the bankrupt is not shown to be knowingly false, such as to constitute a criminal offense, or a false oath.

Discharge granted.

In re McADAM.

(District Court, S. D. New York. December 23, 1899.)

BANKRUPTCY—OPPOSITION TO DISCHARGE—CONCEALMENT OF ASSETS.

Where an attorney at law, at the time of filing his petition in bankruptcy, had contracts outstanding securing to him a share of the amount to be recovered in suits which he was then prosecuting for clients, *held*, that the right of the trustee to any part of the sums realized on such contracts was so doubtful that the bankrupt's omission of them from his schedule of assets could not be said to amount to a knowing and fraudulent concealment of property, nor to make his verification of the schedule a false oath, such as to forfeit his right to a discharge.

In Bankruptcy. On bankrupt's application for discharge, and opposition thereto by creditors.

The bankrupt was an attorney at law. At the time his petition was filed he had a number of written contracts outstanding, providing for the payment to him of one-half the recovery as compensation for the prosecution and collection of various claims for damages. These claims were in various stages of progress; some not on the calendar; some on the court calendar for trial; some tried and on appeal. None of these claims was referred to in his schedules of assets. His discharge was opposed on the ground that the creditors were entitled to a certain interest in these contracts and that this interest had been fraudulently concealed and a false oath made by the bankrupt in not including this interest in his schedules. The referee overruled the objections, holding that the bankrupt's contingent interest as attorney was not assignable.

Henry Smith, for bankrupt.

Benjamin B. Kenyon, for creditors.

BROWN, District Judge (after stating the facts as above). I am not wholly satisfied that the trustee might not be entitled to some pro rata part of any moneys hereafter realized on the bankrupt's contracts; but there is such doubt on the question that it is impossible to hold the defendant to have "committed an offense" in acting on the contrary hypothesis, or that in so doing he fraudulently concealed anything, or knowingly made a false oath.

Discharge granted.

In re HENRY ULFELDER CLOTHING CO.

(District Court, N. D. California. December 12, 1899.)

No. 2,966.

1. BANKRUPTCY—CONCLUSIVENESS OF ADJUDICATION—DEBT OF PETITIONING CREDITOR.

Where the respondent, in a petition in involuntary bankruptcy, denies his alleged indebtedness to the petitioning creditor, and takes issue on the validity and the consideration of the note set forth in the petition and on which such creditor claims, and, upon evidence offered on both sides, the

court finds the allegations of the petition to be true, and makes an adjudication of bankruptcy, such adjudication is conclusive evidence of the validity of the petitioner's claim when the note is presented for allowance as a claim against the bankrupt's estate, and it cannot be disputed either by the bankrupt or by any creditor who joined in the proceedings and opposed the adjudication.

2. SAME—CLAIMS OF THIRD PARTIES.

Where the respondent in a petition in involuntary bankruptcy took issue on the question of his insolvency, and the petitioning creditor, for the purpose of proving insolvency, offered in evidence certain promissory notes made by the debtor to third parties, and the debtor contested their validity and consideration, and, upon hearing the evidence on both sides, the court found the allegations of the petition to be true, and made an adjudication of bankruptcy, *held* that, as such notes were not directly in issue, but only collaterally brought in question, and as the holders thereof were not parties to the proceeding, the adjudication of bankruptcy was not conclusive as to their validity, and would not preclude the bankrupt from opposing their allowance as claims against his estate.

In Bankruptcy. On review of ruling of referee in bankruptcy.

Franklin P. Bull, for certain creditors.

Edward Meyers, for bankrupt.

Chas. S. Peery, for petitioner.

DE HAVEN, District Judge. Donie Ulfelder filed in this court her petition asking that the Henry Ulfelder Clothing Company, a corporation, be adjudged bankrupt. In this petition she alleged that the corporation was indebted to her in the sum of \$2,000, evidenced by a promissory note executed by it to her on or about June 15, 1898, and that the corporation had committed an act of bankruptcy on the 10th of June, 1899, in that it had "suffered and permitted, while insolvent, one Bernard Lowenstein, a creditor of said corporation, to obtain a preference by legal proceedings." The petition further alleged that the creditors of the corporation were less than 12 in number. To this petition separate answers were filed by the corporation and by the creditor, Bernard Lowenstein. These answers put in issue the allegation of the petition in relation to the insolvency of the corporation, and also contained a denial that the petitioner was a creditor of the corporation in any sum or amount whatever. The issues presented by the petition and answer came on regularly for trial, and upon such trial the petitioner, for the purpose of proving that the Henry Ulfelder Clothing Company was indebted to her in the sum alleged in the petition, introduced in evidence a note dated January 25, 1898, purporting on its face to have been executed to her by that corporation, for the sum of \$2,200; and, in support of the further allegation that the corporation was insolvent, she offered in evidence two notes, dated January 25, 1898, purporting on their face to have been executed by such corporation, one to Henry Ulfelder, in the sum of \$1,800, and one to A. Levy, in the sum of \$1,490, and also evidence to the effect that such notes were duly executed, and upon a sufficient consideration; and, upon the part of the corporation and B. Lowenstein, evidence was introduced tending to show that the corporation did not execute any of said notes, and that all of them were, as to the corporation, without

consideration. The court, upon consideration of the conflicting evidence, found the allegations of the petition to be true, and the corporation was thereupon adjudged bankrupt. Thereafter the following proceedings in the cause were had before the referee, as appears by his certificate:

"Claims against said bankrupt were presented for allowance by Donie Ulfelder in the sum of \$2,200, Henry Ulfelder in the sum of \$1,800, and A. Levy in the sum of \$1,490. Objections to these claims, and each and all of them, were presented by the bankrupt, and also by B. Lowenstein, a creditor of the bankrupt, whose claim against the bankrupt had been filed with the referee. The grounds of such objection to said claims, and each and all of them, were: (1) That said claims, and each and all of them, and the alleged promissory notes upon which the same are based, are not the obligation of said bankrupt, and are fraudulent and void; (2) that the bankrupt never authorized the making, execution, or delivery of said promissory notes, or either of them, to said claimants, or either of them; (3) that no consideration, of any kind or nature, was ever had or received by the bankrupt for said promissory notes, or either of them. Said bankrupt and said B. Lowenstein thereupon offered and proposed to establish their objection to said claims, and each and all of them, by competent evidence, and to show that said claims, and each and all of them, are fraudulent and void, and to sustain their objections to said claims, and each and all of them, upon the grounds hereinbefore set forth. It was thereupon held by the referee that said claims, and each and all of them, were established and adjudicated by the order of the court adjudicating the corporation a bankrupt. It appearing that said bankrupt, and said B. Lowenstein, both appeared in said bankruptcy proceedings, and filed answers to said petition filed in the proceedings, praying that said corporation be adjudged a bankrupt, the referee decided that the validity of said claims, or either or any of them, cannot be questioned or contested by said bankrupt or by said B. Lowenstein, and that as to them said claims, and each and all of them, are finally established."

This ruling of the referee is now before the court for review. Upon the argument of the exceptions, it was conceded that the claims filed with the referee by Donie Ulfelder, Henry Ulfelder, and A. Levy were represented by the same promissory notes which were introduced in evidence upon the trial, resulting in the decree by which the Henry Ulfelder Clothing Company was adjudged bankrupt; and the court will also at this time take judicial notice of the fact that the only matters in controversy between the parties upon that trial related to the alleged invalidity of these promissory notes as claims against that corporation, and that the general finding upon which that decree was based includes the implied finding that all of the promissory notes referred to were valid claims against the corporation. The court must have so found in order to reach the conclusion that Donie Ulfelder was a creditor of the corporation, and that the corporation was insolvent.

1. The ruling of the referee, in so far as it relates to the claim of Donie Ulfelder, will be first considered. She was the petitioner in the proceeding to have the Henry Ulfelder Clothing Company adjudged bankrupt, and, the alleged fact having been put in issue by the answer to her petition, it was incumbent upon her to prove that she had a legal demand against that corporation for at least \$500 in excess of securities held by her. Bankr. Act, § 59, subd. b. Without proof of this fact, the corporation and creditor who appeared in opposition to the petition for involuntary adjudication would have been entitled to a dismissal of the proceeding. In re Cornwall, 9

Blatchf. 114, Fed. Cas. No. 3,250; *Bank v. Moore*, 2 Bond, 170, Fed. Cas. No. 10,041; *In re Skelley*, 2 Biss. 260, Fed. Cas. No. 12,921. The question whether she was a creditor in that amount was therefore a material issue in that proceeding, and the decree therein undoubtedly establishes the fact that she was such creditor. The decree does not show upon its face the particular ground or particular claim of indebtedness upon which this adjudication was made, and in such a case it is competent to show, by extrinsic evidence not inconsistent with the record, the particular matter litigated upon the trial and determined by the judgment. *Wood v. Jackson*, 8 Wend. 45; *Doty v. Brown*, 4 N. Y. 71; *Lewis v. Pier Co.*, 125 N. Y. 341, 26 N. E. 301; *Wilson's Ex'rs v. Deen*, 121 U. S. 525, 7 Sup. Ct. 1004, 30 L. Ed. 980; *Packet Co. v. Sickles*, 5 Wall. 592, 18 L. Ed. 550; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Driscoll v. Damp*, 16 Wis. 106. Now, in this case, it appears that upon the trial of the issues in the involuntary proceeding the same promissory note upon which Donie Ulfelder bases her present claim against the bankrupt corporation was offered in evidence to prove that she was a creditor of that corporation, and she relied upon no other claim in proof of that fact; and the questions whether such note had been duly executed by the corporation and delivered upon a sufficient consideration were in controversy and litigated upon that trial. The inevitable conclusion from these facts is that the validity of the claim founded upon this promissory note was directly in issue in the proceeding in which the Henry Ulfelder Clothing Company was adjudged bankrupt, and it is equally clear that the decree therein was in favor of its validity, as the court, in adjudging that the petitioner was a creditor of the corporation, could have proceeded upon no other ground than that such note was a valid obligation of the corporation. May the same question be again drawn into controversy in the bankruptcy proceeding in which that decree was given? I think not. In considering the legal effect of this decree, there does not seem to be any reason for a departure from the well-settled rule that matters which have been once litigated and determined by the judgment of a court cannot again be made the subject of legal contention, as between the parties to such judgment and their privies. The right to prosecute a proceeding in involuntary bankruptcy is one of the remedies which the law in the cases prescribed in the bankruptcy act gives to the creditor for the enforcement of his claim against his debtor, and in such a proceeding the question whether the petitioning creditor has a legal demand against the alleged bankrupt in such an amount as entitles him to maintain the action may be put in issue and tried, and the decision of that question in favor of the petitioning creditor is conclusive, as to the particular claim thus litigated, in all subsequent proceedings in the cause having relation to such claim, so long as the judgment remains in force. The law certainly does not contemplate that the petitioning creditor shall be required to establish the validity of a particular claim against the bankrupt more than once in the same proceeding, unless the court shall, upon some legal ground, grant a new trial of such issue.

The proceeding against the Henry Ulfelder Clothing Company was not one of which creditors were, upon the facts admitted by the pleadings therein, entitled to notice, under subdivision d of section 59 of the bankruptcy act. Any creditor had the right, however, to voluntarily appear and join in the petition, or to be heard in opposition thereto (Bankr. Act, § 59, subd. f), and those not appearing were, in contemplation of law, represented by the bankrupt, and therefore concluded as to all matters directly in issue and determined by the decree. It was held in *Candee v. Lord*, 2 N. Y. 269, that a judgment obtained, without fraud or collusion, against a debtor, "is, upon all questions affecting the title to his property, conclusive evidence against his creditors to establish (1) the relation of creditor and debtor between the parties to the record, and (2) the amount of the indebtedness." And in answer to the argument that creditors not parties to the suit in which such judgment was rendered were not in privity with the defendant debtor, and therefore not estopped thereby, the court said:

"We think otherwise. The law which gave the judgment debtor the unlimited right (when honestly exercised) to contract debts, to settle and adjust their amount, to secure and to pay them, made him, to that extent, the representative of all his creditors who should seek the satisfaction of their demands out of his property. So far, at least, they are in privity with, and claim under, their debtor."

And, upon precisely the same principle, the decree in the involuntary proceeding against the Henry Ulfelder Clothing Company, which, in legal effect, determined that at the date of the commencement of such proceeding the bankrupt was indebted to the petitioning creditor upon the identical claim now filed with the referee, and for its full amount, because such claim is indivisible, is conclusive upon all other creditors in the administration of the estate of the bankrupt. It most certainly is conclusive upon the bankrupt and the creditor who was a direct party to that proceeding.

2. The claims of Henry Ulfelder and A. Levy were not, in my opinion, conclusively established by the decree against the Henry Ulfelder Clothing Company. It is true, as before stated, that the notes representing these claims were introduced in evidence upon the trial resulting in that decree, and that the general finding of the court that the corporation was insolvent at the time alleged in the petition for involuntary adjudication must necessarily have been based upon an implied finding that such notes were valid obligations of the corporation; but neither Henry Ulfelder nor A. Levy was a direct party to that proceeding, and the validity of their respective claims was not directly in issue therein, but was only brought collaterally in question by others who were parties to that proceeding. If the court, upon the evidence then before it, had found against their validity, and for that reason had adjudged that the corporation was not insolvent, and dismissed the proceeding, such finding and judgment would not have constituted a bar to a subsequent action by Henry Ulfelder and A. Levy against the bankrupt to recover upon the same claims. They would not have been estopped by such a judgment, because, not being parties, the question of the validity of their present claims was

not, and could not have been, litigated by them in the involuntary proceeding. In the case of *In re Schick*, 2 Ben. 5, Fed. Cas. No. 12,455, the defendant was adjudged bankrupt upon the ground that a certain judgment confessed by him in favor of one Cowen was an act of bankruptcy, and in the course of the opinion it was said by Blatchford, J.:

"This proceeding, however, is, so far, one merely between the petitioning creditor and the debtor. Cowen is no party to it, although examined as a witness for the creditor; and in the further progress of the matter, if the assignee of the debtor to be appointed should institute proceedings to realize, for the benefit of the debtor's estate, in bankruptcy, the property levied on by the sheriff under the execution, Cowen will have a full opportunity to assert his rights, and maintain, if he can, the integrity of the judgment, and there is nothing in this adjudication to preclude him from doing so."

And in the case of *In re Drummond*, 1 N. B. R. 231, Fed. Cas. No. 4,093, McDonald, J., in adjudging the defendant bankrupt because of his act in preferring certain creditors, said:

"It is proper, also, to say that I give no opinion touching the liability of any of the preferred creditors in case of a suit against them by the assignee in bankruptcy who may be appointed in this case. * * * And, indeed, as the preferred creditors are not parties to this proceeding, it would be unjust that the present decision should in any manner affect their interest, except so far as it fixes the status of Drummond as a bankrupt."

See, also, *In re Dibblee*, 3 Ben. 283, Fed. Cas. No. 3,884.

The cases just cited, which I think are sound in principle, show that Henry Ulfelder and A. Levy would not have been bound if, in the involuntary proceeding, the court had found against the validity of their present claims, and upon that ground had entered a decree in favor of the bankrupt corporation; and, this being so, it necessarily follows that the bankrupt corporation is not bound by the contrary decree, in which the validity of these claims was incidentally affirmed, for, as was said by the court in *Nelson v. Brown*, 144 N. Y. 390, 39 N. E. 356:

"The record of a judgment, in order to conclude either of the party litigants, must be conclusive upon both. The operation of the rule must be mutual."

The ruling of the referee, in so far as it relates to the claim of Donie Ulfelder, is affirmed. The exceptions to that part of the ruling of the referee which relates to the claims of Henry Ulfelder and A. Levy are sustained, and the referee is directed to permit the bankrupt or the creditor Lowenstein to introduce any competent evidence in support of the objections to the validity of said claims.

In re HORGAN et al.

(Circuit Court of Appeals, Second Circuit. November 15, 1899.)

1. BANKRUPTCY—EXAMINATION OF WITNESSES—SCOPE OF INQUIRY.

The provisions of the bankruptcy act authorizing the examination of third persons as witnesses in bankruptcy proceedings, and requiring them to produce books and documents when called for, are intended to enable creditors to find grounds of opposition to the bankrupt's discharge, if any exist, and to enable the trustee to discover assets of the estate which may be applied to the payment of the bankrupt's debts.

2. SAME—REVIEW ON APPEAL.

In the examination of third persons as witnesses in bankruptcy proceedings, and the scrutiny of their books and papers, the bankruptcy court should see to it that the examination is confined to the legitimate objects of such an investigation, viz. the discovery of assets of the bankrupt, or of grounds of opposition to his discharge. But in this matter it is vested with a wide discretion, and its action will not be interfered with by the appellate court unless such discretion has been manifestly abused.

3. SAME—BOOKS OF CORPORATION NOT A PARTY.

Two partners, after failing in business as architects and builders, organized a corporation for the prosecution of the same business, composed of themselves, their wives, and one other. The wives held substantially all the stock, but contributed no value therefor; practically the only capital being the professional reputation and personal services of the husbands. The latter were the officers and directors of the corporation, and managed its business, and drew all the money earned. The partnership, as such, being adjudged bankrupt on their voluntary petition, and the trustee and creditors claiming the right to examine the books of the corporation, the district court ordered one of the bankrupts to produce the books in his custody as the president of the corporation, and submit them for such examination, and fined him for his refusal to comply. *Held*, that such order was within the authority of the bankruptcy court, and was a reasonable exercise of its judicial discretion, and would not be reversed on appeal.

On petition for review of an order of the district court of the United States for the Southern district of New York, in bankruptcy. See 97 Fed. 319, where the facts of the case are fully stated.

James W. Hyde, for bankrupts.

Herbert J. Hindes, for creditors.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. We have no doubt of the power of the court below to make the order fining the petitioner for refusal to produce the books of the corporation (in his custody as its president) for examination before the referee in bankruptcy, nor that the order was a reasonable exercise of judicial discretion. The provisions of the bankruptcy act authorizing the examination of third persons as witnesses, and compelling the production of books and documents upon such examinations, are intended to enable creditors to discover transactions which may affect the right of the bankrupt to obtain a discharge, and to enable the trustee to ascertain whether any assets exist which should be collected and applied towards the payment of the bankrupt's debts. It is the duty of the bankruptcy court to see that such examinations are not permitted to transcend the limit of a legitimate investigation for these purposes; but of necessity this is a duty which involves the exercise of wide discretion, and which should not be interfered with by any appellate court except when it has been manifestly abused. It is not a valid objection to the production of the books of a corporation that their inspection may disclose concealed assets, or supply evidence to enable the trustee to maintain a civil action to recover the value. In the present case the bankrupts were the officers and directors of the corporation whose books were sought to be examined, their wives were the stockholders, and substantially the only capital originally contributed or subsequently employed in its business consisted of

the professional reputation and personal services, as architects and builders, of the bankrupts themselves. Whether the profits of the business carried on in the name of the corporation were, as against the creditors, the property of the bankrupts; whether the corporation was merely a paper instrumentality, and the bankrupts the real principals in all its transactions; or whether the corporation was a concern of which the wives of the bankrupts were the genuine, beneficial owners,—are questions which the court below was not called upon to decide. It suffices that enough appeared to justify the trustee in investigating the history of the transactions, with a view to bringing an action to test the title to the profits derived from them.

The order is affirmed.

UNITED STATES v. EIGHT CASES OF PAPER.

(District Court, S. D. New York. December 14, 1899.)

CUSTOMS SEIZURES—BOND FOR DELIVERY OF GOODS—COSTS.

Under Rev. St. § 938, a claimant of goods seized by the United States for undervaluation, under the customs laws, on giving the bond therein required, is entitled to have the goods delivered to him, and cannot be required, as a condition precedent to such delivery, to pay the costs incident to such seizure. The government is amply protected as to such costs by the bond in case of recovery, and the omission of the section to require their payment in advance must be regarded as intentional.

This is a motion, by the claimant of goods seized by the customs officers for undervaluation, for an order for the delivery of the goods, the bond prescribed by statute having been given.

Stephen G. Clarke, for the motion.

Henry L. Burnett, U. S. Dist. Atty., and Arthur M. King, Asst. U. S. Dist. Atty.

BROWN, District Judge. The above goods, imported by the steamer St. Louis, were seized for undervaluation under the customs laws while in the custody of the collector. After publication of process, the claimant of the goods appeared, paid the duties, and gave a bond pursuant to section 938 of the Revised Statutes in order to obtain possession, and now moves for a delivery order. For the government it is objected that the cost of publication, amounting to about \$41, should be paid by the claimant to the marshal before delivery of the goods.

The claimant is entitled to a delivery of the property to him upon compliance with the conditions of section 938, without any additional charge for costs or expenses in the suit. It is admitted that the claimant has complied with all the express conditions of section 938; and the section thereupon declares that:

"The court shall by rule order such vessel, goods," etc., "to be delivered to such claimant; * * * and if judgment passes in favor of the claimant, the court shall cause the said bond to be canceled; but if judgment passes against the claimant, and the claimant does not within 20 days thereafter pay into the court * * * the appraised value with the costs, judgment shall be granted upon the bond on motion in open court without further delay."

Besides the bond given, a further stipulation for costs has also been given, which embraces the marshal's expenses for publication and otherwise, so that the government is abundantly secured. As no costs, however, are granted against the United States, the claimant, if required to pay the costs of publication in advance, as a condition of receiving the delivery of his goods, could not recover against the United States the costs thus paid, even though he should prevail in the suit. The omission of a requirement that the claimant should pay any costs as a condition of receiving delivery on bonding, should, therefore, be regarded as an intentional omission, in order that equal justice may be done, whatever the event of the suit.

The practice is the same upon ordinary arrests of property in suits in rem in admiralty, when a bond for the release of vessel or goods arrested is given to the marshal under section 941, Rev. St. It has been the long and constant practice of the court in such cases, to require the delivery of the property without any payment to the marshal of his fees or costs, since the statute does not attach any such requirement to the obligation to discharge the vessel or property from arrest. Dist. Ct. Rule 20; *The Georgeanna* (D. C.) 31 Fed. 405, 408.

The motion is granted.

STERN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 15, 1899.)

No. 32.

CUSTOMS DUTIES—CLASSIFICATION—PILE FABRICS.

Construing paragraphs 315 and 342 of the tariff act of 1897 together, "plushes, velvets, velveteens, corduroys and all pile fabrics, cut or uncut," "composed of cotton or other vegetable fibre," are dutiable under paragraph 315, except "pile fabrics of which flax is the component material of chief value," which are dutiable under paragraph 342, and, under such construction, colored flax and cotton plush, flax chief value, is dutiable under paragraph 342.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decision of the circuit court (91 Fed. 521), reversing a decision of the board of general appraisers, which decision sustained the protest of the importers, and reversed the decision of the collector of the port of New York.

Wm. Wickham Smith, for appellants.

Chas. D. Baker, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The importation was correctly returned by the appraiser as "colored flax and cotton plush, flax chief value." Concededly, it is within the terms of two paragraphs of the tariff act of July 24, 1897, and the only question in the case is which of the two is the more specific. The relevant paragraphs are:

"315. Plushes, velvets, velveteens, corduroys, and all pile fabrics, cut or uncut; any of the foregoing composed of cotton or other vegetable fibre, not

bleached, dyed, colored, stained, painted, or printed, nine cents per square yard and twenty-five per centum *ad valorem*; if bleached, dyed, colored, stained, painted, or printed, twelve cents per square yard and twenty-five per cent. *ad valorem*: * * * provided, further, that none of the articles or fabrics provided for in this paragraph shall pay a less rate of duty than forty-seven and one-half per centum *ad valorem*."

"342. All pile fabrics of which flax is the component material of chief value, sixty per centum *ad valorem*."

The question presented by these two sections is a perplexing one. If paragraph 315 provided for plushes only, or for some only of the varieties of pile fabrics, there would be no difficulty in disposing of the question, under the well-known principle that a reference in a tariff act to some article *eo nomine* is more specific than a descriptive reference which will cover that article and others. If the words, "all pile fabrics, cut or uncut," did not appear in paragraph 315, the paraphrase of the two paragraphs suggested by appellants might be correct, viz.: "Pile fabrics of which flax is the component material of chief value, except plushes, velvets, velveteens, and corduroys." But paragraph 315 is a much broader one. It includes not only the varieties of pile fabrics which it specifically names, but also all the other varieties of the same genus, when made of any and every kind of vegetable fiber; and when, in a subsequent paragraph, we find all the varieties of the same genus taxed at a different rate, when made of one specified kind of vegetable fiber, it would seem as if in that particular it was the intention of congress to make the component material the determinative factor as to the rate of duty to be paid. In *Bister v. U. S.*, 20 U. S. App. 222, 8 C. C. A. 175, 59 Fed. 452, which is relied upon by appellant, the phraseology of the two paragraphs under consideration was unlike those now before us. Had the one paragraph in that case read "cashmeres, delaines, and all women's and children's dress goods," etc., and the other read, "all women's and children's dress goods," etc., "of which silk is the component of chief value," a very different question would have been presented. Although the language used in paragraphs 315 and 342 is not in all respects the same as that which was construed in *Solomon v. Arthur*, 102 U. S. 208, 26 L. Ed. 147, we are inclined to the opinion that they should be similarly construed, so that, together, they will read:

"Plushes, velvets, velveteens, corduroys and all pile fabrics, cut or uncut, composed of cotton or other vegetable fibre [such and such a duty], but if any pile fabric contains flax as its component of chief value, then it shall pay 60 per cent."

The decision of the circuit court is affirmed.

UNITED STATES v. HENSEL et al.

(Circuit Court of Appeals, Second Circuit. November 15, 1899.)

No. 29.

CUSTOMS DUTIES—CLASSIFICATION—FRAMES OF PAINTINGS.

It having been the uniform practice of the treasury department since 1866, in case of dutiable oil paintings in frames, to assess a separate and independent duty on the frames, tariff statutes since enacted must be construed with reference to such practice; and the word "paintings," as

used in paragraph 454 of the tariff act of 1897, cannot be construed to include the frames in which such paintings are imported; nor are the frames to be assessed for duty as "coverings," under section 19 of the customs administrative act of 1890, but they are to be classified as separate importations, and are dutiable, under paragraph 208 of the same tariff act, as manufactures of wood.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decision of the circuit court (91 Fed. 523) reversing a decision of the board of general appraisers which affirmed a decision of the collector of the port of New York.

Henry C. Platt, for the United States.

Howard T. Walden, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The appellees imported certain oil paintings, with frames. The collector assessed duty upon the paintings at 20 per cent. ad valorem, under paragraph 454 of the tariff act of July 24, 1897, and separately upon the frames at 35 per cent., as "manufactures of wood," under paragraph 208 of the same act. Paragraph 454 reads: "Paintings in oil or water colors, pastels, pen and ink drawings and statuary, not specially provided for in this act, twenty per centum ad valorem," etc. The importers contend that a duty of 20 per cent. ad valorem should be assessed on the framed painting as an entirety,—painting and frame together,—or under section 19 of the act of June 10, 1890, on the theory that the frame is a case or covering of the painting, and to be reckoned as a part of the dutiable value of the painting. This last proposition commended itself to the circuit court. The section last cited provides, *inter alia*, that "if there be used for covering or holding imported merchandise * * * any unusual article, or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied * * * upon such article at the rate to which the same would be subject if separately imported." Manifestly, these frames were designed for use otherwise than in the transportation of the pictures to the United States. They are ornamental, and are designed rather to add to the attractiveness of the pictures when exhibited, than to protect them against the risk of transport. It will not be necessary, however, to review the decisions bearing on this question of coverings, since *Obertenuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. 462, 29 L. Ed. 706, where the act of 1883, which imposed what was practically a penalty of 100 per cent., was construed; nor to discuss the argument advanced by appellee, that, within the common or ordinary meaning of the word, a "painting" includes the frame in which it is bought, sold, transported, imported, and exhibited. It was held in *Robertson v. Downing*, 127 U. S. 613, 8 Sup. Ct. 1330, 32 L. Ed. 271, that "when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded, without the most cogent and persuasive reasons." It appears that the treasury department has allowed frames containing pictures, which for some rea-

son had been given free entry by congress, to come in free with the pictures; but in the case of dutiable oil paintings the practice of assessing a separate and independent duty upon the frames has been followed by the treasury department continuously since 1866, and, so far as appears, has never been successfully attacked; nor, indeed, has it ever been presented to any court. We therefore conclude that the decision of the circuit court should be reversed, and the classification of the frames for duty purposes as manufactures of wood should be sustained.

UNITED STATES v. ROSENSTEIN et al.

(Circuit Court of Appeals, Second Circuit. November 15, 1899.)

No. 22.

CUSTOMS DUTIES—CLASSIFICATION—PICKLED HERRINGS.

The first part of paragraph 258 of the tariff act of 1897 covers only the choicer articles of small fish when "packed in oil or otherwise in bottles, jars, tin boxes or cans," and fish of the herring family, pickled and put up in kegs, are not dutiable under such paragraph, but under paragraph 260, as pickled herrings.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decision of the circuit court, Southern district of New York (91 Fed. 637), affirming a decision of the board of general appraisers which reversed a decision of the collector of the port of New York.

Harry P. Disbecker, for the United States.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The merchandise was imported under the tariff act of July, 1897. The relevant paragraphs are:

"Par. 258. Fish known or labelled as anchovies, sardines, sprats, bristlings, sardels, or sardellen, packed in oil or otherwise, in bottles, jars, tin boxes or cans, shall be dutiable as follows: When in packages containing seven and one-half cubic inches or less, one and one-half cents per bottle, jar, box or can; containing more than seven and one-half and not more than twenty-one cubic inches, two and one-half cents per bottle, jar, box or can; containing more than twenty-one and not more than thirty-three cubic inches, five cents per bottle, jar, box or can; containing more than thirty-three and not more than seventy cubic inches, ten cents per bottle, jar, box or can; if in other packages, forty per centum ad valorem. All other fish, (except shellfish), in tin packages, thirty per centum ad valorem; fish in packages containing less than one-half barrel, and not specially provided for in this act, thirty per centum ad valorem."

"Par. 260. Herrings, pickled or salted, one-half of one cent per pound; herrings, fresh, one-fourth of one cent per pound."

The record is exceptionally meager as to the character of the importation. Neither the protest, nor the appraiser's return, nor the evidence, nor the finding of the board discloses what fish it is, of what size, or how it is made. From a reference in the opinion of the board to *Rosenstein v. U. S.* (C. C.) 71 Fed. 949, and from the argument, however, we are no doubt justified in assuming that the merchandise

is the same as that which was before the circuit court in that case, and which was thus described:

"It is undisputed that the fish belong to the genus known as 'herrings.' That they are herrings is established beyond doubt. They are put up in a preparation of vinegar and spices. Some vegetables—such as onions and carrots—are also added to the mixture. Unquestionably the fish are pickled, and the only question is whether or not the addition of the vegetables in small quantities changes their character."

The customs officers originally classified this importation, which came in small kegs, under the clause of paragraph 258, which provides for fish in packages containing less than one-half barrel, and not specially provided for in this act. Manifestly this was an erroneous classification, since the fish, if not elsewhere found, is specifically provided for as "herrings, pickled or salted." The government has apparently abandoned this part of its claim, and now contends that it is dutiable as sardines, under the same paragraph (258). The opinion of the board refers to the merchandise as "pickled Russian sardines." There is no evidence, however, that they are thus known commercially; indeed, the importer testified that the commercial name is "pickled fish of Russen." How it was labeled does not appear. The sample put in evidence before the board was not presented on the argument.

We are of the opinion that the first part of paragraph 258 covers only the choicer articles which are put up in bottles, jars, tin boxes, or cans. The structure of the sentence indicates this quite strongly. Having enumerated the kinds of fish, the style of packing, and the character of the package (bottle, jar, tin box, or can), the writer, after a colon, introduces with a capital letter a distribution of these packages by cubic capacities, using the phrases "packages containing" $7\frac{1}{2}$ cubic inches and under, $7\frac{1}{2}$ to 21 cubic inches, etc., and concluding with the words "if in other packages, forty per centum ad valorem." It would seem that the phrase "other packages" was used to mean packages other than those containing $7\frac{1}{2}$ cubic inches, 21 cubic inches, etc., and not at all in contradistinction to the description of the style and character of packing which is expressed in the first part of the sentence, preceding the colon and the capital, viz. "packed in oil or otherwise, in bottles, jars, tin boxes or cans." Since they are not so packed, the fish imported here, even if they be small herrings,—and there is no evidence as to their size,—are not covered by paragraph 258.

The decision of the circuit court is affirmed.

UNITED STATES v. NADAY et al.

(Circuit Court of Appeals, Second Circuit. November 15, 1899.)

No. 27.

CUSTOMS DUTIES—CLASSIFICATION—FANCY LEATHER.

Pieces of leather, cut uniform, 28 inches in width and from 32 to 36 inches in length, having on one side an embossed pattern in silver and other colors, and designed to be cut and used in making dress trimmings, pocket-books, and other fancy articles, are dutiable under paragraph 340 of the

tariff act of 1894, as leather not specially provided for, and not under paragraph 341, as "skins," or under paragraph 342, as leather cut into forms suitable for conversion into manufactured articles.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decision of the circuit court (92 Fed. 140) which reversed a decision of the board of general appraisers reversing a decision of the collector of the port of New York touching the assessment of certain merchandise for customs duty.

Henry C. Platt, for the United States.

Everit Brown, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The importation in question was made under the tariff act of August 28, 1894. The merchandise is certain so-called "leather gouffré." According to the findings of the board,—and the evidence sustains such findings,—it consists of pieces of thin leather, cut uniform, 28 inches in width and from 32 to 36 inches in length. One side is plain, while the other surface presents an embossed pattern, coated with designs in silver and various attractive colors. These pieces are not used in the imported condition, but are cut up and made into dress trimmings. There is evidence that they are sometimes cut up and used in the manufacture of pocketbooks and other fancy leather goods. Sometimes, when thicker than these at bar, so that the paste will not strike through, they are used as wall decorations. There is no evidence as to the particular kind of hides or skins from which the merchandise was produced, but, as the board found, it is in fact a fancy leather.

The relevant paragraphs of the tariff act are these:

"340. Bend or belting leather, and leather not specially provided for in this act, ten per centum ad valorem.

"341. Calfskins, tanned, or tanned and dressed, dressed upper leather, including patent, enameled and japanned leather, dressed or undressed, and finished; chamois or other skins not specially enumerated or provided for in this act, twenty per centum ad valorem; bookbinders' calfskins, kangaroo, sheep and goat skins, including lamb and kid skins, dressed and finished, twenty per centum ad valorem; skins for morocco, tanned but unfinished, ten per centum ad valorem; pianoforte leather and pianoforte action leather, twenty per centum ad valorem; boots and shoes, made of leather, twenty per centum ad valorem.

"342. Leather cut into shoe uppers or vamps, or other forms, suitable for conversion into manufactured articles, twenty per centum ad valorem."

Originally the customs authorities contended that the articles should be classified under paragraph 353, as "manufactures of leather not otherwise provided for." The circuit court held that under the decision of the supreme court in *Dejonge v. Magone*, 159 U. S. 562, 16 Sup. Ct. 119, 40 L. Ed. 260, such contention is unsound, and it has now been abandoned by the appellant. It is, however, insisted that the merchandise consists of "leather cut into shoe uppers or vamps, or other forms suitable for conversion into manufactured articles." Manifestly the cutting has not progressed so far as to render the goods suitable for one purpose rather than another, or to a point

which indicates even distantly the probable use of them; and the language of the paragraph seems to indicate that the "forms" referred to are to be characteristic and distinctive, as are the "shoe uppers" and "vamps," which are practically in their ultimate shape. A bolt of flannel 56 inches wide and 100 yards long may by additional cutting be transformed into a coat or into a dress skirt, or into a lap robe, or into a piano cover; but the entire piece would hardly be described as "flannel suitable for conversion into manufactured articles." The case closely resembles *In re Mills* (C. C.) 56 Fed. 820 (affirmed by this court, without opinion, in 14 U. S. App. 711, 13 C. C. A. 692), where the phrase "partly-made" wearing apparel was construed; and it was held that the process of making up must have progressed far enough to enable us to identify the article it will be made into when completed. We concur, therefore, with the board and with the circuit court in the conclusion that the importation is not covered by paragraph 342.

Paragraph 341 contains several distinct categories. The first contains "calfskins * * * tanned and dressed." As to this, it is sufficient to say that the board has found that there is no evidence from what kind of hides or skins the merchandise is produced. And the same remark will apply to the third category, which contains "calfskins, kangaroo, sheep and goat skins, including lamb and kid skins, dressed and finished." Nor can the merchandise be included in the second category, as "chamois or other skins not specially enumerated or provided for," since it is in fact leather, as the board has found, and as the evidence clearly shows. In the absence of any evidence of commercial designation, we cannot assume that these articles, which have not only been tanned, dressed, and finished, but have also been changed from the distinctive shape which is suggestive of the skin of the animal from which they are taken, are to be classified for duty as "skins," under paragraph 341, when they are aptly described as leather in paragraph 340. The circumstance that the two varieties of leather specifically enumerated in paragraph 340 (bend leather and belting leather) are not of the same character seems not to be a sufficient reason for so restricting the broad phrase, "leather not specially provided for," so as to exclude these articles, which in the ordinary use of language it would fairly cover. The decision of the circuit court directing the classification of the importation under paragraph 340 is affirmed.

UNITED STATES v. POPPER.

(District Court, N. D. California. December 18, 1899.)

No. 3,722.

1. INTERSTATE COMMERCE—REGULATION BY CONGRESS—SCOPE OF POWER.

The provision of Act Feb. 8, 1897 (29 Stat. 512), making it unlawful for any person to deposit with an express company or other common carrier, for carriage from one state or territory to another, any article or thing designed or intended for the prevention of conception, is not unconstitutional, on the ground that it is a police regulation, and as such a matter

over which the states have exclusive jurisdiction, but is within the constitutional powers of congress to regulate interstate commerce.

2. INDICTMENT—DESCRIPTION OF OFFENSE.

An indictment under Act Feb. 8, 1897 (29 Stat. 512), charging the defendant with having deposited with an express company, for carriage to another state, "an article designed and intended for the prevention of conception," which charges that such article was contained in a package deposited with an express company named, at a place and on a date named, addressed to a particular person at a designated place in another state, is sufficiently specific, and need not more specifically describe the article.

On Demurrer to Indictment.

E. J. Banning, Asst. U. S. Atty.

Cannon & Freeman, for defendant.

DE HAVEN, District Judge. The indictment in this case charges that the defendant did, upon a day named, at the city and county of San Francisco, state of California, "knowingly deposit and cause to be deposited with an express company, to wit, Wells, Fargo & Co.'s Express, for carriage from the city and county of San Francisco, in the state of California, to Winnemucca, in the state of Nevada, a certain package, then and there directed to Mrs. Ida Anderson, Winnemucca, Nevada," and containing an article designed and intended for the prevention of conception." The defendant has demurred to this indictment, alleging as grounds—First, that the act of congress upon which it is based is unconstitutional; and, second, that it is uncertain, in that it fails to properly describe the article alleged to have been contained in the package addressed to Mrs. Anderson.

1. The indictment is under the act of February 8, 1897 (29 Stat. 512). That act, among other things, makes it "unlawful for any person to deposit with any express company or other common carrier for carriage from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, * * * any article or thing designed or intended for the prevention of conception. * * *" It is contended, in support of the demurrer, that this provision of the statute attempts to legislate upon a matter to which the police power of the state extends, and over which it has exclusive jurisdiction. This contention cannot be sustained. Congress is given power, by section 8 of article 1 of the constitution, "to regulate commerce with foreign nations and among the several states and with the Indian tribes." This is a sovereign power, and I have no doubt that under it congress is authorized to forbid, as it has done in the provision of the act above quoted, interstate commerce in such articles as are named therein. The power to regulate commerce includes the power to declare what property or things may be the subject of commerce. Thus, in those cases in which it has been held that congress may lawfully prohibit the sale of intoxicating liquors to Indians in what is known as the "Indian Country," the power to enact such legislation is said to be derived from the authority to regulate commerce with the Indian tribes. *U. S. v. Holliday*, 3 Wall. 407, 18 L.

Ed. 182; *U. S. v. Forty-Three Gallons of Whisky*, 93 U. S. 188, 23 L. Ed. 846. In the first case it was said by the court: "The act in question, although it may partake of some of the qualities of those acts passed by state legislatures which have been referred to the police powers of the state, is, we think, still more clearly entitled to be called a regulation of commerce." And in the case of *U. S. v. Forty-Three Gallons of Whisky* the court, in upholding, as a regulation of commerce, the act of congress forbidding any one "to give or sell liquor to an Indian in charge of an agent, or to introduce it into the Indian country," said: "The power is in no wise affected by the magnitude of the traffic or the extent of the intercourse. As long as the Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband." That the power to regulate commerce includes the power to prescribe what articles of merchandise shall not be the subject of commerce was also the opinion of Chief Justice Taney, as stated by him in the *License Cases*, 5 How. 577, 12 L. Ed. 256: "And congress, under its general power to regulate commerce with foreign nations, may prescribe what articles of merchandise shall be admitted and what excluded, and may therefore admit or not, as it shall deem best, the importation of ardent spirits." And he added, on page 578: "The power to regulate commerce among the several states is granted to congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is co-extensive with it." It necessarily follows from these views that the provision of the act of February 8, 1897, under which the present indictment is framed, is not subject to the constitutional objection urged against it by the defendant.

2. The second objection is that the indictment fails to sufficiently identify or describe the article which is therein described as one designed and intended to prevent conception, in that it cannot be determined therefrom whether such article is an instrument or a drug in liquid or solid form. It is not necessary that there should be such certainty of description in the indictment. The indictment, in describing the article as one contained in a certain package deposited by the defendant with a certain express company in the city and county of San Francisco on a day named, and addressed to a particular person, gives sufficient information to the defendant of the act with which he is charged to enable him to make his defense thereto, or to plead his acquittal or conviction, in bar of any subsequent indictment relating to the same offense. Greater certainty than this is not required in an indictment. 1 Bish. Cr. Proc. (3d Ed.) §§ 507, 517, 543, 544. Demurrer will be overruled.

WEST v. GAMMON et al.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1899.)

No. 771.

CRIMINAL LAW — CONSTITUTIONAL RIGHT TO TRIAL BY JURY — JUDGMENT ON PLEA OF GUILTY.

The trial by jury, the right to which is secured to the accused in all criminal prosecutions by the sixth amendment to the constitution, is a trial according to the course of the common law, as it existed at the time such amendment was adopted, and by that law the court might proceed to judgment upon a plea of guilty, and a trial by jury was necessary only in cases where the accused, by plea of not guilty, had made an issue to be tried; hence a judgment of conviction rendered on a plea of guilty, voluntarily entered, and which leaves no issue of fact for trial, is not in violation of the constitutional rights of the defendant.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

Ellis Cocke, for appellant.

Abram M. Tillman, U. S. Atty.

Before TAFT, LURTON, and DAY, Circuit Judges.

DAY, Circuit Judge. This is an appeal from the circuit court of the United States for the Middle district of Tennessee, in which it is sought to reverse the judgment of the circuit court in a proceeding in habeas corpus in which the writ was sued out to obtain the release of the appellant from confinement in the penitentiary in the state of Tennessee, under a sentence passed upon him by the circuit court of the United States upon his pleas of guilty of offenses arising under sections 3279 and 3281 of the Revised Statutes of the United States. It is disclosed in the record that, having been arraigned upon indictments duly found for violation of these sections, appellant pleaded guilty, and was sentenced, in accordance with the statute, to pay a fine of \$1,000 and costs, and be imprisoned for a period of 16 months, in each case the sentences to run concurrently. There was no objection at the time on the part of appellant or his counsel to these proceedings, and the appellant was committed accordingly. Afterwards a petition for a writ of habeas corpus was filed with the clerk of the court below, alleging that appellant was wrongfully restrained of his liberty, because the sentence imposed was in violation of the rights guaranteed to him by article 6 of the amendments to the federal constitution. A writ having been issued and hearing had, the circuit court declined to grant the prayer of the petition, and dismissed the same; to which action appellant excepted, and the case is brought here for review. The question made is, was it proper for the court to sentence the appellant upon his plea of guilty without the intervention of a jury? The claim of the appellant is that this action is in violation of the sixth amendment of the constitution of the United States, which reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

It is manifestly the purpose of this amendment, among other things, to preserve to the accused in all criminal prosecutions the right to a speedy and public trial by an impartial jury in the state and district wherein the crime has been committed. It is claimed by the appellant that this language means, not only that the accused shall have the right, if he shall see fit to claim it, to a jury trial in prosecutions for crime, but requires that he be convicted and punished for a criminal offense in no other way, not even by confession of guilt by plea in open court. It is claimed that it is the purpose to secure to the accused, beyond the possibility of waiver, in prosecutions in the United States courts for crimes against the United States, immunity of punishment, unless conviction be had by a competent jury. It is well settled by repeated decisions in the state and federal courts that constitutional provisions aiming to preserve to the citizens of the United States the right of trial by jury have reference to that right as it existed at the time of the adoption of such constitutional guaranty. This amendment to the constitution must be construed with reference to the common-law right to a jury trial as the same existed at the time of its adoption as a part of the federal constitution. This is the conclusion of Judge Cooley in his work on *Constitutional Limitations* (5th Ed. 319):

"Accusations of criminal conduct are tried at the common law by jury; and wherever the right to this trial is guaranteed by the constitution, without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused."

In the late case of *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061, Mr. Justice Harlan, in considering the question of the right to jury trial, says:

"Assuming, then, that the provisions of the constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale, P. C. 161; 1 Chit. Cr. Law, 505. This question must be answered in the affirmative. When *Magna Charta* declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' 2 Story, Const. § 1779. In *Bac. Abr.* tit. 'Juries,' it is said: 'The trial per pais, or by jury of one's country, is justly esteemed one of the principal excellencies of our constitution; for what greater security can any person have in life, liberty, or estate than to be sure of not being divested of, or injured in, any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by *Magna Charta*.' So, in 1 Hale, P. C. 33: 'The law of England hath afforded the best method of trial that is possible, of this and all other matter of fact, namely, by a jury of twelve men, all concurring in the same judgment, by the testimony of witnesses viva voce, in the presence of the judge and jury, and by the

inspection and direction of the judge.' It must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument."

The learned justice herein emphasizes the fact that the constitutional right of a citizen to a trial by jury has reference to that right as it was understood in this country and in England at the time of the adoption of the constitution. An examination of the earliest writers on criminal law will show that at the common law, as it stood at the time of the adoption of the amendment in question, the right to a trial by jury existed only in cases where the accused had made by his plea an issue properly triable by a jury. Should the accused see fit to plead guilty, and thus raise no issue, there was no necessity for a trial. The accused, by the plea of guilty, eliminated all issues of fact, and left nothing to be submitted to a jury. Had he denied his guilt, he would have had a right to have had that issue determined by a competent jury of 12 men. This was not the only method in which a conviction could be had. A conviction of crime may be had in two ways,—either by the verdict of a jury, or by the confession of the accused in open court, which is the highest conviction. Clark, Cr. Proc. p. 372, and note. The supreme court of New Hampshire had occasion to consider this question in a case arising in that state under a statute which permitted a person to plead guilty of murder, leaving the court to determine the degree of the crime. The constitution of that state guarantied to the accused a right to trial by jury, and it was claimed that in no other way could his guilt be ascertained. In a learned opinion by Judge Blodgett, the subject was very thoroughly canvassed. *State v. Almy*, 67 N. H. 274, 28 Atl. 372. The judge says:

"In criminal proceedings, a confession of the offense by the party charged, by a plea of guilty, is the highest kind of conviction of which the case admits (2 Hawk. P. C. c. 31, § 1; 2 Hale, P. C. 225; 4 Bl. Comm. 362), and subjects him to precisely the same punishment as if he were tried and found guilty by verdict (1 Archb. Cr. Prac. & Pl. 110). And the effect of a confession being to supply the want of evidence (*Rex v. Hall*, 1 Term R. 320), it is an admission of every material fact well pleaded in the indictment, and authorizes the court having jurisdiction of the offense to proceed to judgment. 4 Bl. Comm. 329; 1 Chit. Cr. Law, 429; 1 Bish. Cr. Proc. 795."

It will be observed that the principles of law, as stated by the early common-law writers upon this subject, made it perfectly competent for the accused to enter a plea of guilty, and for the court to proceed to enter a judgment upon that plea, in the same manner as it would have done had there been a trial and verdict of guilty by a jury. In discussing the meaning of "trial by jury," in article 16 of the bill of rights in the constitution of that state,—and, in our judgment, the phrase is used in the same sense in the sixth amendment of the constitution of the United States,—the judge further says:

" 'Trial by jury,' in article 16 of the bill of rights, is common-law language, used in its common-law sense. It means trial by twelve men, who return their unanimous verdict 'upon the issue submitted to them.' But while the right of every one to have his cause tried, or to be tried himself if accused of crime,

by a jury, is guarantied and established beyond the power of the legislature to abridge it, the constitution does not compel any one to exercise the right thus secured; and there is no reason whatever to suppose that its makers designed to repeal or alter the moss-grown rule of the common law, 'by which a party indicted for an offense, however grave in its nature, may enter a plea of guilty thereto, if he sees fit so to do,' or the other no less well-established rule that 'in such a case there is no issue to be submitted to a jury on which a verdict can be founded.' The trial by jury, secured to the subject of the constitution, is a trial according to the course of the common law, and the same, in substance, as that which was in use when the constitution was formed *East Kingston v. Towle*, 48 N. H. 57, 64."

In order to support the contention of the appellant, the court would be required to hold that this article of the constitution not only preserved to the accused the right to enjoy a trial by jury in cases where he had seen fit to make an issue by pleading not guilty, but required him in all cases to submit the question of his guilt to a jury, whether an issue had been made in the case or not. This would be going far beyond the rights guarantied to accused persons under the common law, and would require the court to disbelieve the accused when he sought to confess his guilt to the accusation made. The very fact of a jury trial being necessary in the case presupposes an issue to be submitted to the jury. That no such issue existed at common law, in the face of the plea of guilty, is apparent from the authorities cited. As was said by Mr. Justice Shiras in *Hallinger v. Davis*, 146 U. S. 318, 13 Sup. Ct. 105, 36 L. Ed. 986:

"If a recorded confession of every material averment of an indictment puts the confessor upon the country, the institution of jury trial and the legal effect and nature of a plea of guilty have been very imperfectly understood, not only by the authors of the constitution and their successors down to the present time, but also by all the generations of men who have lived under the common law."

In the present case it is not contended that the accused was not fully advised of his rights. It is admitted that he was possessed of his senses and understanding, knew the nature of the case and the accusation against him, had the advice of counsel, and voluntarily came into court and entered a plea of guilty. To accept such a plea, and to proceed to judgment, has been the constant practice of the courts from the earliest records of the common law of which we have any knowledge. It was the purpose of the constitution to preserve to the accused the right, not the necessity, of a trial by jury. At least, the necessity of such trial can be dispensed with where the accused, by his plea of guilty, leaves no issue to be submitted to a jury. Finding the accused to have been properly convicted and sentenced, the judgment of the circuit court is affirmed.

IN re LELAH-PUC-KA-CHEE.

(District Court, N. D. Iowa, Cedar Rapids Division. December 29, 1899.)

1. INDIANS—SAC AND FOX TRIBE IN IOWA—JURISDICTION OF STATE COURTS OVER.

In view of the cession by the legislature of Iowa to the United States of jurisdiction over the reservation in Tama county occupied by a portion of the Sac and Fox tribe of Indians, and the acceptance of such cession by congress in the general Indian appropriation act of June 10, 1896 (29 Stat.

331), a district court of the state of Iowa has no jurisdiction to appoint a guardian for the person of a minor of such tribe residing on the reservation.

2. **SAME—GOVERNMENT SCHOOL—COMPULSORY ATTENDANCE.**

Act March 2, 1895 (28 Stat. 906), prohibiting any Indian agent or other employé of the government from using compulsory means, such as withholding rations or the like, to induce the parents or next of kin of any Indian child to consent to the removal of such child beyond the limits of the reservation, is applicable to the Sac and Fox tribe of Indians in Iowa, and is paramount to any regulation of the department. Under such statute the agent of the tribe and the superintendent of the school established therefor not only have no power to compel children to attend the school, which is situated outside the reservation, by force, but the consent of the parents or next of kin of such children is required to authorize their removal thereto.

3. **SAME—ATTENDANCE AT SCHOOL OF MINORS—EFFECT OF MARRIAGE.**

The fact that an Indian girl, a minor, while in attendance at a government school which is outside the reservation of the tribe of which she is a member, contracts a marriage, in accordance with the custom of her tribe, with another member, does not entitle her husband to a writ of habeas corpus to remove her from the school, nor can she be retained there against her own will; but in such case her marriage releases her from parental authority, and she has the right to remain or not at her own election. So long as she remains unmarried, her attendance during her minority is subject entirely to the will of her parents, or those who stand to her in the parental relation.

This was a hearing on a petition for a writ of habeas corpus on behalf of Lelah-puc-ka-chee, alleged to be unlawfully restrained of her liberty at an Indian school, and the answers of G. W. Malin, Indian agent, and G. W. Nellis, school superintendent.

J. W. Lamb, for petitioner.

H. G. McMillan, U. S. Dist. Atty., and De Witt C. Cram, Asst. U. S. Atty., for respondents.

SHIRAS, District Judge. In this proceeding a petition has been filed praying the issuance of a writ of habeas corpus to cause to be brought before the court Lelah-puc-ka-chee, an Indian girl belonging to the Sac and Fox tribe of Indians, who occupy a reservation in Tama county, Iowa; it being averred in the petition that she is unlawfully restrained of her liberty by being compulsorily kept at the Indian training school, which is situated near the city of Toledo, Tama county, and in the vicinity of the Indian reservation. As it was apparent to the court that in the hearing of the matter questions of moment would arise, which ought not to be determined without opportunity being given for full consideration, and as it was also apparent that need did not exist for taking the Indian girl from the school during the pendency of the proceedings, the court directed the petition for the writ to be set down for hearing, and notice thereof to be given to W. G. Malin, the Indian agent, and G. N. Nellis, the superintendent of the school, who are the parties charged in the petition with illegally and wrongfully depriving the Indian girl of her liberty. Upon the day thus set for hearing the matter, the respondents appeared in person and by the United States district attorney, and filed an answer to the petition, and thereupon counsel for the respective parties were heard at length upon the

questions involved. Briefly stated, the position taken by the attorney for the petitioner is that Lelah-puc-ka-chee is about 18 years of age; that she is a married woman, being the wife of Ta-ta-pi-cha; that, contrary to her wishes and those of her husband, she is compelled to remain at the training school; that there is no law authorizing the Indian agent and school superintendent to compel the attendance of the Indian children of this tribe at the school in question; and that the detention of the girl is therefore wholly unwarranted. On behalf of the respondents it is claimed that Lelah-puc-ka-chee is but little over 16 years of age; that W. G. Malin, the Indian agent, was appointed the guardian of Lelah-puc-ka-chee by the district court of Iowa for the county of Tama, her parents being incapable of taking care of her; that she was placed in the training school, under charge of the respondent Nellis; that in some way she was induced by Ta-ta-pi-cha and other Indians to leave the school, and by intimidation was induced to report that she had been married to Ta-ta-pi-cha; that this pretended marriage is in fact a fraud; that it is necessary, in order to complete her education, that Lelah-puc-ka-chee should be kept for some time yet at the training school, where she was placed by her guardian; that Ta-ta-pi-cha, the alleged husband, with other Indians, is opposed to the education of the Indian children at the training school; and that the present proceeding is merely in aid of this purpose, and, if sustained, will result in defeating the beneficial object for which the school has been established.

The first matter for determination is the position or relation which the Indians settled upon the reservation in Tama county hold with reference to the state and federal governments. It appears that under date of October 11, 1842, the United States entered into a treaty with the Sac and Fox Indians whereby the latter ceded to the United States all their lands west of the Mississippi river, the United States agreeing to assign to them, as a reservation and a permanent place of residence, a tract of land upon the Missouri river, or some of its tributaries, to which the Indians were to remove within three years; the government to pay to the Indians an annual interest of 5 per cent. upon the sum of \$800,000, and to pay the existing debts of the Indians, and also to furnish certain supplies. 7 Stat. 596. It further appears that in accordance with the terms of this treaty a reservation was set apart for the Indians, which is now included within the boundaries of the state of Kansas, and the tribes removed thereto. Subsequently a few of the number returned to Iowa, and, uniting with some scattered remnants that had not gone to the new reservation, they established themselves in Tama and the adjoining counties. The government of the United States endeavored to induce these members to join the confederated tribes, and for years refused to pay them any portion of the tribal annuity, but these efforts were of no avail. Finally, in 1856, the state of Iowa, by an act of the general assembly, recognized their right to remain in the state; and in 1857 the Indians bought an 80-acre tract of land in Tama county, making it the nucleus of their proposed permanent settlement, which has increased, through

the bounty of the state and national governments, until it now includes nearly 3,000 acres in extent, with an Indian population of about 400 souls. In 1895 there was organized what is known as "The Indian Rights Association of Iowa," the main purpose of which was to labor for the advancement of the Indians on the Tama reservation; and to that end the general assembly of Iowa was induced to pass in 1896 an act ceding to the United States jurisdiction over the reservation in question, which cession was accepted by congress by a clause inserted in the act approved June 10, 1896, making appropriations for the Indian department, in which clause it is enacted "that the United States hereby accepts and assumes jurisdiction over the Sac and Fox Indians of Tama county, in the state of Iowa, and of their lands in said state, as tendered by the act of the legislature of said state. * * *" 29 Stat. 331. Through the combined efforts of the agent for the reservation, the Indian Rights Association, and the department for Indian affairs, there was secured from congress, under date of June 10, 1896. an appropriation of the sum of \$35,000 for the purchase of a site and the erection of the necessary buildings for an industrial school at or near the reservation in Tama county; and the money thus appropriated was used in the construction of the buildings now constituting the Indian training school, which adjoins the town of Toledo, and is some four or five miles from the reservation. From this brief statement it sufficiently appears that the reservation in Tama county and the Indians living thereon are now committed to the care and control of the United States government, and the source of the authority of the Indian agent and superintendent of the school over the Indians must be sought in the legislation of congress, and the regulations of the department in charge of Indian affairs. I can find no substantial ground upon which to base the right and authority of the district court of Iowa for Tama county to appoint guardians for the persons of the Indian children living on the reservation. If this right exists simply by reason of the fact that the Indians reside within the territorial boundaries of Tama county, it would necessarily follow that the state court would possess the right to appoint administrators of the estates of the Indians, and in all respects to take charge of the domestic relations of these Indians; but this right has never been asserted, and it is apparent that the exercise thereof would of necessity cause constant confusion in the affairs of the Indians. As I understand it, the purpose of the cession by the state to the national government of the jurisdiction over the reservation and the Indians living thereon was to center in the one government the duty of taking charge of these Indians, and thereby to avoid the evils that would necessarily arise from a divided control over them. If it should be held that the state court has the power and right to appoint guardians over the persons of the Indian children, on the allegation made in the case of Lelah-puc-ka-chee, to wit, that her parents are not taking proper care of her, or for any other reason, then that court may select any competent person to act as guardian, and such person could remove the child from the reservation, and would be en-

titled to demand reimbursement for the expense of maintaining and educating the ward from some source; but it is apparent that the state court could not reach, for such purpose, the interest of the child in the tribal property. These and other like considerations result in the conclusion that the right to compel the attendance of the Indian girl at the training school cannot be based upon the fact that the Indian agent was appointed her guardian by the district court of Tama county. In the case of *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228, the supreme court reannounced the doctrine that had been held in the early cases of *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, and *Worcester v. Georgia*, 6 Pet. 515, 4 L. Ed. 483, that:

"The Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection."

It will be noticed that this rule is announced with respect to the Indian tribes, and is not intended to be applied to individuals who may have severed their tribal relations, or who have become incorporated into the citizenship of the state in which they reside, but it is the rule that is applicable to tribes who are in the situation of the Sacs and Foxes on the reservation in Tama county; and therefore it must be held that the appointment of G. W. Malin as guardian of the person of Lelah-puc-ka-chee is of no force or effect, for the reason that she is a member of the Indian tribe, and as such is not within the jurisdiction of the state.

The next question for consideration is whether the Indian agent has the right to compel the attendance of the Indian children at the training school, regardless of the wishes of the parents or of the children themselves. My attention has not been called to any act of congress making attendance upon this school compulsory upon the children of the reservation, or conferring upon the agent the power to take the children from their homes and place them in the school, and to enforce their remaining at the school by measures restrictive of their personal liberty; and I do not understand that this compulsory power is claimed to exist, on behalf of the respondents. In the answer filed to the petition for the issuance of the writ, it is averred that:

"Under the laws of congress, and in accordance with the provisions of the rules and regulations of the commissioner of Indian affairs, it is the duty of the agent of said reservation and the superintendent of the Indian school, in so far as possible, to secure the attendance at said school of all children between the age of five and eighteen years."

And this statement, in my judgment, fairly defines the power vested in the respondents as Indian agent and superintendent of the Indian school.

But the duty to secure the attendance of the children at the school does not include the power to compel their attendance by force, contrary to the wishes of their parents. Certainly the right to supersede and override parental control in such matters cannot be based on anything less than congressional action to that end,

even if that would be effectual unless it was concurred in by the Indians acting in their tribal capacity.

In the Indian appropriation act approved March 3, 1893, it was enacted that:

"The secretary of the interior may in his discretion establish such regulations as will prevent the issuing of rations or the furnishing of subsistence either in money or in kind to the head of any Indian family on account of any Indian child or children between the ages of eight and twenty-one years who shall not have attended school during the preceding year in accordance with such regulations. * * * Hereafter the secretary of the interior may, in his discretion, withhold rations, clothing and other annuities from Indian parents or guardians who refuse or neglect to send and keep their children of proper school age in some school a reasonable portion of each year." 27 Stat. 612.

In the act approved March 2, 1895 it is provided that:

"Hereafter no Indian child shall be sent from any Indian reservation to a school beyond the state or territory in which said reservation is situated without the voluntary consent of the father or mother of such child, if either of them are living, and if neither are living without the voluntary consent of the next of kin of such child. * * * And it shall be unlawful for any Indian agent or other employee of the government to induce, or seek to induce, by withholding rations or by other improper means, the parents or next of kin of any Indian to consent to the removal of any Indian child beyond the limits of any reservation." 28 Stat. 906.

Under the provisions of this section of the act of 1895, Indian agents and school superintendents are clearly prohibited from using compulsory means, such as the withholding of rations, payment of annuities, or the like, in order to coerce the parents or next of kin of any Indian child into permitting the removal of the child beyond the reservation; and this congressional enactment necessarily abrogates and nullifies all rules and regulations of the department of the interior, or any of its bureaus, which conflict therewith. As the Indian training school in Tama county is beyond the limits of the reservation, the statute just cited is applicable thereto; and under its provisions the agent in charge thereof is forbidden from coercing the parents of the children, by withholding rations, annuities, or the like, into giving consent to the removal of their children beyond the limits of the reservation, in order that they may be placed in the training school. Not only does it appear that congress has not conferred upon the Indian agents and school superintendents the power to take the Indian children by force and remove them to schools situated beyond the reservation, without the consent of their parents or next of kin, but, on the contrary, the consent of the parents is made a condition to such removal, as well as in cases wherein it is proposed to place Indian children in white families. I can see no other conclusion from the statute applicable to the situation than that in this case. The Indian agent and school superintendent must seek to secure the attendance of the children of the reservation at the training school through the influence of the tribe and of the parents of the children; and, to secure such influence, the good will and confidence of the adults of the tribe must be acquired. This will doubtless require time, and careful and discreet conduct on the part of the officials. If I am correctly informed, much dislike towards the school as a place for the edu-

cation of the Indian children now exists among many of the tribe, due partly to the natural belief among the Indians that the school training is intended to alienate the pupils from their tribe, but also partly due to the overzeal in the past management of the affairs of the agency, and to unwise interference of third parties, which has resulted in mistrust of the motives of those in charge of the reservation, and a consequent antagonism to plans and purposes intended for the actual advancement and betterment of the condition of the Indians. Owing to the inherent nature of the Indians, and to the conflict that has existed between them and the whites since the advent of the latter upon this continent, it must be expected that their suspicions of the motives of the whites will be easily aroused, and cannot be readily allayed. It would seem clear that the success of the training school at Tama City, as now constituted, cannot be assured unless it is so conducted as to win the confidence and good will of the tribe as a whole, or at least of a large portion of the more progressive element; and surely this cannot be accomplished by the use of force or other means whereby the will of the Indian is overcome, leaving his judgment unconvinced. The school and attendance thereat should not be made a matter to be feared, but, on the contrary, the Indians should be led to understand that this school is an institution of their own reservation, and that attendance thereat and success therein will benefit their children as Indians, and that it is not the purpose to wean the children from the tribe, and convert them into mere hangers-on of the whites. The creation of this feeling of confidence in the beneficent purposes of the school cannot be accomplished in a day, but it is the work to which the efforts of the agent and superintendent should be directed, rather than to merely enlarging the compulsory attendance of the children of the reservation. As far as possible, all causes of irritation operating on the feelings of the adult Indian should be removed, and every means possible should be resorted to that will win their confidence, and enlist their co-operation in carrying on the industrial education of their children. In this work the agent and superintendent are entitled to the hearty support of all good citizens, and should not be hampered by ill-judged, though well-meant, interference on the part of outsiders; and, so long as they properly perform the duties of their positions, they are entitled to be protected against unwarranted influence brought to bear upon the Indians themselves. It is the government of the United States that has put into operation the training school at Tama City, and it is one of the agencies upon which the United States depends to advance the condition of the Indians upon the reservation, and to secure the confidence of the Indians in the beneficent purposes of the government towards them; and therefore all efforts, without just cause, to interfere in the conduct of the agency or the Indian school, and thereby to cause ill feeling on part of the Indians towards the government, might bring the actors within the condemnation of section 2113 of the Revised Statutes of the United States, which declares that any one "who alienates or attempts to alienate the confidence of any Indian or Indians from the government of the

United States, is liable to a penalty of one thousand dollars." Any good citizen who deems there is cause for believing that any official connected with the Indian reservation is derelict in his duty can readily call the attention of the Indian department to the matter, and thus secure an investigation of the charge, or, if need exists, may invoke, in a proper case, judicial action, and will be commended for so doing; but if one disregards these methods of securing justice to the Indian, and contents himself with creating hard feeling on part of the Indians against the government officials, he lays himself open to the charge of being an intermeddler without a commendable purpose.

Some discussion on part of counsel has been had over the effect of a marriage which it is claimed has been had, according to the custom of the tribe, between Lelah-puc-ka-chee and Ta-ta-pi-cha; it being claimed on behalf of the respondents that, if such a marriage should be given recognition by the court, it would afford an easy method by which the attendance of the girls at the school could be prevented. If a marriage in accordance with the recognized custom of the tribe has taken place between the parties named, I know of no ground upon which the court would be justified in pronouncing it invalid and of no binding force. The question that lies at the foundation of the proceeding now before the court is whether the Indian girl is in fact unlawfully restrained of her liberty. If she is in attendance at the school voluntarily, or has been placed there by her parents, being under age, I see no good reason why the court should grant a writ of habeas corpus to her husband to compel her to leave the school. The true interests of the girl in such case become of paramount importance. A refusal of the writ under the circumstances is not a denial of the validity of the alleged marriage, but is a recognition of the right of the wife, in view of her youth, to obtain a reasonable education, which will probably better fit her for her duties as a wife, and as a member of the tribe to which she belongs. When this marriage took place the girl was in attendance at the training school, and assuming that she was there with her own consent or that of her parents, and if she wishes to complete her education before leaving the school, I cannot see that the husband has just cause of complaint if the court should refuse to compel the wife to leave the school, and be thus deprived of the benefits she would receive from a continuation thereof.

The conclusion reached upon the questions submitted to the court is that the respondents, as the agent and school superintendent at the Tama county reservation, cannot by force or compulsion take the Indian children from the reservation proper, and keep them at the Indian training school, without the consent of the parents, or those who may stand in that relation to them; that, if Lelah-puc-ka-chee has in fact been married to Ta-ta-pi-cha according to the recognized tribal custom and manner, that fact emancipates her from parental control, and, if she wishes to leave the school, she cannot be lawfully prevented from so doing, but if she, although married, wishes to continue in attendance at the school, she has

the right so to do; that if she is not in fact married to Ta-ta-pi-cha, and her parents desire to have her remain in the school, she being less than 18 years of age, the respondents have the right to require her attendance, but, if her attendance can only be secured by compulsion, that compulsion must be exercised by the parents, and not by the respondents. I trust that the foregoing statement of the views of the court upon the questions submitted will result in such wise action on part of the respondents that further action on part of the court will not be necessary in the premises.

NATIONAL FOLDING-BOX & PAPER CO. v. BROWN & BAILEY CO. et al.
(Circuit Court, E. D. Pennsylvania. December 22, 1899.)

No. 22.

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where the affidavits filed on behalf of the respective parties on an application for a preliminary injunction are conflicting, and leave the question of infringement in serious doubt, the court will deny the injunction, and leave the matter to be determined on a full hearing.

This is a suit in equity for infringement of a patent. On motion for temporary injunction.

Walter S. Edmonds, for complainant.

Francis T. Chambers, for respondent.

DALLAS, Circuit Judge. If the moving papers submitted on behalf of the plaintiff were alone to be considered, its motion for a preliminary injunction would seem to be adequately supported. But the affidavits presented for the defendant have at least created a serious doubt in my mind respecting the question of infringement, and the existence of such a doubt requires a denial of the writ. It is not necessary or desirable that the validity of the patent in suit should now be passed upon. As to its infringement by the defendants, the experts on either side have given repugnant opinions. The question is a nice and difficult one, and cannot be solved by the court upon its own inspection of the exhibits, aided only by conflicting ex parte affidavits. This conflict may possibly be reconciled, and will at all events probably be made more easy of determination, by cross-examination of the respective witnesses, but it certainly could not be safely decided upon the present proofs. The views expressed by the court of appeals for this circuit in *Blakey v. Manufacturing Co.*, 37 C. C. A. 27, 95 Fed. 136, are applicable to this case. Preliminary injunction denied.

MEYROWITZ MFG. CO. v. ECCLESTON et al.
(Circuit Court, D. Massachusetts. December 22, 1899.)

No. 1,040.

PATENTS—SUIT FOR INFRINGEMENT—LACHES.

Complainants, the owners of a patent, wrote defendants, charging infringement and threatening suit, and defendants answered, denying infringement, contesting complainants' construction of the patent, and calling attention to a prior patent. To this complainants replied that they

would look the matter up. There were no further communications between the parties on the subject for nearly 10 years, during which time complainants purchased considerable quantities of the alleged infringing goods made by defendants, and the latter expended money in enlarging their facilities for manufacture. *Held*, that complainants were guilty of such laches as precluded them from maintaining a suit in equity for infringement.

This was a suit in equity for infringement of a patent. On final hearing.

H. Albertus West, for complainant.

Oliver R. Mitchell and Henry B. Montague, for defendants.

LOWELL, District Judge. In this case it is not necessary to determine the validity of the complainant's patent, or the issue of infringement, because the case can be disposed of on another ground. The complainant's patent was issued November 3, 1885, to E. B. Meyrowitz, by whom it was, on April 3, 1894, assigned to the complainant. E. B. Meyrowitz is president, and his brother secretary and treasurer, of the complainant corporation. The patent under which the defendants manufacture was issued in 1887, and they began to manufacture at about that time. In the year 1888 the following correspondence took place:

"New York, April 28th, 1888.

"Mess. W. H. Eccleston & L. E. Sibley, Southbridge, Mass.—Gentlemen: It has come to our notice that you are manufacturing and selling a 'nose-guard' which is clearly an infringement on the first claim of a patent owned by us. We have taken the advice of a competent patent lawyer, and are assured that we have good grounds upon which to proceed against you in the regular process of law. Before doing so, we write you to know if you will not arrange this matter with us amicably, rather than be obliged to spend what profit there may be in the patent in defending this suit.

"Respectfully yours,

Meyrowitz Bros."

"Southbridge, May 1, 1888.

"Meyrowitz Bros.—Gents: Your favor of the 28th at hand, and contents noted. We will give the matter due consideration [and you will hear from us later].¹ Yours, resp't, Eccleston & Sibley, Southbridge, Mass."

"Southbridge, May 4, 1888.

"Meyrowitz Bros.—Gents: We have examined your patent, and fail to see wherein we infringe. If you will kindly inform us, we will be obliged.

"Yours, resp't,

Eccleston & Sibley, Southbridge, Mass."

"New York, May 11th, 1888.

"Messrs. Eccleston & Sibley, Southbridge, Mass.—Gentlemen: Your favor of 4th inst. duly received. You are infringing upon the 1st claim of our patent, which, if you will read carefully, shows your patent to be practically invalid, and really secured by the above-mentioned 1st claim of our patent. We quote from the report made to us by our patent lawyer: 'I am consequently of opinion that your said patent No. 329,474 is infringed by the manufacture, sale, or use of said "cork nose-guard," and makers, sellers, and users thereof are each separately liable to you, and can be stopped by injunction, if the patent is sustained in court as of the scope I have indicated. The fact that said "cork nose-guard" are themselves patented would not protect their makers, sellers, and users, as said patent No. 375,541 in no sense supersedes your said patent No. 329,474, which appears to have been strangely overlooked when the appli-

¹ Words in brackets canceled.

cation for said patent No. 375,541 was examined.' Please let us hear from you immediately, as we are determined to take the necessary measures for the protection of our rights in this matter.

"Respectfully yours, Meyrowitz Bros., per E. B. Meyrowitz."

"Southbridge, May 16, 1888.

"Meyrowitz Bros.—Gents: Yours of the 11th at hand, and noted. We would say we cannot see wherein the validity of your claim 1 lies in view of the patent granted prior to yours to T. P. Hubbell, June 16, '85. Please let us hear from you in regard to it.

"Yours, resp't, Eccleston & Sibley, Southbridge, Mass."

"New York, May 21st, 1888.

"Mess. Eccleston & Sibley, Southbridge, Mass.—Gentlemen: Your favor of 16th inst. duly to hand. We will have our lawyer look into the Hubbell patent, and will reply to you in a few days.

"Very truly yours, Meyrowitz Bros."

There was no further correspondence or transaction between the parties until about April 28, 1897, when the complainant's agent ordered from the defendants one gross of the article alleged to infringe. Four orders for considerable quantities of similar goods were sent subsequently, three before and one after the filing of the bill in this case, August 2, 1898. Under these circumstances it seems to me clear that the complainant is disentitled to relief in equity by reason of its laches and delay. The reasons given for the delay by the patentee are not sufficient. He testified, "I have, from time to time, been collecting such evidence as I could obtain." Being asked, "What evidence of infringement have you collected since then?" he replied, "I have, both by purchase from them direct of the infringed goods and from seeing other dealers handling the article, satisfied myself that they were still continuing the infringement of the patent in suit." This is frivolous. The patentee had obtained, in 1888, all the evidence which the complainant now has. The defendants, on the other hand, since 1888, have invested a considerable sum of money in establishing the alleged infringing manufacture. No two cases of laches are precisely similar in their facts, but the case at bar is essentially similar to *Manufacturing Co. v. Williams*, 15 C. C. A. 520, 68 Fed. 489, and to *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 200, 14 Sup. Ct. 78, 37 L. Ed. 1049. In the latter case the complainant was an employé of the defendant. The invention was perfected in 1872, the patent applied for in 1875, and obtained in 1876. In 1875 and 1876 the complainant demanded from the defendant an arrangement or settlement for the use of his invention, but was refused. He then dropped the matter, and continued to acquiesce in the defendant's use of the patent, and to receive from it a salary. When asked to account for his conduct, he replied that he felt convinced that any demand he might have made would have been rejected, and thus his friendly relations with the defendant might have been disturbed. The court held that the bill must be dismissed upon the ground of laches, apart from any question of implied license. In the case at bar the patentee called the defendants to account in 1888, alleging infringement, and threatening suit. The defendants denied the infringement, and contested the construction put by the patentee upon his patent. The patentee replied that he would have his lawyer look

into the matter, and would reply to the defendants in a few days. No reply was ever made, and, as no suit was brought, the defendants might, not unnaturally, infer that their contention concerning the patent was acquiesced in. This inference would be greatly strengthened by the purchase at sundry times, in the way of ordinary business, by the complainant from the defendants, of considerable quantities of the goods alleged to infringe. In argument the complainant's counsel sought to explain the delay in suing as an exercise of the complainant's patience and forbearance. Doubtless patience and forbearance are Christian virtues, but courts of equity do not regard them as equivalent substitutes for diligence and promptitude in enforcing legal rights. Upon the whole, the reasoning of the supreme court in *Lane & Bodley Co. v. Locke* seems applicable to the case at bar. See, also, *McLaughlin v. Railway Co.* (C. C.) 21 Fed. 574, referred to with approval in *Keyes v. Mining Co.*, 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929; *Insurance Co. v. City of Austin*, 168 U. S. 685, 697, 18 Sup. Ct. 223, 42 L. Ed. 626. The bill is dismissed, with costs.

THE FORTEVIOT.

(District Court, D. Washington, W. D. December 11, 1899.)

SEAMEN—INSUFFICIENT PROVISIONS—RIGHT TO LEAVE SHIP.

Seamen who, during the time they served on a voyage, were supplied with less food, on an average, than was called for by their shipping articles, and during a part of the time considerably less, and insufficient for their comfortable maintenance, and who, on making complaint to the captain of being starved, were threatened with being starved worse before the end of the voyage, were justified in leaving the ship before the completion of the voyage for which they signed, and entitled to recover full wages for the time served.

This was a libel by seamen against the British bark *Forteviot* to recover wages.

Frank Allyn, for libelants.

W. O. Chapman, for claimant.

HANFORD, District Judge. The sole question to be decided in this case is whether the libelants were justified in leaving the ship before the termination of the voyage described in their shipping articles, by reason of having suffered deprivation of sufficient food while they were in the ship. The evidence shows clearly that on the entire voyage, from New York to Shanghai, and thence to Tacoma, the crew were supplied with no potatoes or fresh vegetables, except soup containing vegetables served a few times, and at Shanghai a few small potatoes were given them. They were given, on an average, 1 pound per day of salt meats, and 1 pound per week of fresh meat. This is an actual shortage of nearly 2 pounds per week below what they were entitled to receive, according to the scale of provisions specified in their contract; and all that appears to have been given them as substitutes for their shortage of meat was an average of half a pound of butter and half a pound of marmalade and about one-third

of a pound of beans per week. This is the average for the entire voyage from New York via Shanghai to Tacoma. It is only a little below the specified quantity, but I find from the evidence that during part of the time the rations actually issued were considerably below this average; and the hardships which the libelants had a right to complain of lie in the fact that they were at times deprived of food equal to the scale specified in their contract, or sufficient for their comfortable maintenance. Men at work require sufficient food every day. If a man has sufficient on one day, it will not relieve his distress from hunger a day or a week afterwards. It appears by the ship's provision book that for several successive weeks during the months of October, November, and December the weekly allowance of provisions for the crew of 30 men was as follows: Salt beef, 90 pounds; salt pork, 90 pounds; fresh meat, 30 pounds; hard bread, 210 pounds; peas, 27 pounds; barley, 2 pounds; flour, 45 pounds; rice, 15 pounds; beans, 18 pounds; butter, 15 pounds; marmalade, 15 pounds; besides sugar, tea, coffee, lime juice, and vinegar. For workmen, this was certainly a scant allowance. It only amounts to 1 pound per day of meat, including bones; 1 pound per day of hard bread; 2 pounds per week of peas, rice, and beans; 1 ounce per week of barley; $1\frac{1}{2}$ pounds per week of flour; $\frac{1}{2}$ pound of butter and $\frac{1}{2}$ pound of marmalade per week,—to each man. The captain, in his testimony, claims that something additional was furnished in molasses and oat-meal porridge; but his testimony as to these matters is vague and indefinite, and he is not corroborated by the provision book, nor by the cook, who testified as a witness for him. The libelants testify that they actually suffered from hunger most of the time, and it is shown that, when they complained to the captain of the ship of being starved, he treated them contemptuously, and threatened to starve them worse before they got back to Liverpool; and, in giving his testimony before the commissioner in this case, the captain showed no disposition to rectify the wrong done to his men, but, on the contrary, admitted that the crew had not received the full quantity of meat specified in the scale of provisions contained in the shipping articles, and declared that they would not be supplied with that quantity in his ship. The libelants were certainly entitled to have the full measure of the scanty allowance of food which they contracted for while serving in the ship, or sufficient to enable them to do their work without suffering from hunger. The contract between them and the ship was first broken by the captain, and, there being no reason to expect better treatment on the long voyage from Tacoma to Europe, I hold that they were legally entitled to quit the service, and to recover full pay at the contract rate up to the time of leaving the ship. A decree will be entered awarding to libelants the following sums: To Harry Roy, \$75.05; to Peter Reynard, \$79.35; and to Jacob Jacobson, \$137.35,—and costs.

SKINNER v. HARRIS.

(District Court, E. D. North Carolina. November 16, 1899.)

ADMIRALTY JURISDICTION—MARITIME CONTRACTS.

A contract by which respondent, as a ship broker, agreed to collect certain freights earned by a vessel, and to divide the same with libelant, in consideration that the latter would not contest a claim filed by respondent against the vessel in pending proceedings in which she was libeled, is not maritime, and a suit for its enforcement cannot be maintained in a court of admiralty.¹

In Admiralty. This was a suit in personam based on a contract. Heard on the pleadings, and on motions by libelant for the appointment of a commissioner, and by respondent to dismiss.

Thos. Evans, for libelant.

Geo. Rountree and E. K. Bryan, for respondent.

PURNELL, District Judge. Cause argued at fall term, 1899, on the pleadings; libelant moving the court to appoint a commissioner to find the facts, and respondent to dismiss because the cause is not one in the admiralty jurisdiction. Proctors are not agreed as to the facts admitted or issues raised, but taking the libel as several times amended, and the answers, the following facts appear and are found as admitted: On March 12, 1895, Phillip B. Gardner, of Philadelphia, Pa., purchased of S. W. Skinner, Wilmington, N. C., the bark Marion S. Harris, and executed a mortgage on said bark to secure the unpaid balance of the purchase money. The home port of the bark was thereafter Philadelphia, Pa. 29 C. C. A. 428, 85 Fed. 799. In 1895 the said bark completed a voyage from Jamaica to Philadelphia, when she was libeled and sold to satisfy liens. See *supra*. Respondents collected \$863.34, as ship's agents, for freight earned, which amount has been disbursed under the orders of the owner and master before the filing of the libel herein. Neither Skinner, libelant, nor Harris, respondent, were owners of the bark or any interest therein. In December, 1895, said bark made a voyage from the island of Jamaica to Chester, Pa., laden with logwood consigned to Geo. Harris, Son & Co., shipbrokers, who undertook to collect the freight, amounting to \$1,550. The cause of action is shifted several times in the pleadings, but the following seems to be the basis, and only basis, of libelant's claim against respondent: On January 30, 1896, what is claimed to be a contract appears to have been entered into, signed by "Geo. Harris, Jr., Atty. for Geo. W. Harris, Son & Co., party of the first part, and Samuel W. Skinner, by Thomas Evans, Atty., party of the second part," by which it appears "the party of the first part" stipulated and agreed, in consideration that Skinner "should not allege or offer proof or argument against the claims of Geo. Harris, Son & Co. for \$1,927.60 on the bark Marion S. Harris, now under libel in Philadelphia district court," the party of the first part

¹ For admiralty jurisdiction as to matters of contract, see note to *The Richard Winslow*, 18 C. C. A. 347, and, supplementary thereto, note to *Boutin v. Rudd*, 27 C. C. A. 530.

is to collect and divide the freight earnings as stipulated, and the following appears as a proviso: "Provided, nevertheless, that, should the court exercise jurisdiction over this aforesaid freight fund, then, to the extent of such jurisdiction, this agreement shall thereafter be and remain void."

There are issues of fact raised, but the above is the basis of the libel. Is this a maritime contract,—one of which a court of admiralty will take jurisdiction and enforce? Is such contract in aid of, or does it appertain to, navigation? At best, it is, if a contract which any court will enforce,—and not discussing the many questions which might arise,—a civil contract, not enforceable in a court of admiralty. The least said of it the better for all concerned. It looks like the dealings of classes who may sometimes run the gauntlet of a court where the law is administered strictly, sometimes harshly, and where equity is unknown; but the parties to such contract have no standing in a court of admiralty. It is not a cause maritime, and within the admiralty jurisdiction. *Insurance Co. v. Dunham*, 11 Wall. 1-16, 20 L. Ed. 90. This is evident, and it is therefore unnecessary to consider the issues raised and discussed. The jurisdiction must appear affirmatively in the libel. It is therefore ordered and adjudged that the libel herein be dismissed, and that libelant pay the costs to be taxed by the clerk of this court. It is so ordered.

On Reargument.

(November 27, 1899.)

Proctor for libelant, having, at his own request, been heard in an argument of over two hours, requests that, unless the opinion on the question of jurisdiction be changed, no order to take testimony be made. No complaint is made of the findings of fact on the face of the pleadings, and my opinion on the questions decided in the former opinion filed is unchanged. Many facts were discussed which show admiralty jurisdiction, but these facts are aliunde the record. It is insisted, for instance, that the notes given by Gardner were for repairs to the bark while in port at Wilmington, and that, upon the surrender of the notes and mortgage, the maritime lien for repairs reattaches. As a proposition of admiralty law, this might not be controverted, if applicable to the case at bar, and the claim of a maritime lien on this account had not been already passed upon, as appears. If the bark had not been sold, under a decree of a court of competent jurisdiction, to satisfy liens for seamen's wages and supplies having priority, the lien might attach in rem; or it may be good as a maritime lien in personam against Gardner, the owner of the ship, or George W. Harris, Son & Co., for freight collected, but could not, even in the liberality of admiralty, give the court jurisdiction of an action against George W. Harris, Jr., for freights not collected. The contract shows, on its face, George W. Harris, Jr., attorney, signed the firm's name to bind the firm; and, without a finding of fact, upon testimony, the court cannot see facts, except as admitted or shown on the contract itself. Whether George W. Harris, Son & Co., George Harris, Jr., & Co., George

Harris, Son & Co., George W. Harris, Jr., attorney, and respondent, are all one and the same, may be clear to libelant's proctor, but it is not so to the court; nor is it clear how either can be liable, under the facts, for a libel in rem claimed against the bark, which may now be classed, at least as far as libelant is concerned, as one of "the ships that pass in the night." She is certainly not within this jurisdiction, and George W. Harris cannot, under any principles known to the court, be considered in her dock.

As to the claim in personam: The claim is not made against any of the firms named, but George W. Harris, Jr., is singled out. If he is liable for the firm for which he signed as attorney, why is the proceeding not in the name of libelant's proctor, who also signed as attorney? This is *reductio ad absurdum*. It is not necessary to decide if the firm for which the contract was signed could be held liable in any court for freight collected, or which might or should have been collected. The question is, can George W. Harris, Jr., be held liable, on the contract set out, for freights not collected, or collected and paid out, by the firm, on the order of the owner and master of the bark? What might be done in a court of law it is not necessary to discuss. After listening to an *ex parte* argument of over two hours by libelant's proctor, I must still hold this contract is not within the admiralty jurisdiction, and this court cannot entertain this suit.

The case of *Skinner v. Winsmore*, reported in 29 C. C. A. 428, 85 Fed. 798, seems to have involved many of the questions urged by libelant's proctor aliunde the record, who also represented him there, and to the *res adjudicata* by a court of competent jurisdiction. The parties to the contract were represented in that court,—*Skinner and George Harris, Son & Co.* If, as seems the fact, on the face of the contract, *Skinner* then agreed to suppress certain matters, which should have been presented in that case, and thus practiced a fraud on the court, he cannot now, in a far-off district, take advantage of his own act, and set up the same matters in this court. The lien for supplies, the mortgage, and other claims were passed upon in the circuit court of appeals of the Third circuit. No additional facts appear to give this court jurisdiction, and the jurisdiction must affirmatively appear. The former order, dismissing the libel, must stand.

THE BOYNE.

THE VOLAGE.

(District Court, E. D. Virginia. May 18, 1899.)

1. SALVAGE—AMOUNT OF AWARD.

The absence of other assistance is an important element to be taken into consideration in determining the amount of a salvage award.

2. SAME—FACTS CONSIDERED—RESCUE OF SHIPS FROM BURNING WHARF.

Two large steamships were lying side by side in a slip 150 feet wide, near the shore end, fastened together, while one was made fast to a pier, when, during the night, while neither had steam up, a fire broke out on the wharf, which burned rapidly, destroying the pier to which they were made fast,

together with the shipping between that and the adjoining pier; only one vessel, which had steam up, being able to save herself. The ships cut loose from the pier, but were unable to work themselves out of the slip. The pier on fire was 800 feet long; and the one opposite, 650 feet. The ship nearest the burning pier had already taken fire, when libelants, with their tug, came voluntarily to their assistance, entered the slip, and succeeded in towing both to a place of safety; neither having sustained more than slight injury. The ships, with their cargoes, were of the value of about \$240,000, and the tug was of the value of \$12,000. The time consumed in the service was 15 to 20 minutes. There was no other assistance at hand. *Held*, that taking into account the extreme peril of the ships, and their almost certain loss, as shown by the evidence of disinterested witnesses, but for the timely, prompt, and energetic assistance rendered by the tug, libelants were entitled to salvage to the amount of 5 per cent. on the value of the ship nearest the fire and her cargo, and $3\frac{1}{2}$ per cent. on value of the other and her cargo.¹

In Admiralty. These were libels on behalf of the owners, master and crew of the steamtug Luckenbach, for salvage services rendered to the steamships Boyne and Volage.

Whitehurst & Hughes, for libelants.

Sharp & Hughes, for respondents.

WADDILL, District Judge. These are two admiralty cases, heard together, in which the owners, master, and crew of the steamtug Luckenbach seek to recover salvage against the steamships Boyne and Volage for services rendered them on the 27th of April, 1897, while at the port of Newport News, Va. The said steamships were lying in the slip, near the shore end, between piers 4 and 5 of the Chesapeake & Ohio Railway Company's wharves; the Boyne being at the time fastened with its starboard side to pier 5, and the Volage lying along its port side, and made fast to it. The two ships were large ones,—the Boyne being 285 feet in length, and $34\frac{1}{2}$ feet beam; and the Volage, 336 feet in length, and 43 feet beam. The total valuation of the two ships was at the time \$239,827,—the valuation of the Boyne being \$60,000, and its cargo \$12,000; the Volage, \$130,000, and its cargo \$37,826. The value of the Luckenbach was about \$12,000. About 4:30 o'clock on the morning of the 27th of April, 1897, while said ships were lying at the pier, a terrific fire broke out on the wharves of the Chesapeake & Ohio Railway Company; and piers 5 and 6, together with the shipping between said piers, with the exception of a steamship of the Old Dominion Line, which had steam up, and managed quickly to move out, were consumed by fire. The tide at the time was flood, and the wind blowing strongly from N. W. to N. to N. N. W. Pier 5, against which the Boyne was lying, was 800 feet in length, and the next pier, No. 4, 650 feet in length, and the width of the slip between said two piers was 150 feet. At the earliest moment after the breaking out of the fire, neither of the ships having up steam at the time, they cut loose from pier 5, which was on fire, and, by working the winches of their donkey engines, warped themselves as rapidly as possible across to pier 4, and then attempted to warp out of the slip alongside of pier 4,

¹ As to salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

to which the fire had not spread, though it was in imminent peril of catching. The ships worked down along pier 4, their bows being lashed together and sterns separated, until within, say, 50 feet of the end of pier 4, and 200 feet of that of pier 5, the latter being 150 feet longer than the former, when the steamtug Luckenbach steamed up, and, at the instance of the master of the Volage, made fast to her; and the master of the Luckenbach then insisted that a rope should be extended from the tug to the Boyne, which was done, and the two ships were towed out into the stream and placed in a position of safety; the Boyne having in the meantime, before it could be gotten out, taken fire.

Libelants insist that they rendered salvage service of a highly meritorious character, and should be liberally rewarded, and urge that an award of 15 per cent., or \$10,800, should be made against the Boyne, and 10 per cent., or \$16,718.82, against the Volage; and, on the other hand, respondents say that, while they are entitled to some compensation, the salvage service was of a low order of merit, and they should only receive \$250 in each case, and no costs, because of the large amount sued for.

That the libelants, under the circumstances of these causes, are entitled to salvage, cannot be seriously questioned, and, indeed, this is admitted. The services were voluntarily rendered to the ships when in great peril, and the right of recovery is clear. *The Blackwall*, 10 Wall. 1, 19 L. Ed. 870; *The Henry Ewbank*, 1 Sumn. 400, Fed. Cas. No. 6,376.

The really controverted question is the amount of the allowance, and about that, certainly as between counsel, there is great divergence of views; and the evidence is not free from the usual conflict in admiralty cases, though I have but little difficulty in arriving at the material facts in the case. Unlike such cases ordinarily, the evidence is not confined to the parties in interest, but the libelants have examined quite a number of witnesses of character and experience in such matters, who have no manner of interest in the controversy, and were eyewitnesses to all that occurred at the time of the fire. The leading considerations to be observed in determining an award for salvage service are well defined by a long line of decisions, and need not be restated here. *The Blackwall*, 10 Wall. 1, 14, 19 L. Ed. 870; *The Sandringham* (D. C.) 10 Fed. 573; *The Egypt* (D. C.) 17 Fed. 367; *Simonton*, Fed. Prac. §§ 231, 232. That the ships, at the time they were removed by the tug, were in a position of great peril, and from which they could not themselves have escaped, I think there can be no doubt upon the whole evidence. One of them had actually taken fire. The other was lashed onto it, and between two piers, only 150 feet apart, one of which was rapidly burning, and the other in the greatest possible danger of catching. Indeed, its taking fire was only prevented by the pouring of water upon it by means of its own fire appliances. But for the expeditious removal of the two ships at the moment they were taken out of the slip by the Luckenbach, it is quite clear they would have been destroyed, and the flames, in all probability, spread from them to pier No. 4, and it, too, consumed. The length of time it would have taken to warp the ships

out by means of the winches of the donkey engines, if it could have been done at all after the end of pier No. 4 was reached, in my judgment made that method of escape impracticable. The ships, one being already on fire, would during the time either have burned, or certainly, in attempting to warp out of the space between the two piers, of 150 feet, have been destroyed by coming in contact with pier No. 5, on which the fire was then raging. The distance between the two piers, taking into consideration the space occupied by the ships themselves, and the fact that they were some feet apart at their sterns, would seem to be conclusive of the question of whether or not they were in a position of extreme peril; and, when it is remembered that one of them had already taken fire, the question of peril would no longer appear to be in dispute. Time, in the position in which the ships were, was of vital importance. The least delay would have been fatal, and this time was just what was saved by the arrival of the Luckenbach. The Bay of Naples (D. C.) 44 Fed. 90, 92. That the services of the libelants were skillfully, energetically, and promptly rendered, is not disputed; nor is the fact that there was no other assistance at hand. There was no chance of aid from the fire department of Newport News; nor was there any other tug or steamer or other means by which these two ships could have been saved from the almost certain flames in which they would have been enveloped. The only steamer that was saved at all between any of the piers was the Old Dominion Company's ship, which happened to have up steam, and prudentially saved itself, without time to render assistance to others. The absence of other assistance is an important element, and should be taken into account in ascertaining the amount of a salvage award. The Indiana (D. C.) 22 Fed. 925; The O. C. Hanchett, 22 C. C. A. 678, 76 Fed. 1003; The Monticello (D. C.) 81 Fed. 214; The Roman Prince (D. C.) 88 Fed. 336.

The value of the salvaged property is undisputed. It amounted to nearly a quarter of a million of dollars, and was salvaged with only inconsiderable loss. And while the value of the property employed by the salvors was not very large, in proportion to what was saved, and the danger to which it was exposed was not great, still there was some risk incurred, as it is quite clear from the evidence that the Luckenbach came into the piers at least 50 feet alongside of pier No. 4. Some of the evidence tended to show that it came in much further; but I think it fair to say it came 50 feet, and in that position made fast to the two ships, and took the chances of danger from fire, and the wind blowing it down against the burning pier 5, and the risk of strain on its machinery in moving two ships of the size of these, and carrying them out to a place of safety. The time consumed, it is true, was not very great,—not exceeding 15 or 20 minutes; but it was all that was necessary to do the work in hand successfully, and the services were rendered at just the time to save the two ships and their cargoes.

On the question of the amount of award the authorities differ greatly, and each case depends so largely upon its own peculiar facts and circumstances that it is difficult to obtain much assistance from adjudicated decisions; but generally it may be said that compensa-

tion as salvage is not fixed on the principle of a quantum meruit, or as a remuneration pro opere et labore, but as a reward given for perilous services voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property. In *The Connemara*, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751, only the tug engaged to tow the steamer, its officers and crew, two passengers, and one passenger on the burning steamer, rendered assistance. The fire occurred at 11 o'clock in the night, on the Mississippi river, and broke out in the poop above the main deck, and near the door, which could be opened by raising the latch, and, when discovered, was confined to three bales of cotton, a square sail, and two coils of tarred rope; and only these articles were partially destroyed, and the upper deck, or roof of the poop, partly burned, and the ship and the cargo were not otherwise injured. The time consumed was not over 15 or 20 minutes, and there was no serious risk or damage to the tugboat, or of injury to life or limb of any one of the salvors, and the services were rendered when other assistance was near at hand. The supreme court approved an award of 6 per cent., or \$14,198, upon the gross valuation of the ship and its cargo, of \$236,637. In *The Avoca* (D. C.) 39 Fed. 567, an award of \$5,000 to a tug and its crew was made by Judge Benedict against a bark and her cargo, valued at \$70,000. In this case there was no special hazard to the salvors, or skill required on their part; the services were of short duration, the removal of the bark to a position of safety consuming only about 20 minutes; the fire entirely extinguished in an hour and three-quarters; and other aid was readily at hand; and there, as here, the claim was made that the bark could have relieved itself, but the court thought differently, and emphasized the fact that, owing to the intensity of the fire, and the exposed position of the bark, no other tug was present in time to afford any valuable assistance to the bark. In *The Bay of Naples*, 1 C. C. A. 81, 48 Fed. 737, an award of \$12,000 upon a valuation of \$81,400 was made by the circuit court of appeals of the Second circuit, reducing an award of \$20,000 made by the district and circuit courts for the Eastern district of New York in the same case. (D. C.) 44 Fed. 90. The time employed was five hours, the weather fair, and the salvors encountered no peril to person or property, and no extraordinary exertion was required of them. In this case my opinion is that a proper salvage award is 5 per cent. upon the value of the *Boyne* and her cargo, and $3\frac{1}{2}$ per cent. upon that of the *Volage* and her cargo,—that is, for the sum of \$3,600 against the *Boyne* and its cargo, and \$5,873.94 against the *Volage* and its cargo; and a decree may be entered for these amounts, with interest.

GATES IRON WORKS v. JAMES E. PEPPER & CO. et al.

(Circuit Court, D. Kentucky. November 13, 1899.)

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP.

A cause is not removable by a defendant on the ground of diversity of citizenship alone where some of his co-defendants, who are interested adversely to each other in some of the questions involved, are citizens of the same state.¹

2. SAME—SEPARABLE CONTROVERSY—REQUISITES OF PETITION.

A petition by one of several defendants for removal on the ground of separable controversy should of itself distinctly show and point out the separable controversy, name the parties to it, and state all the grounds upon which the petitioner relies; and it should also show that such controversy involves the requisite jurisdictional amount.²

3. SAME—SEPARABLE CONTROVERSY.

In a suit in a state court to enforce a mechanic's lien, other lien claimants were made defendants, and filed cross petitions for the enforcement of their liens. The principal defendant filed an answer and cross petition bringing in as defendants a mortgagee alleged to hold a lien on the property by virtue of an after-acquired property clause in its mortgage, and also a subsequent grantee of the property, whose deed the defendant asked to have canceled or reformed. Such mortgagee and grantee were citizens of the same state. *Held*, that each of such cross defendants was adversely interested in the controversy of the other, so that neither could remove the cause on the ground of a separable controversy as to which a diversity of citizenship existed.

On Motion to Remand to State Court.

Geo. S. Shanklin, for complainant.

Pirtle & Trabue, Falconer & Falconer, and John J. McHenry, for defendants Harrisburg Trust Co. and R. G. Cox.

EVANS, District Judge. The plaintiff, the Gates Iron Works, an Illinois corporation, brought this action in the Fayette circuit court in February, 1899, whereby it sought judgment against James E. Pepper & Co., a Kentucky corporation, for \$3,060.20, and for the enforcement of a mechanic's lien which it asserted to exist upon certain real estate described in the petition. To this suit Houston, Stanwood & Gamble, a firm composed of citizens of Ohio, were made parties upon the ground that they also claimed a mechanic's lien upon the same real estate to secure a debt for \$1,143.30. Thomas A. Combs (subsequently changed to the Combs Lumber Company, a co-partnership made up of citizens of Kentucky) was also made a party, upon the allegation that he claimed a mechanic's lien upon the same real estate to secure his debt for \$2,070. S. C. Saunier, a citizen of Kentucky, was also made a defendant, because it was alleged he claimed a mechanic's lien upon the same property to secure a debt of \$53.86. Subsequently Houston, Stanwood & Gamble filed their answer, which was made a cross petition against the other

¹ As to diverse citizenship as a ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249, and, supplementary thereto, note to *Mason v. Dullaghan*, 27 C. C. A. 298.

² As to separable controversy as a ground of removal, see note to *Robbins v. Ellenbogen*, 18 C. C. A. 86, and, supplementary thereto, note to *Mecke v. Mineral Co.*, 35 C. C. A. 155.

parties to the suit. In it they formally set up their claim to a mechanic's lien upon said real estate to secure their demand above described. S. C. Saunier also filed a similar pleading, for a similar purpose, except that only James E. Pepper & Co. was made a defendant to his cross petition. A fourth controversy arose by the filing by the Combs Lumber Company of their counterclaim and cross petition against the other defendants to the suit, in which their lien was also asserted and sought to be enforced against the said real estate for \$2,070. A fifth controversy arose in the action when the corporation of James E. Pepper & Co. filed its answer and cross petition, to which it not only made the other parties to the suit defendants, but also, for the first time, introduced as a defendant the Harrisburg Trust Company. The pleading thus filed by James E. Pepper & Co. not only denied the validity of the claim of the Gates Iron Works, but sought to have the deed which, after the creation of the mechanics' liens thereon, it made to R. G. Cox for the land described in the petition, canceled upon the ground of fraud, or, failing in that, it prayed that the boundaries of the said land might be corrected. It also set up the fact that there had been a mortgage upon other property executed by it to the Harrisburg Trust Company, as trustee, two years anterior to the creation of the mechanics' liens, to secure the payment of \$150,000 in bonds, which were now held by divers persons, and that the terms of the mortgage were such that it embraced the real estate described in the pleadings, though acquired after the mortgage was made.

This being the state of the pleadings, on the 19th of June last, R. G. Cox, a citizen of Pennsylvania, without otherwise appearing in the action, filed his separate petition for the removal of the cause to this court on the sole ground, as alleged therein, that he is one of the defendants in a suit of a civil nature in which the matter in dispute exceeds \$2,000, exclusive of interest and costs, and that the controversy is between citizens of different states. Thereupon he sets out the citizenship of the various parties, and avers that the controversy in this suit is between citizens and residents of different states, and that the petitioner desires to remove this suit before the trial thereof into the circuit court of the United States. On the same day the Harrisburg Trust Company, also a citizen of Pennsylvania, without otherwise appearing in the action, filed a precisely similar petition; and, both of them having executed bond, the case was removed to this court, and the plaintiff, the Gates Iron Works, has moved to remand it to the state court.

If a proper construction of these petitions limits the claim of right to remove to mere diverse citizenship, neither of the petitioners could rightfully remove the case, because some of their co-defendants, who are necessary and not merely formal parties to the litigation, are averred to be citizens of Kentucky. If nothing else exist, the motion to remand must at once be sustained upon that ground. *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823; *Winchester v. Lond*, 108 U. S. 130, 2 Sup. Ct. 311, 27 L. Ed. 677. But it is insisted upon the part of the Harrisburg Trust Company and R. G. Cox that the record, as distinguished from their petitions, shows that there is a

separable controversy as to each of them, which can be fully determined as between either of them and the plaintiff or cross plaintiff without the presence of the other defendants as parties. The first thing that strikes the mind in reading the petitions is that neither of them makes a clear or definite statement upon which to base the claim to remove. The petitioners do not state that there is any controversy between either of them and the plaintiff or anybody else in which the amount in dispute is over \$2,000; nor is it anywhere alleged that the real estate described in the petition is worth more than that sum, although that real estate may be the only thing in controversy, so far as the petitioners are concerned. The controversy between the Gates Iron Works and James E. Pepper & Co., and that between the Combs Lumber Company and James E. Pepper & Co., respecting the latter's mere personal indebtedness, are about claims which obviously exceed the amount; but inasmuch as neither petitioner is actually interested in these controversies, and as there is no statement as to the value of the real estate, it does not appear that there is any controversy involving the required amount between the petitioners, or either of them, and James E. Pepper & Co., or any cross plaintiff. Without stating how they are interested in it, or specifying what it is, the petitioners go entirely upon the general averment that there is somewhere in the suit a controversy between unnamed citizens of different states. The court is therefore in much doubt as to whether it is at liberty to consider any other question upon this motion than the one thus presented by the petitions. And, besides, the court is strongly inclined to the opinion that a petition for removal must of itself distinctly show and point out the separable controversy, name the parties to it, and state all the grounds upon which the petitioner relies, and not leave the court to grope through the record to find, perchance, something lurking there which, outside of the petition, would justify the removal. 2 *Fost. Fed. Prac.* § 385a; *Black's Dill. Rem. Causes*, §§ 169, 170, 49; *Grace v. Insurance Co.*, 109 U. S. 284, 3 *Sup. Ct.* 207, 27 *L. Ed.* 932.

The court is also strongly inclined to doubt whether the amount involved is sufficiently stated in the petitions, as between either of the petitioners and any other party to the suit, because, as before stated, neither of the petitioners states that the matter in dispute between the petitioner and any plaintiff or anybody else exceeds the value of \$2,000. The court is, indeed, somewhat inclined to put its decision upon the two grounds indicated above; but, waiving each of them, and assuming that the petitions are good in both of these respects, the court still cannot find that there is in the case such a separable controversy in respect to either of the petitioners, or in which they are actually interested, or to which their petitions can properly apply, as between them and a plaintiff or cross plaintiff, or in respect to both of them, as citizens of Pennsylvania, which can be fully settled, and complete relief afforded, without the presence of the original defendants as parties, or, indeed, without the presence, *mutatis mutandis*, of a citizen of the same state of Pennsylvania in opposing interests. These elements are all necessary in order that there may be a removal in case of a separable contro-

versy. To remove upon this ground, there must be a separate controversy, upon one side of which a defendant and petitioner appears, and which can be completely settled without the presence of other defendants in the action whose presence would defeat the jurisdiction of this court. If there were a controversy here between either petitioner upon the one side and any other plaintiff or cross plaintiff upon the other, which might be completely settled without the presence of the other defendants or of another citizen of Pennsylvania on the opposite side, then the jurisdiction of this court might be sustained; but the court is clearly of opinion that the record discloses no controversy involving a sum exceeding \$2,000, besides interest and costs, between either of the petitioners and anybody else, which can be fully determined without the presence of all the original defendants in the action. In order to completely settle any controversy which the record discloses of interest to the petitioners, it seems to the court to be entirely clear that all the parties to this action should be parties to the litigation respecting such controversy. Every one of the parties appears to be directly interested in every one of such controversies. While the questions of personal indebtedness by James E. Pepper & Co. can probably be settled without the presence of other parties, the controversies respecting the real estate and claims to and interests therein, legal and equitable, cannot be fully determined unless all claimants are before the court. The action should be remanded, and it is so ordered.

BATES v. CARPENTIER et al.

(Circuit Court, N. D. California. December 4, 1899.)

No. 12,818.

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—SUIT TO QUIET TITLE.

A suit to quiet title, brought in a state court, against a number of defendants, for the purpose of obtaining an adjudication of all claims adverse to complainant which may exist in favor of any of the defendants, is severable as to each defendant; and a defendant who is a citizen of a different state from complainant may remove the cause, as against him, to the federal court, where the requisite amount is involved.¹

On Motion to Remand to State Court.

Freeman & Bates, for plaintiff.

George Leviston, for defendant Carpentier.

MORROW, Circuit Judge. This action was first brought in the superior court of the city and county of San Francisco, state of California, by the plaintiff, a citizen of said city, county, and state, against the defendants, to quiet title to certain described real property situated in said city and county of San Francisco, upon the averment that "the defendants claim some estate, right, title, and interest

¹ For separable controversy on ground of federal jurisdiction, see note to Robbins v. Ellenbogen, 18 C. C. A. 86, and, supplementary thereto, note to Mecke v. Mineral Co., 35 C. C. A. 155.

in and to said property adverse to the plaintiff, the nature of which claim and interest is not to the plaintiff more fully known." Publication of summons was allowed by the court upon the affidavit of the plaintiff that the defendants Carpentier and McDonald were, and had been for more than six months, nonresidents of this state. The defendant Carpentier appeared by way of demurrer to the complaint, and at the same time filed a petition for removal of the cause to the circuit court of the United States for this district; stating as grounds therefor the diverse citizenship of the plaintiff and himself, and that the cause of action set up by the plaintiff presented a separable controversy as to the petitioner. The state court granted this petition, and the action was accordingly removed to this court. Plaintiff has moved to remand the cause to the state court on the ground that all of the defendants are not nonresidents of this state, and that the circuit court has not jurisdiction thereof.

By the act of March 3, 1887, as amended by the act of August 13, 1888 (25 Stat. 433), governing the removal of causes from state courts, it is provided in section 2:

"Any other suit [than one arising under the constitution, laws, or treaties of the United States] of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district, by the defendant or defendants therein, being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

It has been repeatedly held that, under this statute, the failure of any of the defendants to join in the petition is fatal to the right of removal, when there is no separable controversy. *Rogers v. Van Nortwick* (C. C.) 45 Fed. 513; *Thompson v. Railway Co.* (C. C.) 60 Fed. 773; *Railroad Co. v. Townsend* (C. C.) 62 Fed. 161; *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442. The question to be determined is, therefore, does the action before the court present a separable controversy between the plaintiff and the defendant Carpentier? It is said in *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528, and cases therein cited, that, in order to justify a removal of a cause on the ground of a separate controversy between citizens of different states, "the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit." In *Goldsmith v. Gilliland* (C. C.) 24 Fed. 154, it was decided that a suit to quiet title to real property presented a subject-matter capable of such separable determination, and, "where a number of persons claim undivided interests in real property adversely to one in possession of the same, the latter may maintain a suit to quiet his title against any or all of such claims, and neither of said persons or adverse claimants is a necessary party to a suit for that purpose against the other." The plaintiff herein seeks to settle in one proceeding any and

all adverse claims asserted by any and all parties against the title to certain real property, and he contends that a defendant has no right to say that an action shall be several, which the plaintiff has elected to make a joint one against a number of persons; relying upon the cases of *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; *Deere v. Railroad Co.* (C. C.) 85 Fed. 878; and decisions in suits upon creditors' bills. But the plaintiff does not aver that all the defendants claim title to the realty jointly, or under one common source of title. He brings the various named defendants into the suit for the purpose of determining and adjudicating each and every claim or interest they may set up adverse to his own, no matter how diverse or opposed to each other. And where an action is brought by one plaintiff against several defendants, not because they claim any joint interest or are subject to any joint liability in respect to the subject-matter of the action, but merely for convenience, it will generally be capable of resolution into separable controversies between the plaintiff and the individual defendants. *Black, Dill. Rem. Causes*, § 148. A bill in equity to quiet title to real property, brought under the above conditions, has been decided to include a separable controversy with each of the defendants, so that, if one of them is a nonresident, he may remove the suit. *Field v. Lowsdale, Deady*, 288, Fed. Cas. No. 4,769; *Goodenough v. Warren*, 5 Sawy. 494, Fed. Cas. No. 5,534; *Stanbrough v. Cook* (C. C.) 38 Fed. 369. In the case of *Bacon v. Felt* (C. C.) 38 Fed. 870, the issue is almost identical with the one under consideration. The complainants sought in the district court to quiet title to certain realty against a number of defendants, and upon the petition of one of the defendants, as a nonresident, claiming the existence of a separable controversy, the cause was removed to the United States circuit court. Complainants moved to remand the cause on the ground that the circuit court was without jurisdiction, and in support of the motion relied upon the same authorities cited by the plaintiff herein. The court held that the case did not come within the principle of those decisions; that the bill to quiet title was not filed to settle a single controversy, and did not present a single controversy, within the rule given in the cases cited, but, on the contrary, required each defendant to set up any claim or right he might have, or be forever barred from so doing, and was therefore framed for the purpose of including in one suit as many separable controversies as the defendants might be able to assert. The motion to remand was denied. The reasoning of these authorities is applicable to the removal in question, and, in accordance with such opinions, the motion to remand is denied.

SHIELDS, County Treasurer, v. BOARDMAN (three cases).

(Circuit Court, N. D. Ohio, E. D. December 7, 1899.)

Nos. 5,189-5,191.

REMOVAL OF CAUSES—FEDERAL QUESTION.

To bring a case within the jurisdiction of a circuit court of the United States, under the judiciary acts of 1887 and 1888, on the ground that it arises under the constitution or laws of the United States, the plaintiff must claim some right under such constitution or laws which he seeks to enforce in the action; and a petition in a state court based upon a state statute, although its sufficiency is challenged by defendant by demurrer, without any additional averments in defense, upon a ground found in the federal constitution, does not disclose a case arising under such constitution which is removable by defendant.¹

On Motion to Remand to the State Court.

P. H. Kaiser, F. L. Taft, and F. S. Monnett, for plaintiff.

W. W. Boynton and N. T. Horr, for defendant.

TAFT, Circuit Judge. These cases now come before the court on motions to remand. The suits were originally brought in the court of common pleas of Cuyahoga county to recover back taxes assessed against the defendants, under sections 2782 and 2781 of the Revised Statutes of Ohio. The plaintiff specifically bases his right to recover on those sections. The petition for removal states that those sections are void because in conflict with the fourteenth amendment to the constitution of the United States, in that they permit the taking of property without due process of law. The question is whether a defendant may remove a cause from the state court to the circuit court of the United States, in which the plaintiff's petition claims no right under the constitution or laws of the United States, but makes a case, on its face, the legal sufficiency of which the defendant, without any additional averments in defense, challenges because of the inhibition of the federal constitution.

It is argued that the question under the constitution of the United States must, in such a case, arise on the face of the petition, and the petition alone, and therefore that the case, begun by such a petition, arises under the constitution of the United States, within the acts of 1887 and 1888, conferring jurisdiction on this court. The point presented is covered entirely by the decision in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511. That was the decision in three cases. Two of them were bills in equity to collect taxes and enforce liens, filed originally in the circuit court of the United States; and a third was a bill to collect taxes, filed in the state court, and removed to the federal court on the ground that the case arose under the constitution of the United States. In the first and second cases the state officers averred that the defendant banks claimed a tax exemption under their charter,

¹ For jurisdiction of federal courts in cases involving federal questions, see note to *Bailey v. Mosher*, 11 C. C. A. 308, and, supplementary thereto, note to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

the provisions of which were set out, and that the general tax law under which the bill was filed was an impairment of their contract rights, in violation of the federal constitution. In the second case the bill was demurred to, and the bill was dismissed by the circuit court because the general tax law was in violation of the federal constitution. The supreme court held that the circuit court had jurisdiction of neither of the three cases, because the plaintiff, in the statement of his own claim, did not make it a suit arising under the constitution of the United States, and that this rule, under the jurisdiction acts of 1887 and 1888, applied as well in original suits in the circuit court as in suits attempted to be removed, although a different view had been taken of the removal section of the act of 1875. Now, therefore, a case which cannot be originally brought in the circuit court, under this general branch of its jurisdiction, cannot be removed if begun in the state court. The *Union & Planters' Bank Case* holds expressly that a petition, though demurrable for a reason found in the federal constitution, does not state a case arising under the constitution of the United States, within the meaning of the jurisdiction acts, unless it appears in plaintiff's own statement of his claim. It would seem that the plaintiff must claim a right under the federal constitution or laws, and seek to vindicate it in the action brought, before it becomes subject to the federal circuit court jurisdiction. As Justice Gray says in the case referred to:

"In the third bill no mention is made of the constitution or laws of the United States, or of any right claimed under either; and no statement in the petition for removal, or in the demurrer, of the defendant corporation, can supply that want, under the existing act of congress."

The cases must be remanded, at the costs of the defendants, to the common pleas court, whence they were removed.

LOUISVILLE TRUST CO. v. MARX et al.

(District Court, D. Kentucky. December 23, 1899.)

JURISDICTION OF COURTS OF BANKRUPTCY—SUITS BY TRUSTEES.

A district court of the United States, as a court of bankruptcy, has jurisdiction of a bill in equity by a trustee in bankruptcy to set aside an alleged fraudulent preference made by the bankrupt. Section 23b of the bankruptcy act, providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is a limitation upon the jurisdiction of the circuit courts of the United States, and does not affect the jurisdiction in bankruptcy conferred upon the district courts by section 2 of the act.

In Equity. On demurrer to a bill in equity filed by the Louisville Trust Company, as trustee in bankruptcy of the firm of L. Marx & Bro., against Leopold Marx and others.

Charles S. Grubbs, for complainant. •

D. I. Heyman, O. A. Wehle, and Kohn, Baird & Spindle, for defendants.

EVANS, District Judge. The complainant, the Louisville Trust Company, is the trustee in bankruptcy of the firm of L. Marx & Bro., who in January, 1899, were adjudged by this court to be bankrupts. As such trustee it brought this suit in equity in this court to set aside certain alleged fraudulent preferences made by the bankrupts within four months before the adjudication.

Assuming that the bill of complaint states a cause of action under the bankrupt act, the defendants severally demur to it upon the sole ground that this court has no jurisdiction to hear and determine such a suit. This brings up, of course, the question which has been so widely discussed, as to the proper construction of section 23 of the act. The jurisdiction has been maintained in cases like the following: In re Sievers (D. C.) 91 Fed. 366; In re Smith (D. C.) 92 Fed. 135; Carter v. Hobbs (D. C.) 92 Fed. 594; In re Richard (D. C.) 94 Fed. 633; In re Newberry (D. C.) 97 Fed. 24; and Robinson v. White (D. C.) 97 Fed. 33,—but has been denied in Heath v. Shaffer (D. C.) 93 Fed. 647; Camp v. Zellars, 36 C. C. A. 501, 94 Fed. 799; Goodier v. Barnes (C. C.) 94 Fed. 798; Hicks v. Knost (D. C.) 94 Fed. 625; Burnett v. Mercantile Co. (D. C.) 91 Fed. 365; and Mitchell v. McClure (D. C.) 91 Fed. 621. The section about which there has been such marked difference of opinion is in this language, namely:

"Sec. 23. (a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. (b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. (c) The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

Viewed in connection with the other provisions of the statute, it seems to me to be manifest that the language of the section refers alone to the jurisdiction of the circuit courts, except as to criminal matters, and to the "suits" brought therein; and it is not altogether impossible that efforts at its construction have been made somewhat more difficult by the lettering of the clauses of the section. Clauses "a" and "c," in express terms, except as to criminal offenses, relate to the circuit courts only; and the "suits" referred to in clause "b" should be limited to those "suits" which may be brought as provided in the first clause. There is nothing in clause "b" which makes it either necessary or appropriate to conclude that congress meant its language to have a wider scope, and certainly nothing to show that it was meant to include courts nowhere mentioned, or even remotely alluded to, either by name or designation, so far as civil actions are concerned. It does not seem to me that any rule governing the interpretation of statutes warrants the notion that anything in the general language of clause "b" meant to enlarge the scope of what was otherwise evidently

the purpose of the section as clearly indicated by clause "a"; and, unless the meaning of clause "b" is greatly expanded beyond that of its associate clauses, this must be the construction. That clause of the section put in between clauses "a" and "c" must take color and meaning from them, and be limited by them. This would be the natural result, and seems to me certainly to have been the intention of congress. While the original jurisdiction of the circuit courts is thus provided for and limited, it is by no means said to be exclusive; and, when we go to other provisions of the act to ascertain the jurisdiction of this court, it will be found to be manifestly concurrent with that of the circuit courts, as far as the latter goes. It is mainly found in section 2, which, for the purposes of this opinion, reads as follows, namely:

"Sec. 2. That the courts of bankruptcy as hereinbefore defined, viz. the district courts of the United States, * * * are hereby made courts of bankruptcy, and are hereby invested within their respective territorial limits * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, * * * to (1) adjudge persons bankrupt * * *; (2) allow claims," etc.; "(3) appoint receivers," etc.; "(4) arraign, try and punish bankrupts, officers and other persons," etc.; "(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; and * * * (15) make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

It is in section 23 provided that the circuit courts may also have jurisdiction of certain suits; but this is only a concurrent power, and but for this provision the jurisdiction of the district courts would be exclusive. It seems to me that this is all that was intended, and that there was no purpose whatever to give, and then entirely take away, the powers given the bankrupt court in section 2 respecting jurisdiction in equity. This seems to derive much support from the fact that congress appears to have had so fixed a purpose as to concurrent jurisdiction that it expressly provides for it in criminal cases by clause "c." This will afford a proper solution of the question, and we can see no occasion for bestowing equity jurisdiction for "determining controversies in relation to the estates of the bankrupts," or "for entering judgments," as provided in such express terms in clauses 7 and 15 of section 2, for any purpose except such as gives potency to the contention which sustains the right to try cases like this in this court. This certainly is an action for determining a controversy in relation to the bankrupt's assets, provided for in section 2, cl. 7. The language of that section is broad and comprehensive, and when so construed as to give force to all provisions of the statute, and to harmonize real or fancied conflicts, it seems to me to require the restriction of the language of section 23 to the jurisdiction of the circuit courts, and to suits brought therein, even if its proper and natural meaning did not so demand, as I think it does. Its real purpose and effect was to give the circuit courts concurrent jurisdiction with the district courts in certain "suits," and in criminal cases growing out of the bankrupt act. It may always aid somewhat in the interpretation

of this statute to recall the fact that part of the legislative history of it is that the two houses of congress, in trying to perfect it, were proceeding upon radically different lines, and that at the last moment there was need of a somewhat hasty adjustment of differences to secure any legislation at all. The results of this are apparent at several points. Those who have the burden of the practical administration of the law would find its efficiency very much weakened if the bankrupt courts should be found to be impotent in their efforts speedily and promptly, through the equity jurisdiction given them by section 2, to "reduce to money and distribute the bankrupt's assets, and to determine controversies in relation thereto." If, instead of having this power, their efforts are to be suspended in cases like this, until, by the more or less slow or long protracted proceedings in a state court, the fraudulent practices of bankrupts and favored creditors shall be attacked and set aside, we shall not only have nothing like a uniform system of bankruptcy, but we shall have one the efficiency of which is greatly and unnecessarily impaired. Except for proceedings like this, what could have been the object of giving jurisdiction in equity to the district courts? Clauses 7 and 15 of section 2 cannot be made effective, except by suits in equity. The bankrupt law was designed for prompt action all along the line, not only in the bankrupt court, but in courts of supervisory and appellate jurisdiction. See sections 18, 24, and 25. But if section 23 applies to the district court, otherwise than in respect to criminal matters, the very cases which will the most loudly call for prompt, vigorous, and effective action will be the ones which cannot receive it; for, instead of administering the bankrupt's estate in the bankrupt court, and there determining questions in relation thereto, and reducing the assets to money, its jurisdiction, in large measure, will be ancillary only to that of a foreign and possibly inharmonious forum. True, these considerations should have no weight if the proper construction of section 23 require otherwise, but they are strong reasons why the construction should not be hastily given. Without, however, going further into reasons for it, my opinion is that the district court has jurisdiction of this action, and that the demurrers should be overruled.

HUNTINGTON v. CHESAPEAKE, O. & S. W. RY. CO. et al. (ZACHER, Intervener).

(Circuit Court, D. Kentucky. July 1, 1899.)

1. **INSOLVENT CORPORATIONS—SUIT FOR WINDING UP.**

Where a suit for the winding up of a corporation is instituted by a stockholder under a state statute, it is to be regarded as adversary, and not voluntary, as to the corporation, and its character as such is not affected by the fact that the corporation offers little or no resistance to the proceeding.

2. **SAME—EFFECT OF ASSIGNMENT UNDER STATE INSOLVENCY LAWS—PROPERTY IN OTHER STATES.**

Where, after the institution of such suit, and the appointment of a receiver therein, the corporation executes a conveyance of all its property to the receiver in his official capacity, such conveyance is, in effect, one made

under the insolvency statute of the state, and not a voluntary common-law assignment, and as such it operates only on property within that state. As to property in other states, it has only such effect as may be given it by their laws, and, in general, must give way to the claims of creditors pursuing their remedies there.

On Intervening Petition of Edmund Zacher, Receiver.

Simrall & Doolan, for plaintiff in garnishment Cranch.

Humphrey & Davie, for intervener Zacher.

Harris & Barr and Wallace & McDonald, for garnishee Fidelity Trust & Safety-Vault Co.

EVANS, District Judge. The Newport News & Mississippi Valley Company was a corporation organized under the laws of the state of Connecticut, and authorized to lease and operate railroads in any state except Connecticut. In 1886 it leased a railroad in Kentucky belonging to the Chesapeake, Ohio & Southwestern Railway Company, and operated it until July 31, 1893, when the lease, by mutual consent of the parties, was canceled. Meanwhile the first-named company became insolvent, owing at the time something over \$1,000,000 to C. P. Huntington. Shortly after this particular indebtedness was satisfactorily arranged, namely, at a meeting of the stockholders held March 16, 1894, it was unanimously resolved by the quorum of stockholders present that the affairs of the company be wound up. On March 20, 1894, in a suit brought against the company by C. P. Huntington in the superior court of Connecticut, and after the service upon defendant of a copy of the complaint therein, Edmund Zacher was appointed a temporary receiver for the company. Huntington was then a stockholder, but not a creditor, of the Newport News & Mississippi Valley Company, against which his suit was filed. On April 13, 1894, the said Zacher was made the permanent receiver, and by the judgment of the court then entered was given full power and authority to take charge of the affairs, property, and business of the defendant corporation, wherever situate, and to manage the same. This was all done under the provisions of section 1942 of the General Statutes of Connecticut, which reads as follows:

"The superior court in the county in which any corporation, organized under the laws of this state, has its principal place of business, may, as a court of equity, on the application of any of its stockholders, wind up its affairs and dissolve it, if said court shall find that said corporation has voted to wind up its affairs, or abandoned the business for which it was organized, and has thereafter neglected within a reasonable time or in a proper manner to wind up its affairs and distribute its effects among its stockholders; and for this purpose may, if it deem it necessary, appoint one or more receivers of the estate of said corporation, and limit a time for its creditors to present their claims to such receivers, and direct public notice thereof to be given; and all claims not presented within such time shall be barred. Said receivers shall allow all just claims against said corporation, collect its debts, sell its property, and convert the same into money, and report their doings to said court as it may direct. Said court may, on complaint of any person aggrieved by such doings, grant such relief as the nature of the case may require; and it may make such orders as to the doings of the receivers, their compensation, and other expenses, and as to the payment of debts and distribution of the effects of said corporation, as may be just and conformable to law."

Under date of April 14, 1894, but upon acknowledgment taken on May 9, 1894, the company, by its president, F. H. Davis, executed a writing to said Zacher, receiver, which, with its certificate of acknowledgment, is in the following words:

"Know all men by these presents, that the Newport News & Mississippi Valley Company, a corporation created, organized, and existing under the laws of the state of Connecticut, for and in consideration of one dollar to it in hand paid, the receipt whereof is hereby acknowledged, has granted, conveyed, assigned, transferred, and set over, and hereby grants, conveys, assigns, transfers, and sets over, to Edmund Zacher, of the city of New Haven, in the state of Connecticut, as he has been appointed by the superior court of the state of Connecticut, in and for the county of New Haven, receiver of the property of the said Newport News & Mississippi Valley Company, all the property and assets, real, personal, and mixed, of said Newport News & Mississippi Valley Company, and all the claims, demands, and choses in action of or belonging to the said Newport News & Mississippi Valley Company, of whatever character the same may be, or in whatever state or country the same may be situated, to have and to hold to the said Zacher, as he has been appointed receiver, as aforesaid, and his successors and assigns, forever.

"In witness whereof the said Newport News & Mississippi Valley Company has caused these presents to be signed by its president, and its corporate seal to be hereunto affixed and attested by its secretary, this 14th day of April, 1894.

"Newport News & Mississippi Valley Co.,

"[Seal.]

By F. H. Davis, President.

"Attest: Chas. Babbidge, Secretary."

"State of New York, City and County of New York—ss.: I, George H. Corey, a commissioner for the state of Kentucky, duly commissioned and qualified, and residing in the city and county of New York, hereby certify that this instrument of writing from the Newport News & Mississippi Valley Company to Edmund Zacher was this day produced to me by the parties, and which was acknowledged to me by Frank H. Davis, president, and Charles Babbidge, secretary, to be the act and deed of said the Newport News & Mississippi Valley Company. Given under my hand and official seal this ninth day of May, A. D. 1894.

"[Seal.]

Geo. H. Corey, Commissioner for the State of Kentucky.

"Office: 66 Wall Street, N. Y."

There appears to have been no authority given by the company to its president to execute such a paper until May 8, 1894, when it was done at a meeting of the stockholders by a resolution in the following language:

"New York, May 8th, 1894.

"A meeting of the board of directors of the Newport News & Mississippi Valley Company, duly called, was held at the office of the company, No. 23 Broad street, at three o'clock p. m. Present: I. E. Gates, F. H. Davis, A. K. Van Deever, C. Weidenfeld, and Charles Babbidge. On motion of Mr. Gates, seconded by Mr. Weidenfeld, it was resolved that the conveyance and transfer of all the property and assets, real, personal, and mixed, of this company, and all the claims, demands, and choses in action of or belonging to this company, of whatever character the same may be, or in whatever state or country the same may be situated, heretofore executed to Edmund Zacher, as he has been appointed by the superior court of the state of Connecticut, in and for the county of New Haven, receiver of the property of this company, and the execution on behalf of this company, under its corporate seal, of an instrument making such conveyance and transfer, be, and the same hereby is, in all respects, authorized, ratified, approved, and confirmed. There being no other business, the meeting adjourned.

Attest: Charles Babbidge, Secretary."

It was the evident purpose of the stockholders, as appears from the closing words of the resolution, to confirm the title of Zacher

as receiver, and to quitclaim every claim that the company might have to any remnant of ownership in any of its property, if the effect of the judgment appointing the receiver, with the powers and authority given him, had left any remaining. It does not seem to have been, nor in any way to have been intended to be, an independent assignment for the benefit of creditors. The resolution passed by the stockholders authorized nothing of the kind, and the deed itself, by its terms and by being executed to the receiver in his official capacity, excludes any such idea as that it was executed as an original voluntary assignment for the benefit of the creditors of the company. It was executed in aid of the receivership. The receiver gave bond and entered upon the discharge of his official duties. Meantime, in the suit pending in this court of C. P. Huntington against the Chesapeake, Ohio & Southwestern Railway Company, etc., to foreclose a mortgage upon the property of that railway company, certain receivers had been appointed, and the Fidelity Trust & Safety-Vault Company, as assignee of the McDonald Brick Company, on May 11, 1894, was permitted by this court to attach, in the hands of its receivers in this case, a sum probably sufficient to satisfy the judgment which the said trust company, as such assignee, had recovered in a state court against the Newport News & Mississippi Valley Company for \$20,000, besides interest and costs. The writ of attachment by which this was done had issued from the state court, but the order of this court in this case, declaring how the matter should be judicially settled between the claimants of this fund, was in the following language:

"And it further appearing to the court that a lien is claimed upon these amounts by James Crouch, under a process of garnishment, and the Fidelity Trust & Safety-Vault Company being assignee of the McDonald Brick Company under process of garnishment, and that there is pending another application for a process of garnishment, and that this money is claimed by Edmund Zacher as assignee and as receiver of the N. N. & M. V., it is ordered that these amounts, out of whatever fund they may be paid, shall remain in the registry of the court until these parties can, by proper pleadings or otherwise, determine their several rights to the fund."

Matters standing thus, Edmund Zacher, the receiver in the Connecticut case, filed herein his intervening petition, seeking the judgment of this court that the fund thus attached and remaining in the registry of this court should be ordered sent to Connecticut to be administered in the proceedings there, instead of being permitted to remain to be applied in satisfaction of the judgment of the assignee of the McDonald Brick Company, the attaching creditor. This is resisted by the latter, who insists that the fund should be retained in Kentucky, where its debt was created under contract, where it was reduced to judgment, where the attachment issued, and where the creditor resides; that creditor never having in any way submitted to the jurisdiction of the Connecticut court. The question of law involved is supposed to turn somewhat, if not altogether, upon whether the suit in Connecticut, wherein Zacher was appointed receiver, is a proceeding in invitum, or a voluntary proceeding upon the part of the Newport News & Mississippi Valley corporation. It is supposed, if the latter is the proper view of the

question, that the prayer of the intervener must be granted; otherwise, not.

While the court has not been able to lay its hands upon any decision accurately differentiating the two, it is probable that no better or more concrete illustration or test by which to determine the difference can be found than that suggested by the national bankrupt law. An involuntary petition would certainly constitute a proceeding in invitum, while a voluntary petition would not. And this would be so whether the insolvent debtor made no resistance, or but little resistance, or the most active and energetic resistance. The degree of intensity of his opposition to the action of his creditors, or of his reluctance to be adjudged a bankrupt, can in no way affect this question. The character of a proceeding in invitum is ineffaceably impressed upon it by its form. The court will not measure nor inquire into the degree of the defendant's reluctance or willingness to have the judgment prayed for rendered. So here the corporation to be wound up did not seek to wind itself up by any suit brought in its own name. That relief was sought by a stockholder in an adversary suit, the judgment in which, it is supposed, seized and sequestered the defendant's assets for the benefit of its creditors. I say "supposed," for that appears to be the necessary object and purpose of a suit that would otherwise be futile, though the statute itself, so far as exhibited to the court, is somewhat obscure. In form, the suit is adversary and involuntary, and it is not for this court to inquire whether the corporation was more or less willing or unwilling that the prayer of the complaint should be granted. The plaintiff had appealed to the court, and, if he had a good cause of action, the relief must necessarily be granted, whether resisted by defendant or not. This fact, and the form of the suit, settles its character. That the relief prayed for in it was judicially granted by the Connecticut court is averred by the intervener in his petition.

It is somewhat curious that a copy of the complaint of C. P. Huntington, in the Connecticut suit, is not filed in this case, and is not before the court on this hearing, but it may be assumed that it states a cause of action by Huntington. This assumption, and the further one that it was admitted or proved to be true, will be indulged, whether he ever actually knew of the suit filed in his name or not. If the effect of the testimony of Mr. Harrison, the attorney in that suit, on that subject, be regarded as showing that the Connecticut suit was utterly unauthorized by Huntington, and for that reason, possibly, impeachable for fraud and collusion, then the relief prayed for by Zacher should not be granted, for the reason that the judgment under which he claims might be in condition to be set aside as having been obtained in a suit which was wholly unauthorized by the plaintiff, in whose name it was instituted. The court, however, prefers to regard that suit as having been brought by Huntington's tacit or express authority, even if the facts be forgotten. Any other conclusion would possibly render the proceedings scandalous. The court prefers to regard the receivership as having been granted by a valid exercise of the power of the court

in a cause in which it had jurisdiction of the parties, plaintiff and defendant, rather than to treat it as having been obtained upon the false pretense that a suit was brought by Huntington's authority, when in fact it was not, and that the use of his name was an imposition upon the state court. These being the conclusions of the court up to this point, it seems to result that it must be governed, in the decision of this case, by the late ruling of the supreme court of the United States in the case of *Trust Co. v. Dodd*, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 835. There having been in fact no voluntary assignment either made or authorized by the corporation for the benefit of creditors, but only an assignment, worked out through the operation of the judicial decree of the court in Connecticut under the statute of that state, it is precisely equivalent to a statutory assignment by the company under the insolvent laws of Connecticut regarding corporations, and, if so, the following language of the supreme court in the case just referred to must be conclusive. On page 629, 173 U. S., page 546, 19 Sup. Ct., and page 837, 43 L. Ed., Mr. Justice Brown, in delivering the opinion of the court, after stating the rule in cases where there is a voluntary or common-law assignment, said:

"But the rule with respect to statutory assignments is somewhat different. While the authorities are not altogether harmonious, the prevailing American doctrine is that a conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states it is given only such effect as the laws of such state permit, and that, in general, it must give way to claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state. Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under the laws of the state where the property is actually situated."

Many authorities were cited in support of the proposition thus announced, and given approval and effect in that case.

It does not seem to be necessary to pass upon the other questions raised by counsel, though, if the court should be in error in concluding that this case falls within the principles announced by the supreme court in the case just cited, it might be well worthy of inquiry whether the conduct of this corporation in Connecticut was not such as to bring this case within the rules laid down by the court of appeals of Kentucky in the case of *Bank v. Payne*, 86 Ky. 446, 8 S. W. 856. Especially might this be the case if Huntington's name was wrongfully used.

But, without going into that, the court is of opinion that the intervening petition of Edmund Zacher, receiver, should be dismissed, with costs, and that the funds attached in this case, and now within the registry of the court, should be applied to the payment of the debt of the attaching creditor. Should any of the fund remain after satisfying in full the demand of the attaching creditor, it may possibly be that it should be paid to the intervener; but that question is reserved, to be determined upon his further intervention.

MERCANTILE NAT. BANK OF CLEVELAND, OHIO, v. HUBBARD,
County Treasurer.

(Circuit Court, N. D. Ohio, E. D. December 23, 1899.)

No. 5,714.

1. TAXATION—JURISDICTION TO ENJOIN COLLECTION OF TAX—VALIDITY OF ASSESSMENTS.

A court of equity cannot enjoin the collection of a tax on the ground that it was assessed without due notice to the complainant, unless it is also made to appear that it is greater than should have been assessed, so that upon a hearing he would have been entitled to a reduction of the amount.

2. SAME—NATIONAL BANK SHARES—DISCRIMINATION.

The provisions of the statutes of Ohio permitting the deduction of indebtedness from "credits" for purposes of taxation do not constitute discrimination in favor of other moneyed capital, as against shares in national banks, within the meaning of Rev. St. § 5219, merely because such credits are defined to include deposits in savings banks and shares in building and loan associations, and in the absence of proof that such statutes in fact operate to exempt from taxation moneyed capital which comes into competition with the business of national banks.

3. JUDGMENTS—RES JUDICATA.

A decree in a suit against a county treasurer finding that taxes levied upon shares in a national bank were excessive and invalid because the assessments made under the state statutes discriminated against such shares, in favor of other moneyed capital, necessarily rested upon a determination of the question of fact as to the practical operation of such statutes, as shown by the evidence, and is not a conclusive adjudication between the parties of the invalidity of taxes levied upon such shares, under the same statutes, in a subsequent year, when the conditions which rendered the former assessment illegal may not have existed.

In Equity.

This case comes before the court on exceptions to the report of the master. The bill was filed by the Mercantile National Bank of Cleveland, Ohio, a banking corporation organized under the laws of the United States, and doing business in the city of Cleveland, to enjoin the county treasurer of Cuyahoga county, Ohio, from collecting taxes assessed against the holders of the shares of its capital stock, on the ground that the taxes thus assessed violate section 5219 of the Revised Statutes of the United States, which provides that the taxation of national bank shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state. The bill avers that the auditor of Cuyahoga county assessed the total 10,000 shares, of the par value of \$100 each, in the complainant bank, at \$519,320; that the state board of equalization for banks increased this valuation to \$642,320; that this increase was made without notice to the complainant bank, and without giving it an opportunity to be present; that the increase by the state board of equalization was from 60 per cent. to 74 per cent. of the true value of the shares of stock; that the assessed value of other moneyed capital in the hands of citizens of Cuyahoga county and the city of Cleveland does not exceed 60 per cent. of the true value; that the state board of equalization knowingly and designedly made this discrimination against the complainant. The bill further avers that by section 2730 of the Revised Statutes of Ohio, under the title "Taxation," the term "credits" is held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable things, or for labor or services, due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal, bona fide debts owing by such person; that a large amount of moneyed capital

in the hands of individual citizens of the state of Ohio, invested in promissory notes and other legal obligations, is by the aforesaid provision, allowing legal, bona fide debts to be deducted therefrom, expressly exempted from taxation; that at least \$200,000,000 of credits were exempted by this provision; that the shares of building and loan associations created under the laws of Ohio are by law to be considered as credits, and held as such; that thereby \$70,000,000 was by statute exempted from taxation; that such building and loan associations are empowered to borrow and loan money, and do a general banking business with their members and depositors. The bill then avers that a number of shareholders in the complainant corporation owe debts which have not been deducted from the value of their shares, though the evidence of such debts has been tendered to the county auditor. The averments of the bill are that \$123,000 should be deducted from the assessment of the state board of equalization, upon which taxes to the amount of \$3,726.90 have been assessed, and that there should be deducted from said assessment, also, the amount of the indebtedness of the individual stockholders of the bank, which is such a sum that the tax assessed thereon, upon the valuation fixed by the county auditor, is \$3,524.78. The complainant tendered the amount due, less the sum in dispute. The complainant further pleads a former adjudication between the complainant and Horatio N. Whitbeck, the predecessor of the defendant as treasurer of Cuyahoga county, in which it was adjudged, as between the parties, that the system of deduction of debts from credits under the statute of Ohio was a discrimination against the complainant bank, in violation of section 5219 of the Revised Statutes of the United States. The defendant answered, making an issue upon the fact of notice to the complainant of the hearing before the state board of equalization; an issue upon the averments as to the discrimination arising from the operation of the statutes of Ohio, in allowing debts to be subtracted from credits; and an issue denying the effect claimed for the former adjudication between the complainant and the predecessor in office of the defendant.

The case was referred to a master, who has made a report. He finds that no sufficient notice was given to the complainant bank of the intention to increase the assessment. He finds that the board of tax remission, organized under section 167 of the Revised Statutes of Ohio, had no authority to consider the action of the state board of equalization for banks, although it was composed of the same persons. He finds that about 1,479 of the bank's shares are held by persons whose indebtedness, over and above all other credits, exceeds the par value of these shares. The master sets out at length a number of facts bearing upon the value of the stock of the complainant. He finds that the amount of capital stock of building and loan associations paid in 1896 amounted to \$80,000,000; that the total number of shares in force was 1,389,059; that the total number of shares on which loans had been made was 410,000; that large amounts of money were loaned in this year of 1896 by building and loan associations to nonstockholders, in such manner as to bring it into competition with national banks, and which would properly be called credits; that the value of credits, after deducting bona fide debts, amounted to \$90,000,000; that moneys invested in bonds, stocks, joint-stock companies, annuities, and otherwise, amounted to \$7,600,000, and that the valuation of state banks, as fixed by the state board of equalization, was \$8,400,000; that the individual deposits in savings banks in Cuyahoga county in 1897 amounted to \$50,000,000; that real-estate mortgage debts in Ohio amounted to \$259,000,000, and in Cuyahoga county to \$21,000,000. The master says that there is no evidence before him to show what portion of the credits consists of moneyed capital in the hands of individuals which in fact enters into competition for business with national banks; that there is no evidence as to what the total moneyed capital in the hands of individual citizens, and included in the term "credits," amounts to; that he is unable to ascertain or report what proportion the moneyed capital of individuals included in the term "credits" bears to the amount invested in national bank shares; that he is unable to report whether there has or has not been any material discrimination, such as the federal statute was enacted to prevent, against said complainant, and in favor of other moneyed capital in the state, outside of Cuyahoga county. The report proceeds: "I find, however, the fact to be that in said year a large amount of moneyed capital in the hands of individual citizens of the state, invested in promissory notes and other obli-

gations and credits, was by section 2730 of the Revised Statutes of Ohio authorized to be exempted from taxation through the deduction therefrom of legal, bona fide debts. There is nothing in the evidence that will show whether shares of incorporated banks in the counties of the state outside of Cuyahoga county were valued for taxation by the auditors at a higher or lower percentage, compared with the true value in money of their stocks, than were the banks in Cuyahoga county; and hence the master is unable to report or find whether there was any unjust discrimination as between other incorporated banks and the complainant bank, and against the complainant bank. An examination of the valuation of shares of banks as returned to and fixed by the state board of equalization of bank shares for 1897 discloses the fact that the assessed valuation of shares of all incorporated banks in the state of Ohio in the year 1897, exclusive of real estate, as fixed by the state board of equalization, was 61 $\frac{1}{3}$ per cent. of the aggregate capital stock, surplus, and undivided profits of such incorporated banks; that the assessed valuation of all national bank shares in Ohio in 1897, exclusive of real estate, as fixed by the county auditors of the state, was 58.5 per cent. of the aggregate capital stock, surplus, and undivided profits, as reported to said auditors, which said valuation was increased by the state board of equalization to about 59.5 per cent. of the said aggregate value of said capital stock, surplus, and undivided profits,—an increase of 1.6 per cent. on the valuation fixed by the auditors; that the assessed valuation of national bank shares in the state of Ohio for the year 1897, outside of Cuyahoga county, exclusive of real estate, as fixed by the county auditors of the state, was 58.9 per cent. of the aggregate capital stock, surplus, and undivided profits, as reported to such county auditors, which said valuation was decreased by the state board of equalization to 57.7 per cent. of said aggregate value of said capital stock, surplus, and undivided profits, being a decrease of a little more than two per cent.; that the assessed valuation of national bank shares in Cuyahoga county in 1897, exclusive of real estate, as fixed by the county auditor, was 56.4 per cent. of the aggregate of the capital stock, surplus, and undivided profits, as reported to the auditor, which said valuation was increased by the state board of equalization to 67.8 per cent. of the capital stock, surplus, and undivided profits of said banks, being an increase of a little more than 20.2 per cent. of valuation, while the increase of shares of the complainant bank was a little more than 23.6 per cent. I find that moneyed capital in the hands of individual citizens of the city of Cleveland and the county of Cuyahoga was assessed for taxation by the assessing officers of the county in the year 1897, and for a long time theretofore, as nearly as practicable, at sixty per cent. of its value, and that, as compared with other moneyed capital in said county, the value fixed by the auditor on the stocks of said bank for the purposes of taxation was fair and equitable. And I also find that the valuation placed upon the shares of complainant bank by the state board of equalization was much higher than that fixed on other moneyed capital in the hands of individual citizens and corporations in the county of Cuyahoga and city of Cleveland, and that such action of the board of equalization was an unjust discrimination against said complainants. Eighteenth. By stipulation signed by the parties to said cause, it was agreed that, if the court holds it competent to put in proof of taxation of moneyed capital and bank shares outside of Cuyahoga county, that there is no discrimination for counties outside of the county of Cuyahoga, in the state of Ohio, by the taxing officers of said counties, in fixing the valuations for the purposes of taxation upon moneyed capital as against shares in incorporated banks. Nineteenth. I find that on the day said statement was filed with the auditor the actual cash value of the shares of stock in complainant's bank was \$128 per share, and that the value of the real estate of said bank, as it then stood upon the tax duplicate, was \$117,370."

The master than files, as part of his report, a true copy of the record in the case of the Mercantile National Bank v. Horatio N. Whitbeck, Treasurer of Cuyahoga County, Ohio. In that bill of complaint it was averred "that the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, and required him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the state, and that under the laws of the same state the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is

required to list for taxation the whole number of shares owned by him, and not simply the excess of the value of said shares over his indebtedness; and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio." Also, that "a large amount of moneyed capital in the hands of individuals, invested in promissory notes and other obligations and credits, is by the aforesaid provision, allowing deduction of legal, bona fide debts to be made therefrom, expressly exempted from taxation, thereby making an unjust and unlawful discrimination against moneyed capital invested in national bank shares, as to which no exemption or deduction is provided for by the laws of the state." The bill, after setting out the names of certain stockholders who claimed the right to deduct their bona fide debts from the value of their shares, further averred "that each of said above-named shareholders was indebted and owing to others, of legal bona fide debts, a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares, * * * which said excess of said debts over credits as aforesaid should be deducted from the assessed value of said shares so owned by him, and by reason of the facts above stated said shares of said stock should not have been placed on the tax duplicate, and no tax should have been assessed thereon; * * * and your orator insists that, by reason of the premises above set forth, there should be deducted from the shares of capital stock owned by said shareholders above named, and now standing on the tax duplicate of said county, \$285,500, the par value of the shares of said stock,—in all, the sum of \$141,543.48, according to the assessed value thereof." The bill further averred as follows: "Your orator avers and insists that the taxes so levied and assessed against it on account of its said shares of stock are unjust, illegal, and void, for the following, among other, reasons: (1) That said tax is levied and assessed against your orator directly, and is in violation of the act of congress under which your orator is incorporated. (2) That the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, and require him to list for taxation only the excess of credits over his indebtedness, and that such is the uniform practice throughout the state, and that under the laws of the same state the owner of capital stock of your orator is denied the right to deduct therefrom his indebtedness, but is required to list for taxation the whole number of shares owned by him, and not simply the excess of the value of said shares over his indebtedness; and your orator insists that such discrimination results in the taxation of your orator's stock at a much greater rate than is assessed upon other moneyed capital in the hands of individual citizens of Ohio." There was a general denial of these averments, and special denials as follows: "He [defendant] denies that any of the shareholders of said banking association at the times named in the said bill of complaint was indebted or owing to others of bona fide debts a sum in excess of the credits from which, under the laws of Ohio, he was entitled to deduct said debts, to an amount equal to the value of his said shares, or any part thereof. He denies that either of said shareholders was then indebted in any sum whatever, or that, even if any of them was so indebted as claimed in said bill of complaint, he is thereby entitled to deduct the excess of such indebtedness over his credits from the assessed value of his said shares, or that for any reason said shares of stock should not have been placed on the tax duplicate, and no tax assessed thereon. * * * He denies that any sum whatever should be deducted from the valuation of the shares of the capital stock owned by said shareholders named in said bill of complaint. He denies that the laws of Ohio authorize and permit the owner of credits to deduct therefrom all debts owing by him, or that such is the uniform practice throughout the state. He denies that the taxation of shares of said complainant's stock is at a much or any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state. He denies that the necessary effect of the proceedings had in the assessment and levy of the tax standing against said complainant, and the shares thereof owned by its said shareholders, has been to deprive said complainant or said shareholders * * * of any security denied them by the limitation of said act of congress."

A large amount of evidence seems to have been taken in the case, though that has not been produced in evidence here. The case was referred to a special master, and then came on for final hearing. A decree was entered, reciting that the court, being fully advised in the premises, from the testimony and exhibits, and the special master's report, adduced in open court, did find all the allegations of the bill to be true, except certain averments which are not here material, and enjoined the collection of \$3,967 of tax assessed against the complainant.

As conclusions of law, the master in the present case found that the action of the state board of equalization in increasing the assessment was invalid, for want of notice to the bank, and that the state board of tax remission had no jurisdiction to set aside or reconsider that assessment. The master further found that the valuation of the auditor was 60 per cent. of the aggregate capital stock, surplus, and undistributed profits; that the state board of equalization increased this valuation to 70 per cent. of the aggregate capital stock, surplus, and undivided profits; that the valuation of property generally in Cuyahoga county was but 60 per cent.; and that this was a discrimination against the property of the bank of 10 per cent., which should be enjoined. The master further found that the decree in the Whitbeck Case was not a former adjudication of the issues in this case.

W. W. Boynton and Norton T. Horr, for complainant.
P. H. Kaiser and Fred L. Taft, for Cuyahoga County.
F. S. Monnett and S. W. Bennett, for the State of Ohio.

TAFT, Circuit Judge (after stating the facts as above). I am not able elaborately to state the reasons for my conclusions in this case. I think it better, in view of the fact that the case will certainly be appealed, that I should give a very summary statement of them.

Upon the first issue,—whether the action of the state board of equalization was invalid for want of notice,—I do not find it necessary to pass. The action of the state board was embodied in a report to the county auditor, and by him placed upon the duplicate, so that it now appears on the face of the duplicate as a lawful warrant for the collection of the tax.

This proceeding is a bill in equity to enjoin the collection of the tax on the ground that it was assessed without due notice to the complainant. If the tax assessed is no greater than ought to have been assessed, then the complainant is not in a position to ask the intervention of a court of equity, because, however irregular the action of the state board may have been, if the complainant cannot make it clear that by a hearing upon notice it would have been entitled to an assessment less than that which was made, the bill must be dismissed. The master finds that the actual market value of the stock is \$128 per share. There are 10,000 shares of the stock, making a total valuation of \$1,280,000. Sixty per cent. of this valuation would be \$768,000. Deducting the assessed value of the real estate would leave a valuation of \$650,630. The assessment of the state board is \$642,000. It will be seen that the assessment of the state board of equalization is certainly only 60 per cent. of the actual value of the shares of stock in the market. The finding of the master is that there is nothing in the evidence to show whether the shares of incorporated banks in the counties of the state outside of Cuyahoga county were valued for taxation by the auditors at a higher

or lower percentage, compared with the true value of their stocks, than were the banks in Cuyahoga county; and hence the master is unable to report or find whether there was any unjust discrimination as between other incorporated banks and the complainant bank, and against the complainant bank. The other finding of the master, as to the percentage of the aggregate capital stock, surplus, and undivided profits assessed for taxable valuation by the state board of equalization, of all incorporated banks, and of all national banks and national bank shares outside of Cuyahoga county, therefore formed no basis for concluding what relation the assessed percentage of the aggregate capital the surplus and the undivided profits had to the market and actual value of the stock. I am unable to find, therefore, in the grounds upon which the master proceeded, any predicate for the assumption that the other banks in the state were taxed at any less than 60 per cent. of the actual market values of their shares; and, if they were not so taxed, then there is no ground for claiming that there was any discrimination in the action of the state board of equalization in assessing the value at 60 per cent. of its actual value. There is no better evidence of the actual value of bank shares than the market value. It seems to me that the findings of the master upon this point, therefore, are inconsistent; and the exception to them must be sustained. In that view, it becomes unimportant to decide, as already stated, whether or not the notice of the action by the state board of equalization was sufficient.

The next question is whether the operation of the statutory definition of "credits" to be returned for taxation in Ohio operates to discriminate in favor of other moneyed capital in the state against national bank shares. Upon this point the decision in the case of *Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669, leaves no doubt. In that case it was held that the term "moneyed capital," as used in the federal statute, does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks, or moneys belonging to charitable institutions, which are exempted from reasons of public policy, and not as an unfriendly discrimination against investments in national bank shares, cannot be regarded as forbidden by the federal statute. The court then proceeded:

"With no purpose to discriminate against the holders of shares in national banks, and with the taxation of the shareholders in the two classes of banks—state and national—precisely the same, the question is whether this system of taxation in Ohio, in its practical operation, does materially discriminate against the national bank shareholder in the assessment upon his bank shares."

The court then proceeded to treat the question of such discrimination as a question of fact, to be determined by the evidence, and reference was made to the report of the auditor to show what the total credits upon which taxation was laid, after deducting the debts allowed, were. It was pointed out that the deductions which might be made included deductions for many other things than what would be strictly moneyed capital, within the meaning of section 5219, and that there was nothing in the evidence then before the court

to enable it to say how much of these deductions was moneyed capital, within the meaning of that section. I do not find that there was anything more of substance before the master than there was before the supreme court upon this issue of fact. There is proof of the capital in savings banks, and also of the capital invested in building and loan associations; but, under the decision of *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 836, 30 L. Ed. 895, capital invested in savings banks cannot be regarded as moneyed capital, within the meaning of section 5219, exemption of which from taxation can constitute a discrimination within the inhibition of that section. It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that the capital invested in them, though subject to a somewhat different rule of taxation, cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house. The mere fact that every shareholder in a building association need not be a borrower cannot, I think, change the effect of the general purpose of the building association law. The general result of the evidence is no more satisfactory as showing what amount of discrimination, if any, there is by reason of this definition of "credits" in the Ohio statute of taxation, than it was in the case of *Bank v. Chapman*. For this reason I must conclude, as the master did, that the averments of the bill as to the discrimination, arising from the operation of this definition of "credits," against moneyed capital, is not such as to justify any action by the court in the complainant's favor.

There remains to be considered the question arising under the claim of former adjudication made in the bill. Upon the argument, and before I had made a close examination of the bill, my impression was that upon this claim of former adjudication the complainant must succeed. It seemed to me that the adjudication in the former case was a mere adjudication of the necessary operation of the statute of Ohio, as a matter of law, to discriminate against national banks, and therefore that, that question having been in judgment between the same parties, it must receive the same adjudication here. Looking into the bill, however, in the former case, and after an examination of the case of *Bank v. Chapman*, I find that, in order to support the averments of the bill, it was necessary in that case for the complainant to rely, not only upon the statute of Ohio defining "credits," but also on its practical operation in exempting moneyed capital in the hands of individuals in Ohio from taxation. The practical operation of a law of that character to show how much, if any, discrimination there is, is a question of fact to be determined upon the evidence. A large amount of evidence was taken in the former suit, and the court, in its decree, found the averments of fact as to the practical operation of the law of Ohio, in the bill, to be fully sustained. In other words, the court found the fact to be that for the years then involved the

statute of Ohio, as enacted, operated to exempt so large an amount of the moneyed capital in the hands of individuals in that state, as to discriminate against the holders of the complainant's shares, and result in the taxation of the stock at a much greater rate than was assessed upon other moneyed capital in the hands of individual citizens of Ohio. The adjudication, therefore, upon which the complainant relies, is an adjudication, not of law, but of fact,—not of the fact at issue in the present case, but of the fact as to the practical operation of the law at the time of that adjudication, to wit, in 1887, in 1893, and in 1894. In this aspect, the fact as to the practical operation of the law in 1896 may be different from that in 1887 and the other years. A finding of a condition in 1887 does not conclusively establish the existence of the same conditions in 1896 and 1897. For this reason, I cannot sustain the contention made on behalf of the complainant, that the former adjudication conclusively entitles the complainant to the same relief as that which was granted it in the Whitbeck Case. The exceptions to the master's report on this ground are therefore overruled. The result is that the preliminary injunction must be dissolved, and the bill dismissed at complainant's costs. The same order must be made in the other cases which it is agreed depend on this.

NATIONAL WALL-PAPER CO. v. DAVIS et al.

(Circuit Court, N. D. Ohio, E. D. December 23, 1899.)

No. 5,737.

1. CHATTEL MORTGAGES—VALIDITY—PREFERENCES BY INSOLVENT.

Under Rev. St. Ohio, § 6343, which provides that all assignments in trust, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the benefit of all creditors, and which, as construed by the supreme court of the state, does not prevent the preference of creditors by chattel mortgages executed in contemplation of insolvency, the fact that a firm of insolvent debtors, prior to and in contemplation of a general assignment for the benefit of their creditors, execute separate chattel mortgages directly to each of a number of creditors at the same time, and which are filed for record at the same time, does not constitute the transaction an assignment in trust, so as to render the preferences invalid.

2. SAME—INTENTION TO HINDER AND DELAY CREDITORS.

The fact that goods mortgaged separately to a number of creditors by insolvent debtors considerably exceed in value the amount of each mortgage does not evidence an intention on the part of the mortgagors to hinder, defeat, or delay their other creditors, any more than is necessarily incident to the preferences given, where the day following the execution of such mortgages they make a general assignment, and the mortgagees at once surrender possession of the goods to the assignee, looking to their proceeds when disposed of by him for their security.

This is a suit in equity by an unsecured creditor to have certain chattel mortgages, executed by the debtor, declared to constitute an assignment in trust, inuring to the benefit of all creditors under the Ohio statute.

R. B. Murray and Charles Koonce, for complainant.

Wm. W. Zimmerman, Horace T. Smith, and Charles Truesdall, for defendants.

TAFT, Circuit Judge. This is a bill in equity, filed by the National Wall-Paper Company against seven chattel mortgagees of the firm of McLeod & Jewhurst, the mortgagors, John A. McLeod and Joseph W. Jewhurst, and their assignee for the benefit of creditors, Joseph Davis, to set aside the seven chattel mortgages as fraudulent, or at least to have them declared to operate and inure to the benefit of the complainant, as a creditor of said firm, under the terms of section 6343 of the Revised Statutes of Ohio. McLeod & Jewhurst were retail merchants, dealing in wall paper, artists' supplies, etc., and had been carrying on business since 1890. In 1895 they felt the financial depression, and from that time until 1897 struggled along; but finally found themselves, in September of that year, in an insolvent condition. They consulted an attorney in reference to their situation, and, on his suggestion, they concluded to secure, by chattel mortgage, with notes due one day after date, their relatives and such of their creditors as lived in their home town, and thereafter to file a deed of general assignment for the benefit of all their creditors. They executed two notes, each secured by separate mortgage, to Delia F. Jewhurst, wife of Joseph W. Jewhurst, one of the partners, the consideration named in one note and mortgage being \$658.33, and in the other \$460; a note and mortgage for \$253 to Isabel McLeod, daughter of the other partner, and a note and mortgage for \$354.31 to Ina McLeod, another daughter; a note and mortgage for \$65 to E. M. Wilson, brother-in-law of McLeod; a note and mortgage for \$366.67 to Henrietta A. Brown and David John, owners of the store rented by the firm; and a note and mortgage for \$94.05 to the Youngstown Dry-Goods Company. Four of these mortgages—the two to Delia F. Jewhurst, one to Isabel McLeod, and one to Ina McLeod—were filed and put upon record at the same time, on Saturday, September 17, 1897. The remainder were put on file and recorded at the same time, and a few minutes after the others. On the following Monday—September 19th—the firm made an assignment for the benefit of creditors to Joseph Davis, assignee. None of the debts are seriously contested. Indeed, they are all admitted to be bona fide, except the notes to Delia F. Jewhurst, wife of Joseph W. Jewhurst. Much evidence has been gone into upon the validity of these two notes. Without stating my reasons therefor, but after a full examination of the evidence, I have concluded that the first note, for \$658.33, is for a valid debt owed by the firm to Mrs. Jewhurst. The other note and mortgage, for \$460, I think, however, is not for a valid debt. I find that the alleged basis for this debt was money received by Jewhurst as a pensioner of the United States government, and by him turned into a bank account of their deceased son, to the credit of which account the wife had also deposited money; that it remained in that account, subject to check of the husband; and that, although he may have intended to give it to his wife, the firm was in such failing circumstances that he ought then to have devoted it to his creditors, and not to have made it a gift to his wife, even if he did so. The amount was credited on the books of the company to J. W. Jewhurst, and not to Delia F. Jew-

hurst. This is attempted to be explained on the theory that McLeod, who kept the books, while he knew that it was Mrs. Jewhurst's debt, could not remember her name. It remained in this condition, however, for four or five years. My impression is that the arrangement for the transfer of this money from the husband to the wife, was very indefinite, and that it became definite only when the assignment for the benefit of the creditors became necessary. I find, therefore, that the mortgage to Delia F. Jewhurst, for \$460, was invalid, because the debt was not a bona fide debt due from the firm to her.

Much of the evidence has been devoted to showing the intention of the various mortgagees as to what was to be done with the property, in the hope of making it appear to the court that the transaction was really a transfer of the property in trust to Horace Smith, attorney, to secure all the claims of the mortgagees. I find that, with respect to this issue, the complainant has failed. It seems to me that the mortgages were given in the ordinary course, to secure and prefer certain claims of the failing debtors, in contemplation of insolvency. The mortgages were made directly to the creditors, without the intervention of a trustee. It was, of course, necessary, if possession was to be taken by all of them, that some arrangement should be made between them, by which, as to those whose mortgages were of equal priority, at least, a joint possession might be taken. The proposal of Smith that he should take possession for all of them, and their acquiescence therein, was a most natural one, and the best for all parties. The views of the various mortgagees as to what they intended with respect to the property were only their views as to what result the law would attach to that which they had done and expressed in writing, and do not in the slightest degree tend to establish a different agreement from that which was embodied in the mortgages. The mere fact that seven mortgages were executed about the same time, four of them put on file at one time, and three at another, the mortgages being executed directly to the creditors, does not create a trust in any one of the creditors for the benefit of the other creditors. The trust of each creditor, implied in the mortgage, is to account for the balance of the goods mortgaged after payment of that creditor's debt, to the mortgagors. This is not the character of a trust inhibited by section 6343. If it were, it would be impossible to sustain the validity of any chattel mortgage in contemplation of insolvency. In view of the decisions of the supreme court of Ohio, this would be an absurd result. It may be that the action of the mortgagors, in making other mortgages to other creditors, may, by the effect of those other mortgages, create a trust in the first-named creditor to account to those other mortgagees, should he take possession of the property, and sell the same; but that relation of trust to such creditors does not grow out of the chattel mortgage taken by him, but only out of the subsequent or contemporary acts of the mortgagors dehors the mortgage of the first-named creditor.

Nor is the fact that the goods exceeded in amount considerably the amount of each chattel mortgage to be regarded as indicating an intention on the part of the mortgagors to hinder, defeat, or

delay their creditors. The mortgages were evidently made in contemplation of an assignment for the benefit of creditors, and were made only to secure the preferred creditors, and not to delay the payment of the general creditors. They did not hinder the other creditors any more than was incidental to their preference. It was obviously impracticable to divide up the stock and partition it between the preferred creditors. The mortgages in fact did not delay, for the mortgagees immediately surrendered possession to the assignee, waiving their right to retain possession, and looking to the proceeds of the sale by the assignee for their security. The result throws a backward light upon the issue of an intention to hinder, delay, and defraud the other creditors. The fact is that there is nothing about this assignment and these preferences different from thousands of others of the same character, which prefer certain creditors over others by chattel mortgages made in contemplation of insolvency, and which have been sustained time and time again by the supreme court of Ohio. One of the most satisfactory cases upon this subject, in which the whole doctrine is re-examined, is that of *Cross v. Carstens*, 49 Ohio St. 548, 31 N. E. 506.

The recent statute of Ohio, passed to prevent preferences, of course has no effect upon the issues of the present case, for the reason that these mortgages and this assignment were made prior to its passage. The decree of the court will be that the mortgage to Delia F. Jewhurst, for \$460, is set aside as fraudulent, and as in violation of section 6344 of the Revised Statutes of Ohio, as it was in force when the mortgage was made; that all the other mortgages are sustained as valid, and, as to them, the bill will be dismissed; that the costs of this proceeding shall be taxed one-fourth to Delia F. Jewhurst and three-fourths to the complainants, and execution may issue therefor; and that this decree, finding the rights of the complainant as to the second mortgage made by McLeod & Jewhurst to Delia F. Jewhurst, be certified to the probate court of Mahoning county for its action thereon.

FIDELITY INSURANCE & SAFE-DEPOSIT CO. v. ROANOKE ST. RY. CO.
MERCANTILE TRUST & DEPOSIT CO. v. ROANOKE ELECTRIC LIGHT
& POWER CO.

(Circuit Court, W. D. Virginia. October 2, 1899.)

1. JUDICIAL SALE—GROUNDS FOR SETTING ASIDE.

Mere inadequacy of price, unless so great as to shock the conscience, is not ground for setting aside a judicial sale.

2. CORPORATIONS—FORECLOSURE OF MORTGAGE AGAINST—AGREEMENT BETWEEN BONDHOLDERS.

An agreement between bondholders of a corporation which has made default, for the protection of their common interests on a foreclosure, which contemplates a purchase of the mortgaged property, if deemed necessary or advisable, is not illegal, or contrary to public policy, where it contains no provision for preventing competition at the sale, or for obtaining any unfair advantage over others.

On Motion to Confirm Sales under Decrees of Foreclosure of Certain Property of Each of the Defendant Companies.

S. Hamilton Graves and Richard M. Venable, for purchaser.
Scott & Staples, for objecting creditor.

PAUL, District Judge. On the 1st day of May, 1899, a decree of sale was entered in each of these causes, and the same special commissioners were appointed in each to make sale of the property of the respective corporations. For convenience, the defendant corporations will be designated as the "Street-Railway Company" and the "Light & Power Company." On the 1st day of August, 1899, the commissioners sold the two properties at public auction, and Richard M. Venable became the purchaser. The sales were duly reported by the commissioners, and their confirmation recommended. On the 8th day of August, 1899, the court entered decrees nisi on said reports, and fixed the 18th day of August, 1899, for hearing objections to the confirmation of the sales. On that day R. R. Hicks, trustee in a deed of trust executed by M. M. Rogers, an unsecured creditor of the Roanoke Street-Railway Company, whose claim of \$40,000 is disputed, filed a petition in each case objecting to the confirmation of the sales of the respective properties. Said Hicks, trustee, makes no claim for any debt due him from the Electric Light & Power Company, but states that the said Electric Light & Power Company is indebted to the Street-Railway Company in the sum of \$85,950.56, and that, on account of that indebtedness from the Light & Power Company to the Street-Railway Company, he is entitled to share in the proceeds of the sale of the property of the Light & Power Company.

The first objection which the court will consider to the confirmation of these sales is that of the inadequacy of price realized for the respective properties. The master reported, before the decree of sale was entered, that the Street-Railway property was worth \$150,000. This is the amount bid on it, and at which it was knocked down to R. M. Venable, the purchaser. The master reported the Light & Power Company property to be worth between \$50,000 and \$60,000. On this property the bid was \$31,000, and at this price said R. M. Venable became the purchaser.

The ground upon which a court of equity will set aside a sale made under its decree, on account of the inadequacy of price realized, is too well understood to require discussion. The doctrine is thus stated by the supreme court in *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839: "A judicial sale of real estate will not be set aside for inadequacy of price, unless the inadequacy is so great as to shock the conscience, or unless there be additional circumstances against its fairness." The holding of the court in *Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732, is to the same effect. In 2 *Beach, Mod. Eq. Prac.* § 821, the grounds for setting aside a judicial sale are stated as follows: "To justify the interference of the court, there must be fraud, mistake, or some accident by which the rights of the parties have been affected. * * * It has never yet been decided that mere inadequacy of price was a sufficient reason, of itself, to open a sale." *Id.* § 824. There is no allegation of fraud, mistake, or accident in the conduct

of the sale. The only unfairness alleged is that the attitude of the purchaser to the properties offered for sale prevented competition. This will be considered hereafter in this decision. There is no evidence before the court that the properties were not sold for their fair value. There is no offer of an advanced bid nor a better price guaranteed on a resale. The court has no assurance that on a resale the properties would bring more, or even as much, as the prices realized at the sales reported. The bonded indebtedness of the Street-Railway Company is \$350,000. The indebtedness secured by trust deed on the property of the Light & Power Company is \$218,650.56. A mere statement of these figures shows the futility that must attend the efforts of the court to make these properties realize amounts anywhere proximate to the indebtedness of the corporations. They also show how remote is the interest of the petitioner in what can be realized from these sales. No order for a resale, with this purpose in view, will be made.

Said Hicks, trustee, as a further objection to the confirmation of these sales, charges that in the purchase of these properties R. M. Venable was not acting for himself, but as the agent of a committee, consisting of himself, Charles R. Spence, and S. Hamilton Graves, and that the said committee was not acting for themselves, but represented the stockholders and certain creditors of the Roanoke Street-Railway Company and the Roanoke Electric Light & Power Company; that this committee was created under an agreement made the 10th of January, 1898, by the bondholders of the Roanoke Railway Company, certain creditors of the Roanoke Electric Light & Power Company, and the stockholders of both companies. This statement is not sustained by the terms of the agreement to which it refers. The agreement is that of the holders of the first mortgage bonds of the Roanoke Street-Railway Company among themselves. Its character and purpose are shown by the following extracts:

"Roanoke Street Railway. First Mortgage Bondholders' Agreement.

"Baltimore, January 10th, 1898.

"We, the undersigned, hereby agree to deposit with the Mercantile Trust & Deposit Company of Baltimore the number of first mortgage bonds of the Roanoke Street-Railway Company set opposite our respective names, which are to be held subject to the order of Richard M. Venable, Charles R. Spence, and S. Hamilton Graves, a committee of the bondholders appointed at a meeting held in Roanoke, Va., on the 22d day of December, 1897. * * * The said committee, or a majority of them, are authorized to represent the owners of said bonds in all proceedings instituted for the collection of the same, or the enforcement of the rights of the owners thereof, and to do whatever acts in their judgment may be necessary or desirable for the protection of the interests of said bondholders. * * * It is further agreed that, if it shall be necessary to purchase the said railway, or the property of the Roanoke Electric Light & Power Company, or other property, for the benefit of the holders of the bonds deposited subject to the order of said committee, the said committee may organize a corporation to own and operate said railway, and such other property as may be purchased by said committee, upon such basis of bonds and stock as, in their opinion, shall be for the best interests of said bondholders."

This contract is the ground of the second objection to the confirmation of the sale, which is thus specifically stated: "That the property was purchased in pursuance of an agreement between the

stockholders and certain creditors of these companies, which is illegal, against public policy, to the prejudice of other creditors, and void." It is insisted that the agreement among the bondholders falls under the condemnation announced by the supreme court in *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130. The court in that case says: "Foreclosure of a railroad mortgage by collusion between bondholders and stockholders, for the purpose of destroying the interests of unsecured creditors, may be set aside on their application, as a fraud." It is sufficient to refer to the contract of January 10, 1898, to show the absence of collusion between the stockholders and bondholders of the railway company, or between the bondholders of the railway company and the stockholders of the Light & Power Company. It is by no means an unusual contract among mortgage bondholders for the preservation of their interests. It does not recognize and undertake to preserve the interests of the stockholders, and therefore does not bind the parties thereto to protect the interests of other creditors of the corporation.

But it is further contended on behalf of the petitioner that the purchase of the properties sold in these causes is null and void, by reason of a proposed contract dated October 11, 1897, which is referred to in the agreement among the first mortgage bondholders of the Street-Railway Company, of January 10, 1898. The parties to this proposed agreement are given as follows:

"Now, therefore, this agreement, made and entered into this 11th day of October, 1897, between the undersigned stockholders of the Roanoke Street-Railway Company, the stockholders of the Roanoke Electric Light & Power Company, the bondholders of the Roanoke Street-Railway Company, and the Mercantile Trust & Deposit Company of Baltimore, Maryland, and by the Roanoke Street-Railway Company and Roanoke Electric Light & Power Company, provided that all of the stockholders in said companies and all of the bondholders of the Street-Railway Company execute this agreement."

The object of this proposed agreement was to acquire the properties of the Street-Railway Company and of the Light & Power Company, and to form a new organization, to be known as the "Roanoke Railway & Power Company." This proposed agreement, had it been carried into effect, provided for the payment of the floating indebtedness of the Street-Railway Company and of the Light & Power Company, and could not, therefore, have been assailed as null and void because of its failure to provide for the satisfaction of the claims of general creditors. But, as this agreement was never executed, it is not necessary to discuss its provisions. That the proposed agreement of October 11, 1897, was not concluded, is shown by the affidavit of Mr. Venable. That the agreement of January 10, 1898, was a contract among the bondholders alone of the Street-Railway Company is shown, not only by the terms of the agreement itself, but by the affidavit of Mr. Venable, referred to above, which, it is agreed by counsel, may be read in evidence. Following is the affidavit:

"State of Maryland, City of Baltimore, to wit: I hereby certify that on this 21st day of August, 1899, before the subscriber, a justice of the peace of the state of Maryland, in and for Baltimore city, personally appeared Richard

M. Venable, and made oath, in due form of law: (1) That the original proposed agreement of 1897, between the bondholders and stockholders of the Roanoke Street Railway, the stockholders of the Roanoke Electric Light & Power Company, the Mercantile Trust & Deposit Company of Baltimore, and others, was never executed or accepted by the said Mercantile Trust & Deposit Company of Baltimore, and was abandoned, and no stock or bonds were ever deposited with the Mercantile Trust & Deposit Company of Baltimore, under said agreement. (2) That he has examined all of the copies of the agreement of January 10, 1898, which have been signed, and are now in possession of the Mercantile Trust & Deposit Company of Baltimore; that said copies are signed by bondholders, who state in most cases the number of bonds deposited, and in all cases the aggregate amount of such bonds deposited; and that no one has signed any of said agreements as a stockholder of the Roanoke Street Railway, or of the Roanoke Electric Light & Power Company, and that no stock of either of said companies has been deposited with the Mercantile Trust & Deposit Company of Baltimore under said agreements or either of them.

"John L. Webb, J. P."

The bondholders' agreement of the 10th of January, 1898, is such as has received the sanction of the courts in many decisions, and is sustained by leading text writers. In 1 Thomp. Corp. § 271, it is said:

"Where a default has occurred in the interest secured by a railway mortgage, the creditors of the corporation may, without the imputation of fraud, combine for the purpose of protecting themselves, by purchasing the property when legally brought to sale to foreclose the mortgage, provided it is no part of the agreement to prevent competition at the sale, or to acquire any unfair advantage over others."

There is no such purpose apparent in the agreement of the bondholders in this case. As was said by Justice Strong, delivering the opinion in *Sage v. Railroad Co.*, 99 U. S. 334, 25 L. Ed. 394:

"There is almost a certainty that in foreclosure sales of a railroad, especially when the mortgage debts exceed the market value of the property, as in this case, the purchaser will be an association of some of the bondholders secured by the mortgage, who buy with the intention of organizing a new company to hold the property for their interests."

This is the plan adopted by the bondholders of the Roanoke Street-Railway Company. It is a proper and legitimate course to pursue for the protection of their interests. There is nothing in it violative of the rights of any class of creditors, or that is condemned by public policy. The grounds of objections to the confirmation of these sales are untenable. The objections will be overruled, and the sales confirmed.

RANKEN v. ST. LOUIS & B. SUBURBAN RY. CO.

(Circuit Court, S. D. Illinois. December 24, 1899.)

1. STREET RAILROADS — USE OF STREETS OR HIGHWAYS—RIGHTS OF ABUTTING OWNERS.

It is the settled law in Illinois that the construction of an electric railway on a street or highway imposes no additional servitude, whether the fee in the street or highway is in the municipality or in the abutting owner; and, where the right to construct such road is granted by the public authorities, an owner of abutting property has no standing in a court of equity to enjoin the same.

2. JUDGMENT—EFFECT AS ADJUDICATION.

A suit for an injunction was commenced by an owner of abutting property against a company which was constructing an electric railroad upon a highway, and also an action of trespass to recover damages for injuries done to plaintiff's property. In accordance with a stipulation made and filed in the latter action, both actions were dismissed, and judgments rendered against the defendant for costs; the defendant paying an agreed sum as damages, and agreeing to refill certain excavations. *Held*, that such judgments were a bar to any subsequent action based upon the same trespass, the effect of which could not be avoided by plaintiff by tendering back the money received, and by allegations that the agreement to refill the excavations had not been carried out.

3. STREET RAILROADS—MANNER OF CONSTRUCTION—JURISDICTION TO CONTROL.

The manner in which an electric railroad shall be constructed upon a public highway over which the county has control is a matter within the jurisdiction and control of the county board, with whose discretion a court of equity cannot interfere.

This was a suit in equity by an abutting property owner to enjoin the maintenance of an electric railroad upon a highway, and for other relief in relation thereto. On final hearing.

T. C. Mather, James M. Graham, and Wm. B. Thompson, for complainant.

Samuel P. Wheeler, D. M. Browning, and Wilbur N. Horner, for defendant.

ALLEN, District Judge. On October 21, 1898, the complainant exhibited his bill in this court, alleging that he is the owner in fee of certain lands in the bill described, situated in the county of St. Clair, in the state of Illinois; that said lands adjoin the St. Clair County Turnpike Company's road on the north, and that complainant's fee in said lands extends to the middle of said turnpike in part, and in part covers the whole width of said turnpike, subject in either case to the public easement therein; that the defendant company took possession of the north part of said turnpike road without license from complainant, and proceeded to construct a railway along and upon the north side of said turnpike road adjoining complainant's lands, and in so doing made excavations on complainant's lands, leaving high embankments between portions of said land and the turnpike road, greatly injuring complainant's lands, and cutting off access to said lands from said turnpike road, and otherwise greatly injuring said lands by throwing water from said railway roadbed in and upon complainant's lands, injuring the crops and soil thereof, and depreciating the market value of said lands, and tearing away and removing the fence of complainant along the north line of said turnpike road. The bill further alleges that complainant instituted an injunction suit and a trespass suit against defendant company in the St. Clair county circuit court, seeking to enjoin the defendant company from committing said grievances, and to recover damages for some of said trespasses, and in the former suit obtained an injunction, to which the defendant paid no attention, but continued said trespass and committed the grievances stated; that, pending said suits, complainant's attorneys attempted to compromise the causes of action, and upon some kind of indefinite

understanding between opposing counsel said suits were dismissed, and defendant paid complainant \$250 for the destruction of his fence, and did a little filling of said excavations so made on complainant's lands, but has neglected and refused to fill the remaining excavations by it so made, and which were intended for and were a part of the consideration for taking possession of complainant's fee in said turnpike road; that defendant has no right to possess, occupy, and use complainant's fee in said turnpike road, or to impose additional servitude thereon, without first paying complainant therefor, by agreement with him, or by condemning it under the eminent domain law of Illinois; that defendant is insolvent, heavily mortgaged, and that defendant is about to sell its road, franchise, etc., to an innocent buyer, without paying complainant for said grievances, and without paying him for said fee in said turnpike road; and prays that defendant be enjoined from selling its road and franchise until it has paid the said damages, and for taking his fee in said turnpike road. The bill also prays that defendant be required to remove its railway off from complainant's fee in said turnpike until complainant is paid therefor, and that defendant be decreed to fill said excavations, or pay complainant for having the same done, and to construct farm crossings, etc. No restraining order was made on this bill, but on the 9th of January, 1899, the complainant filed what is termed a "supplemental bill," wherein it is alleged that defendant is about to lay down a track on said turnpike road, and on the south side thereof; that defendant has never obtained permission of complainant to construct said additional track over and upon his fee in said turnpike road; that the construction of said tract will impose a new servitude upon the fee title of complainant in said turnpike. The prayer of the supplemental bill is for an injunction restraining defendant from constructing said additional track, etc., or operating its cars thereon, etc. On the filing of the supplemental bill an order for a temporary injunction was made. On the hearing an amendment to the supplemental bill was filed, wherein the manner of construction of the north track is set forth, and the alleged circumstances of the compromise referred to in the original bill are detailed. A tender back of the \$250 is alleged, and an offer made to pay defendant that sum.

Upon a full hearing of the case it appears that the turnpike road in question has been a public highway for more than 50 years, and that in accordance with law the St. Clair Turnpike Company was granted authority to establish a toll road thereon. The road or turnpike, however, remained under the control of the board of supervisors of St. Clair county, and this board granted to defendant the right to lay down and operate two lines of track, using electricity as a motive power. The power of the board of supervisors to make this grant is settled by the supreme court of Illinois in *Trotier v. Railway Co.*, 180 Ill. 471, 54 N. E. 486. So far as the rights of the public are concerned, the grant of St. Clair county, through its board of supervisors, vested in the defendant company authority to use the highway in constructing and operating an electric railway,

in connection with other public uses. The theory of the complainant is that, inasmuch as he has a qualified fee in the bed of the road or highway, he must be compensated by the defendant therefor, because the construction and operation of the electric railway will impose an additional servitude upon the highway and his qualified fee therein. I regard the question as settled in Illinois that the construction of an electric railway upon a street or highway imposes no additional servitude, whether the fee in the street or highway be in the municipality or the abutting owner. *Chicago, B. & Q. R. Co. v. West Chicago St. Ry. Co.*, 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; *Bond v. Pennsylvania Co.*, 171 Ill. 508, 49 N. E. 545. If, then, the construction and operation of an electric railway on the turnpike constituted no additional servitude, the complainant is without any standing in a court of equity on this account. All the other allegations in his bill relate to the manner of construction of the railway, except the one wherein defendant is charged with encroaching upon his lands adjoining the turnpike, and taking therefrom earth that was used in the construction. It will be observed that all these trespasses had been committed before the original bill was filed. The complainant instituted, as was shown on the hearing, an injunction suit against the defendant, and also an action of trespass to recover damages for the trespass now complained of. During the trial of the action of trespass, negotiations were opened, looking to a settlement of all these controversies. A stipulation was dictated to the court stenographer, and later transcribed and filed in the case. By this stipulation defendant agreed to pay complainant \$250, and fill the excavations where soil had been removed from his lands adjoining the turnpike, and both the suits were to be dismissed at defendant's costs. The stipulated amount was paid and received. Both suits were dismissed, and judgments rendered against the defendant for costs. These judgments, in my opinion, constitute a complete bar. But it is alleged the defendant did not restore the soil where it had been removed, and for this reason the complainant may revive the original action by tendering back the money he received. The tender was not made for more than 10 months after the supplemental bill was filed, and failed to place the defendant in his original position, as no offer is made to repay the costs which the evidence shows were long since paid by the defendant, or to pay anything for the use of the money that complainant received more than 18 months before he offered to return it. I am clearly of the opinion that by no form of tender, or the amount thereof in this suit, can the complainant escape the effect of the judgment and decree referred to. These are, perhaps, unimportant, in the view I have of this feature of the case. Clearly, these questions concerning the manner in which the tracks are constructed or laid are all matters within the control and jurisdiction of the board of supervisors of St. Clair county. The exercise of such powers can be referred to no general head of equity jurisdiction. An attempt to exercise them would produce no good, and much harm, by bringing on conflicts of authority between the courts and the legally constituted authorities vested by the law with power in this

regard. *Cairo & V. R. R. Co. v. People*, 92 Ill. 170. In my opinion, the bill and supplemental bill as amended should be dismissed, and the injunction dissolved.

BOSTON & A. R. CO. et al. v. PARR et al.

(Circuit Court, D. Maryland. December 4, 1899.)

EQUITY PLEADING—AMENDMENT OF BILL—DISCRETION OF COURT.

Leave to amend a bill after a demurrer has been sustained thereto is not a matter of right, but rests in the discretion of the court, and will not be granted in a suit to charge directors of a corporation with a highly penal statutory liability on account of transactions several years old, and difficult of ascertainment, where application to amend was not made for a year after the demurrer was sustained.

In Equity. In the matter of the petition of the complainants, filed November 25, 1899, for leave to amend the bill of complaint.

Bernard Carter and Charles J. Bonaparte, for complainants.

George Leiper Thomas, for respondent Parr.

R. M. Venable, William P. Whyte, and Blakistone & Blakistone, for other respondents.

MORRIS, District Judge. This is a suit in equity by creditors of the American Casualty Insurance & Security Company of Baltimore City, an insolvent corporation, to recover from the defendants, who were directors of said corporation, upon the ground that the said directors are liable for the debts of the corporation because of the statutory liability imposed by sections 67, 68, and 69 of article 23 of the Maryland Code upon directors who make loans to any stockholder or officer, or who vote dividends impairing the amount of corporate capital. The debts to the complainants are alleged to have been incurred prior to November, 1893, at which date receivers of said corporation were appointed, and the dividends declared were in 1891, 1892, and 1893. The bill of complaint in this case was filed July 17, 1895, and, after various pleadings were filed and withdrawn, the defendants, on November 4, 1896, filed a demurrer to the bill of complaint, and on January 13, 1897, filed a new demurrer, and on March 1, 1897, filed additional causes of demurrer. The demurrer was heard, and on June 18, 1897, the court filed its rulings, holding that section 69 of article 23 of the Maryland Code, forbidding loans to stockholders and officers, was not applicable to this corporation, and holding that the liability arising under section 67, imposing a liability upon directors who declare dividends not earned, was well alleged in the bill, but holding that the objection of the defendants that the bill of complaint did not set forth the cause of action upon which each one of the complainants claimed that the corporation was indebted to them, respectively, was well taken; and the court sustained the demurrer as to that defect in the bill. Thereupon, on November 20, 1897, the complainants applied for leave to amend their bill of complaint, which was granted, and on the same day they filed their amended bill. December 4, 1897, defendants filed a motion to rescind the order granting the defendants leave to amend,

which motion was overruled December 20, 1897; and on December 29, 1897, the defendants demurred to the amended bill. This demurrer came on to be heard in November, 1898; and the court ruled that the amended bill was still defective, in not sufficiently stating the amounts, dates, and nature of the claims upon which the complainants allege that the American Casualty Insurance & Security Company became indebted to them. No application was made by the complainants for leave to amend the bill. The defendants made a motion to dismiss the bill, but upon counsel for complainants stating that they desired to consult together as to whether they would ask leave to amend, or would stand on their bill as filed, no order was entered. This was sometime in November or the early part of December, 1898. On November 6, 1899, counsel for one of the defendants filed a motion to dismiss the bill for want of prosecution; and thereupon, on November 25, 1899, the complainants filed their petition to be allowed to amend their bill, together with a copy of the proposed amendment. The defendants oppose this petition, and urge the court not to grant the complainants leave to amend.

The debts alleged to be due by the casualty insurance company to the complainants, for which this suit seeks to hold the defendants liable, were incurred under policies of insurance against liability for accidents issued by the insurance company in 1891, 1892, and 1893, and are for sums very large in the aggregate, the facts with regard to which, after this lapse of time, must be difficult of ascertainment. The year that has elapsed since the demurrer last heard was sustained, and during which the bill has not been amended, must have seriously added to those difficulties. Then, also, the alleged liability of the defendants arises from the charge that they, as directors, declared dividends in 1891, 1892, and January, 1893, which diminished the capital stock of the corporation. This is a highly penal liability, for, no matter how small the sum by which the dividend diminishes the capital stock, the directors are made liable for all the existing debts of the corporation, and all that may be contracted while they are in office. The length of time which has elapsed must seriously increase the difficulty of ascertaining the facts with regard to the condition of the assets and liabilities of the company in the years 1891, 1892, and 1893. The leave to amend is not a matter of right, but is in the discretion of the court, as provided by rule 35 of the equity rules. *Bank v. Carpenter*, 101 U. S. 567, 25 L. Ed. 815; *Hunt v. Rousmaniere*, 2 Mason, 342-365, Fed. Cas. No. 6,898. The application for leave to amend must be made promptly, and, by rule 30 of the equity rules, unless the amendment is filed by the next succeeding rule day, it is to be considered as abandoned. Considering the nature of the suit, and the great lapse of time since the liabilities of the corporation originated for which it is now sought to make the defendants liable, and the increased difficulties which the delays must cause the defendants in establishing the facts of the transactions upon which it is sought to hold them liable, I think it my duty to refuse the proposed amendment.

CITY OF PHILADELPHIA v. ECKELS et al.

(Circuit Court, E. D. Pennsylvania. June 8, 1896.)

No. 3.

1. BANKS—DEPOSIT IN INSOLVENT BANK—TITLE TO FUNDS.

The treasurer of a city, in accordance with an arrangement with a bank in which he kept an account as treasurer, deposited at night funds which had come into his office after banking hours, and which belonged in part to the city and in part to the state, for safe-keeping until the next morning, when, as was his custom, he separated out the portion of the funds belonging to the city, and had the same placed to his credit on his bank book. On the morning in question this was done before the hour for opening the bank. The bank was insolvent, and known to be so by its officers, and was at the time virtually in possession of the bank examiner, who took formal possession before the time for opening arrived, and the bank was not thereafter opened for business. The treasurer at once demanded the return of the funds, which were still in the bank, but they were retained by the examiner, and subsequently turned over to the receiver, who credited them to the treasurer on the bank books. *Held*, that such funds did not become the property of the bank, and were recoverable by the city from the receiver.

2. BANKS—TITLE TO CHECKS AND DRAFTS DEPOSITED.

The title to checks and drafts deposited in a bank for credit to the depositor's account remains in such depositor until they are collected, although the amount thereof is at the time entered on his book as a credit.

This was a proceeding against the comptroller and receiver of a national bank to recover funds claimed to be the property of the complainant.

J. W. Catharine, Jr., and C. F. Warwick, for plaintiff.
Read & Pettit, for defendant.

ACHESON, Circuit Judge. The material facts of this case, as established by the proofs, are these: John Bardsley, the treasurer of the city of Philadelphia, acting in his official capacity, and under authority of ordinances of the city, kept an account with the Keystone National Bank in his name as city treasurer, and from day to day deposited therein moneys of the city exclusively, and from time to time drew checks against the same on behalf of the city. Under an arrangement entered into between Bardsley and the bank, it was his common practice to deliver to the bank, after banking hours, taking a receipt therefor, funds belonging in part to the city and in part to the commonwealth of Pennsylvania, which came into the city treasurer's office too late in the day to deposit, for the purpose of safe-keeping in the vaults of the bank overnight; and on the morning of the succeeding day, after the share of the commonwealth in the funds was ascertained and deducted, a deposit ticket would be made out by the city treasurer, and the part of the funds belonging to the city would be deposited in the usual way to the credit of the city treasurer in his said account. Late on the afternoon of March 19, 1891, after the close of banking hours, Bardsley, in accordance with the practice above explained, delivered to the bank, for safe-keeping in its vaults overnight, the fund here in controversy, namely, \$18,500.12, together with some other moneys,

all of which belonged in part to the city and in part to the commonwealth, their respective shares therein not being then ascertained. On the morning of the next day,—March 20th,—between the hours of 9 and 10 o'clock (at which latter hour the bank customarily opened for business), a messenger, having with him the city treasurer's bank book and a deposit ticket showing the amount of the aforesaid funds belonging to the city, was sent from the city treasurer's office to the bank, and a credit for the latter amount was entered in the bank book. The bank was then insolvent, and was insolvent prior to March 20th, and its insolvency was known to the president of the bank. As early as February 28, 1891, the bank examiner had reported to the comptroller of the currency that the bank was insolvent. On the night of March 19, 1891, the comptroller of the currency, by wire, directed William P. Drew, bank examiner, to repair to the Keystone National Bank the next morning (March 20th) at 9 o'clock. Mr. Drew arrived at the bank at the time designated, and at 9:40 a. m. of that day received orders from the comptroller to close the bank, and thereupon the bank examiner ordered the bank's officers not to open the bank. The receiving teller, however, while the examiner was in the director's room, without the knowledge of the examiner, opened his desk before 10 o'clock, and received three or four deposits. About 10 o'clock the examiner directed the teller to receive no deposits, and to put those received aside, to be returned to the depositors. The bank was not opened for business after March 19, 1891. No money was paid out by the bank on March 20th. Exclusive of the fund in controversy, the city treasurer, on March 19 and 20, 1891, had to his credit in the bank in his said account a balance of not less than \$399,363.21. On the morning of March 20th the city treasury officials went to the bank, and demanded the return of the fund here in dispute. The bank examiner was about to return the fund, when he was advised to hold it until he received further instructions from his superiors, and he retained the fund. At the time of this demand the fund was in the bank, and it could have been returned. In the main, it consisted of country checks and checks on trust companies, etc., which amounted to \$14,130.32. These checks were afterwards collected by the bank examiner, who remained in control of the bank and its affairs until Robert M. Yardley was appointed receiver thereof. The proceeds of the checks, together with the cash which constituted the balance of this fund, were paid over by the bank examiner to the receiver. This fund was not credited to the city treasurer upon the books of the bank until May 18, 1891, after the receiver took possession, and such credit was entered by the receiver.

Upon this state of facts it is quite plain to me that the city is entitled to the return of this fund. It was not deposited to the credit of the city treasurer on March 19th, but was left for safe-keeping in the vaults of the bank overnight. The precise interest of the city therein, as distinguished from the interest of the commonwealth, was not then known. Undoubtedly, the fund was left merely for safe-keeping, subject to the right of withdrawal by the city treasurer. The entry of credit in the city treasurer's bank book

on the morning of March 20th, under the circumstances, did not create the relation of debtor and creditor, or divest the title of the city. That entry was not conclusive, either upon the bank or the city. At the time it was made, the bank was virtually, if not actually, in the hands of the government officials. The functions of the bank for the transaction of ordinary business were then suspended. Moreover, the bank being insolvent, and about to pass into the hands of a receiver, it would have been a fraud on the city for the bank to accept a deposit of this fund, and on that ground alone it could have been reclaimed. As respects the checks, most clearly the title would have remained in the city, even had there been a deposit, for then the bank, in the first instance, would have been a mere collecting agent of the city. *Beal v. City of Somerville*, 1 C. C. A. 598, 50 Fed. 647, 17 L. R. A. 291. I entertain no doubt, however, as to any part of this fund. The city never lost its title thereto, either in whole or part. The decision of the supreme court in *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683, I think, conclusively establishes the right of the city to recover.

Let a decree be drawn in favor of the complainant in accordance with the views expressed in the foregoing opinion.

CITY OF PHILADELPHIA v. ALDRICH.

(Circuit Court, E. D. Pennsylvania. December 15, 1899.)

No. 44.

BANKS—CHECKS AND DRAFTS COLLECTED AFTER INSOLVENCY—RIGHT TO PROCEEDS.

A national bank, on the morning on which it was closed by the comptroller, presented to the clearing-house association a large amount in checks and drafts upon other banks, a number of which had been deposited by a city and by another bank. The manager of the association received the proceeds of all such checks and drafts, and paid therefrom debts of the bank, leaving a balance to the credit of the bank. *Held*, that the payments must be presumed to have been made with the money of the bank, and that the remainder included that belonging to the city and the other depositing bank, and constituted a trust fund in the hands of the receiver, representing the checks and drafts the title to which remained in the depositors.

This was a proceeding to recover a fund in the hands of defendant as receiver of the Keystone National Bank.

J. W. Catharine, for city of Philadelphia.

Wm. B. Gill and Read & Pettit, for receiver.

Richard C. Dale, for Second Nat. Bank.

DALLAS, J. The subject-matter of this controversy is a fund of \$21,273.55, now in the registry of this court, which is claimed by the receiver of the Keystone National Bank, and also by the city of Philadelphia, and, in part, by the Second National Bank of the City of New York. The last-mentioned bank is not a party to this suit, but it has been agreed that its right to any portion of the fund in court shall be presently adjudicated in this cause. An agreed statement of facts has been "submitted to the court with like effect

as though duly found by a master." From this statement, which is too long for insertion here, I deduce the following findings and conclusions:

1. No claim, other than those presently to be adjudicated, has been made against the receiver to recover any portion of the funds included in the sum of \$70,005.46, referred to in the next following paragraph, except by Crane, Parris & Co., and for the full amount of their claim they have obtained a judgment against a solvent defendant, which asserts no right to reimbursement out of this fund.

2. On the morning of March 20, 1891, the Keystone National Bank made up and presented for exchange to the Clearing-House Association of Philadelphia, at the morning exchange of that day, packages of checks and drafts upon other banks, and deposited with it by its depositors, or sent it for collection, amounting in the aggregate to \$70,005.46. There were included in this aggregate amount checks taken from funds belonging to the city of Philadelphia, amounting to \$19,190.77, and checks belonging to the Second National Bank of the City of New York, amounting to \$2,655.92. The title of the city of Philadelphia to the said checks for \$19,190.77 was not divested, and the title to the said checks for \$2,655.92 remained in the Second National Bank of the City of New York. *City of Philadelphia v. Eckels* (C. C.) 98 Fed. 485.

3. The checks sent by the Keystone National Bank to the clearing-house association, including those belonging to the city of Philadelphia and to the Second National Bank of the City of New York, were surrendered by the manager of the said association, and he received the proceeds in full, viz. \$70,005.46. Thus a fund was constituted, to a portion of which it is manifest the city of Philadelphia and the New York bank were, respectively, entitled. Their component parts of it were not, it is true, earmarked, or in any manner segregated, but the exact amount which the checks of each had contributed to its creation was fixed, and the entire fund was in the manager's hands. Of that fund \$19,190.77 belonged to the city of Philadelphia, and \$2,655.92 belonged to the Second National Bank of the City of New York.

4. Out of the fund of \$70,005.46 referred to in the last preceding paragraph, the manager of the clearing house paid debts of the Keystone Bank, amounting in the aggregate to \$41,197.36. These payments must be presumed to have been made, not with the money of others, but with that of the Keystone Bank itself, and consequently the balance of \$28,808.10, which then remained in the fund, must be regarded as being inclusive of the money of the city of Philadelphia and of the Second National Bank.

5. After a somewhat protracted litigation, which need not be more particularly referred to, the clearing-house association admitted that it was not entitled to retain the last-mentioned \$28,808.10, but claimed to set off against said sum and interest thereon the amount of certain dividends due upon notes which it held against the Keystone Bank. The receiver agreed to this, and the result of the arrangement was that the debt due by the clearing house was adjusted as being on April 28, 1898, \$21,273.55, and thereupon that sum was

paid into court, and constitutes the fund now in question. I am of opinion that, as respects this fund, the rights of the city of Philadelphia and of the Second National Bank of the City of New York, respectively, are precisely the same as they were with respect to the sum of \$28,808.10, of which it is a part.

The fund in court is insufficient to satisfy the principal of the two claims made upon it, and, consequently, as the scope of this suit has, by agreement, been so restricted as to involve only the disposition of that fund, the question which has been discussed, as to whether the respective claims are entitled to a proportionate part of the interest charged to and allowed by the clearing-house association upon the original balance of \$28,808.10, need not be decided. Let a decree be prepared awarding the fund in court to the city of Philadelphia and to the Second National Bank of the City of New York, severally, in proportion to the amounts of their respective claims.

JAMES et al. v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1899.)

No. 289.

1. JUDGMENTS—PARTIES WHO ARE BOUND BY—REPRESENTATION OF STOCKHOLDER BY CORPORATION.

In the absence of fraud or collusion, a stockholder in a railroad company is represented by the corporation in a suit against it for the foreclosure of a mortgage on its property, and is bound by the decree therein, and by a sale of the property made under such decree.

2. FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.

A circuit court of the United States is not prevented by Rev. St. § 720, from granting an injunction against a proceeding in a state court, where necessary to render effective its own decree; and where it has rendered a decree foreclosing a mortgage upon a railroad, and has sold the property thereunder, it has jurisdiction, as ancillary to such suit, to entertain a bill by the purchaser to enjoin a stockholder of the mortgagor company from maintaining a suit in a state court against such company to place the road in the hands of a receiver, in disregard of the decree of the federal court, by which he is bound, and of the rights of the purchaser thereunder.¹

3. SAME.

A judgment creditor of a railroad company, whose cause of action arose after a sale of its road by a federal court in foreclosure proceedings, and who is seeking by a suit in a state court to enforce his judgment against the road under a state statute, cannot be said to be asserting rights claimed under any party to the decree of the federal court, so as to be bound by such decree; and that court cannot, in view of Rev. St. § 720, enjoin him from maintaining such suit in the state court, nor can it compel him, by supplementary proceedings instituted by the purchaser of the road, to submit his rights to that court for adjudication.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

This is an appeal by the respondents below from a decree of the circuit court of the United States for the Western district of North Carolina, granting an injunction against S. T. Pearson, Mrs. Clemye James, administratrix of W. A.

¹ As to enjoining proceedings in state courts, see note to *Garner v. Bank*, 16 C. C. A. 90, and, supplementary thereto, note to *Trust Co. v. Grantham*, 27 C. C. A. 575.

James, and Mrs. Fannie E. Howard, administratrix of J. H. A. Howard, their agents and attorneys, enjoining the said S. T. Pearson and said Clemye James, administratrix, from proceeding any further in the prosecution of an action set out in the bill of complaint, depending in the superior court of Rowan county; wherein the said S. T. Pearson and said Mrs. James, administratrix, were plaintiffs, and the Western North Carolina Railroad Company defendant, and enjoining Mrs. Fannie E. Howard from instituting any action or proceeding such as the plaintiffs James and Pearson had begun, and from beginning or taking any action for a similar purpose, and enjoining all said persons and their agents and attorneys from in any manner interfering with the property of the Western North Carolina Railroad Company, or the Southern Railway Company, or with the franchise purchased at the foreclosure sale, and owned and possessed by the said Southern Railway Company. The facts necessary to an understanding of this appeal are as follows: The Western North Carolina Railroad Company was originally chartered by North Carolina in 1854-55, to build and operate a railroad within that state. In 1880, by an act of the legislature, the corporation was reorganized, and on September 1, 1884, the company executed a first mortgage to the Central Trust Company of New York to secure bonds to the amount of \$3,856,000, and on September 2, 1884, executed a second mortgage to the same trust company to secure bonds to the amount of \$4,110,000. On April 30, 1886, the company leased its road for 99 years to the Richmond & Danville Railroad Company, a Virginia corporation, and the said lessee company took possession of the railroad property, and operated it until 1892, when, the Richmond & Danville Railroad Company having become insolvent, the property went into the hands of receivers appointed by the circuit court of the United States for the Western district of North Carolina. On April 20, 1894, the Central Trust Company of New York filed in the circuit court of the United States for the Western district of North Carolina its bill to foreclose the second mortgage made to it by the Western North Carolina Railroad Company, and such proceedings were had that a decree of foreclosure of the second mortgage and sale was entered May 2, 1894. On August 21, 1894, the railroad property and franchises of the said Western North Carolina Railroad Company were sold under said decree, subject to the first mortgage, to the Southern Railway Company, a Virginia corporation. On August 22, 1894, the sale was confirmed, and the court accepted the Southern Railway Company as purchaser, and directed that possession of the property be delivered to it, and proper deeds of conveyance executed, subject to the first mortgage, and reserving to the court the right to retake and resell the property if the Southern Railway Company should fail to discharge the debts, liens, or claims which the court should decree to be paid out of the purchase money in preference to the debt secured by the mortgage foreclosed. The Southern Railway Company thereupon was put in possession of the said railroad property, and has ever since operated it as a part of its system of railroads. In 1897,—three years after the railroad was sold and conveyed to the Southern Railway Company,—Mrs. James, administratrix of her husband, brought an action in the superior court of Rowan county against the Western North Carolina Railroad Company for the negligent killing of her husband, who was engine driver of a locomotive on the said road in the employment of the Southern Railway Company, and who was killed in 1896, about two years after the foreclosure sale. In said court a verdict was recovered for \$15,000, and on appeal to the supreme court of North Carolina it was held (*James v. Railroad Co.*, 121 N. C. 523, 28 S. E. 537) that the Western North Carolina Railroad Company, as a corporation under the laws of North Carolina, was still in existence, and was still liable for damages caused by the maladministration of the railroad by the Southern Railway Company, and that the railroad property itself in the possession of the Southern Railway Company could be held liable for such damages, and judgment was entered upon said verdict against the Western North Carolina Railroad Company. A judgment on a similar cause of action was also recovered in the same court by Mrs. Howard for the negligent killing of her husband, who was a fireman in the employment of the Southern Railway Company. The James judgment having been directed to be entered by the supreme court of North Carolina, and that court having ruled that, notwithstanding the foreclosure sale, the property of the railroad was liable for the damages for which she had recovered judgment, Mrs.

James, together with S. T. Pearson, instituted a proceeding in the superior court of Rowan county, setting forth the recovery of the judgment against the Western North Carolina Railroad Company, and alleging, among other things, that the Western North Carolina Railroad Company was insolvent, and the Southern Railway Company, for reasons therein stated, was also insolvent; that the mortgages put upon the railroad property, both by the Western North Carolina Railroad Company and by the Southern Railway Company, were invalid; and praying that a permanent receiver be appointed to take possession of the franchise and property of the Western North Carolina Company, and run the railroad under the orders of the court. The scope of the bill of complaint filed in the superior court of Rowan county was very broad. It was filed not only on behalf of Mrs. James, in an effort to subject the railroad property to the payment of her judgment, but was filed also on behalf of all stockholders of the Western North Carolina Railroad who claimed not to have assented to its reorganization, and all creditors of that company; and one of the complainants was S. T. Pearson, a holder of a share of the original capital stock of the company. The bill alleged that the reorganization, in 1880, of the Western North Carolina Railroad Company, was illegal, and in disregard of the rights of certain stockholders; that the Western North Carolina Railroad Company had abdicated its duty as a corporation, and had, without authority of law, permitted the Southern Railway Company to take possession of its roadbed, property, and franchise; that the pretended title of the Southern Railway Company to the franchise and property of the Western North Carolina Railroad Company was null and void; that the rolling stock and movables of the two railroad companies had been commingled so that the property of the Western North Carolina Railroad could not be identified; that Pearson and certain stockholders of the Western North Carolina Railroad Company had not assented to the reorganization of the Western North Carolina Railroad, and were entitled to hold their stock discharged from any lien created by either of said mortgages to the Central Trust Company of New York (if any lien was created by either of said deeds), and were entitled to have a receiver appointed to collect a fair rental for the franchise and property of the said Western North Carolina Railroad Company from the corporation or persons now operating the road. And on behalf of creditors it was alleged that, by reason of the fraudulent concealment of the property of the Western North Carolina Railroad Company by the Southern Railway Company, the said judgment creditor was unable to distinguish the rolling stock of the Western North Carolina Railroad Company, and subject it to execution, and that the pretended sale under said second mortgage executed by the Western North Carolina Railroad Company to the Central Trust Company of New York had cast a cloud upon the title to the franchise and property of the Western North Carolina Railroad Company. And the bill prayed for a permanent receiver to take charge of the franchise and property of the said Western North Carolina Railroad Company, and operate it under the orders of court; and that a referee be appointed, before whom all stockholders might prove the number and nature of their shares of stock, and all creditors might prove the value and character of the indebtedness of the Western North Carolina Railroad Company; and that the referee might report what claims constituted liens upon the property and franchise of the Western North Carolina Railroad Company. Thereupon the Central Trust Company of New York and the Southern Railway Company of Virginia filed in the above-mentioned foreclosure suit in the circuit court of the United States for the Western district of North Carolina their supplementary petition and bill of complaint, setting forth the foregoing proceedings in the superior court of Rowan county, alleging that notice had been given requiring the Western North Carolina Railroad Company to show cause before said court why a receiver should not be appointed of said railroad property, and alleging that said proceeding was intended to take from the possession of the Southern Railway Company the property sold to it under the foreclosure decree, and to have that sale and the conveyance thereunder declared null and void. The answer of the respondent James to this supplemental bill alleges, among other things, that the Southern Railway Company, being a Virginia corporation, had no power to acquire the title to the railroad and the franchise of the Western North Carolina Railroad Company, and that the Southern Railway Company acquired no title by its purchase.

The answer of S. T. Pearson adopts the answer of his co-respondent James, and the answer of Mrs. Howard is, in material matters, substantially the same. The cause came on to be heard upon the pleadings and exhibits, and the circuit court of the United States for the Western district of North Carolina entered its decree awarding the injunction as prayed. 89 Fed. 24. The respondents appealed, and the decree is before us upon their assignments of error.

A. C. Avery (B. F. Long and Lee S. Overman, on the brief), for appellants.

Charles Price, for appellees.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge (after stating the facts as above). In the bill of complaint in the superior court of Rowan county, filed by S. T. Pearson and Mrs. Clemye James, on behalf of themselves and other creditors and stockholders of the Western North Carolina Railroad Company, praying for a permanent receiver, two classes of claimants are inextricably mingled: First, the stockholders of the Western North Carolina Railroad Company; and, second, the creditors who have become such since the second mortgage was foreclosed and the Southern Railway Company became the purchaser, and since the railroad property, by order of the United States circuit court, was delivered to it. However effectively it might be urged that creditors whose causes of action came into existence two years after the foreclosure sale have a right to prosecute their rights in any court that has jurisdiction, it seems clear to us that the stockholders of the Western North Carolina Railroad Company were parties to the foreclosure suit, and are bound by its decree, and that any proceeding on their part to reclaim the property sold under the decree must be made in the court in which the decree was entered. The contention of the stockholders is that the mortgage deed on which the decree was based was null and void as against them, and that by the decree and the sale thereunder their rights were not affected, and that they have a right to have a receiver appointed to retake the property from the purchaser. The bill of complaint does not so much as make the Southern Railway Company, the purchaser under the foreclosure decree, now in possession of the property, a party to the case, but ignores the foreclosure proceedings as of no effect as to these complaining stockholders.

So far as the stockholders are concerned, the correctness of the decree below depends upon two questions: First, are they bound and estopped by the foreclosure decree? and, second, is this a case in which the circuit court of the United States has jurisdiction, as against a party to the foreclosure suit, to make its decree effective by injunction, notwithstanding the prohibition of section 720 of the Revised Statutes, prohibiting the granting of an injunction by a court of the United States to stay proceedings in any court of a state? It is settled that in a suit to foreclose a mortgage executed by a corporation, where there is no fraudulent collusion, the corporation represents all its stockholders, and that a decree against it binds them. *Railroad Co. v. Howard*, 7 Wall. 392-406, 19 L. Ed.

117; *Hawkins v. Glenn*, 131 U. S. 319-329, 9 Sup. Ct. 739, 33 L. Ed. 184; *Sanger v. Upton*, 91 U. S. 56-59, 23 L. Ed. 220; *Furnald v. Glenn*, 12 C. C. A. 27, 64 Fed. 49-53. S. T. Pearson and the other stockholders are attempting to assert in the state court the very same right which was involved in the foreclosure suit against the Western North Carolina Railroad Company, and which was cut off and foreclosed by the decree and sale. The relief asked by the supplementary bill filed by the purchaser in the United States circuit court is to prevent the parties thus decreed against from retaking the railroad property in disregard of the court's decree. In *Dietzsch v. Huidekoper* 103 U. S. 494, 497, 26 L. Ed. 497, it is said, "A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court;" and in that case an injunction restraining the enforcement of a judgment of a state court in a replevin suit was sustained, because the effect of enforcing the judgment in the state court would be to defeat the judgment of the federal court, which had jurisdiction of the subject-matter. In *Root v. Woolworth*, 150 U. S. 401, 411, 14 Sup. Ct. 136, 37 L. Ed. 1123, a decree had been entered in a circuit court of the United States in a suit to quiet title in favor of one Morton establishing his right to certain land as against Root. Afterwards, notwithstanding this decree, Root, claiming by the same title as before, re-entered, and took possession. Morton's title had been conveyed to Woolworth, and he filed his supplementary and ancillary bill asking that Root be enjoined from asserting any claim of title to the land, and from interfering with Woolworth's sole and exclusive possession. This bill, although filed long after the original decree, and by the assignee of the original complainant, was sustained as a proper exercise of the jurisdiction of courts of equity to make their decrees effective by injunction and writs of assistance. It seems quite clear to us that the injunction granted in the present case against S. T. Pearson was proper, and was within the jurisdiction of the circuit court, as ancillary to the original decree of foreclosure, and for the purpose of making that decree effective against persons who were bound by it.

Whether the circuit court had jurisdiction, and could, notwithstanding section 720 of the Revised Statutes, enjoin Mrs. James and Mrs. Howard from proceeding with the suit entered by them, or any similar suit, or from in any manner interfering with the property of the Western North Carolina Railroad or the Southern Railway, purchased at the foreclosure sale, is, to our minds, quite a different question. The rule that a sale of real estate under judicial proceedings concludes no one who is not in some form a party to the proceedings (*Dupasseur v. Rochereau*, 21 Wall. 130-135, 22 L. Ed. 588) has been applied by the supreme court of the United States to a foreclosure sale of telegraph lines (*United Lines Tel. Co. v. Boston Safe-Deposit & Trust Co.*, 147 U. S. 431-448, 13 Sup. Ct. 396, 37 L. Ed. 231), and to a foreclosure sale of a railroad (*Pittsburgh, C., C. & St. L. R. Co. v. Long Island Loan & Trust Co.*, 172 U. S. 493-515, 19 Sup. Ct. 238, 43 L. Ed. 528). Neither Mrs. James nor Mrs.

Howard could be said, we think, to have been in any sense a party to, or claiming under any party to, the foreclosure suit, or bound by it. Whatever rights they have accrued to them three years after the sale, and had no connection whatever with the rights which were adjudicated by the decree. It may be, notwithstanding anything adjudicated by that decree, that under the laws of North Carolina the Western North Carolina Railroad Company was answerable to them for the damages for which they obtained their judgments, and the railroad, now in possession of the Southern Railway Company, also liable. Those are questions not litigated in the foreclosure suit, and which the appellees, in our judgment, could not, by this supplementary and ancillary proceeding, compel Mrs. James and Mrs. Howard to bring before the circuit court. *Sargent v. Helton*, 115 U. S. 348, 6 Sup. Ct. 78, 29 L. Ed. 412; *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Haines v. Carpenter*, 91 U. S. 254, 23 L. Ed. 345.

The sale to the Southern Railway Company under the foreclosure decree is a defense which can be pleaded in any state court, and, if the state court should fail to give that effect to the decree of the United States circuit court which the parties claiming under it are advised it should have, the law provides an appeal for the revision of that refusal by the supreme court of the United States. *Dupasseur v. Rochereau*, 21 Wall. 130-134, 22 L. Ed. 588; *Bank v. Stevens*, 169 U. S. 432-456, 18 Sup. Ct. 403, 42 L. Ed. 807; *Crescent City Live-Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614; *Pittsburgh, C., C. & St. L. R. Co. v. Long Island Loan & Trust Co.*, 172 U. S. 493-507, 19 Sup. Ct. 238, 43 L. Ed. 528. In the bill which was filed by Pearson and Mrs. James in the superior court of Rowan county on behalf of themselves and others, stockholders and creditors, the allegations on which relief is asked are largely based on the alleged invalidity of the mortgage foreclosed by reason of the supposed rights of Pearson and other stockholders, and it is charged that the pretended mortgage deeds and pretended foreclosure sale have cast a cloud upon the property sold, which makes it impossible for Mrs. James to realize her judgment claim. Thus it appears that the scheme of the bill is based, not upon the supposed right contended for in argument as the result of the opinion of the supreme court of North Carolina in *James v. Railroad Co.*, supra, viz. that the old Western North Carolina Railroad Company continues to exist, and to be answerable for damages incurred in the operation of the railroad, and the railroad in the hands of the Southern Railway Company liable for the judgment, but upon the allegation that by reason of the rights of certain stockholders the mortgage foreclosed was invalid, and the foreclosure sale to be disregarded and treated as a nullity, and a receiver appointed in that collateral proceeding in another court, to take the property from the purchaser. It is not a creditors' bill, based upon legal and equitable rights as creditor, but a stockholder's bill, in which a creditor has joined, basing her claim to relief mainly upon the alleged invalidity of the mortgage foreclosed because of the nonassent of certain stockholders. At least this supposed ground of relief is the gravamen of the whole bill.

Without passing upon any other questions argued by counsel, and which we do not consider necessary to the decision of the case before us, we hold that the injunction, so far as it enjoins the further prosecution of the bill which was filed in the superior court of Rowan county, should be continued, and the decree, so far as it grants that injunction, should be affirmed, but that the decree should be so modified as not to prohibit Mrs. James and Mrs. Howard from proceeding as they may be advised with any other suit not based upon the supposed rights of stockholders with respect to enforcing their judgment claims. The cause is remanded, with directions to modify the decree in accordance with this opinion.

SHERMAN v. AMERICAN CONGREGATIONAL ASS'N et al.

(Circuit Court, D. Massachusetts. December 20, 1899.)

No. 1,165.

1. WILLS—CONSTRUCTION OF BEQUEST—CONDITIONS.

Where a bequest to a religious library association was "upon condition that said association agrees" to pay an annuity to the wife of the testator during her life, and upon her death to apply the income from the fund to specified purposes in connection with its library, the agreement to pay the annuity is not such an absolute condition that the bequest is defeated by the death of the annuitant before the time for its taking effect arrives.

2. SAME—ACCEPTANCE OF TRUST.

The acceptance by an association of a bequest made to it on condition that it should agree to devote the income from the fund to certain purposes specified by the testator, in connection with the object for which the association was incorporated, is an implied agreement to carry out the trust, which is enforceable by a court of equity; and the fact that no formal agreement was executed before the bequest was paid over does not render it recoverable by the heirs of the testator.

In Equity. This was a suit to recover the amount of a bequest made by a testator to the American Congregational Association, and which had been paid over to it by the executors. On demurrer to bill.

Charles E. Sherman and Roger M. Sherman, for complainant.
M. F. Dickinson, Jr., for defendants.

BROWN, District Judge. The demurrer to the bill calls for a construction of the will of Isaac P. Langworthy. The third clause is as follows:

"Third. I direct my executors to pay over to the American Congregational Association, as soon as may be convenient after my decease, the sum of ten thousand dollars (unless previous to my death I shall have deposited said sum with said association), upon condition that said association agrees to pay to my wife, in quarterly payments, during her life, the sum of \$400, and upon the death of my said wife to pay over semiannually the net income of said \$10,000, and any increase thereof, to the library committee of said association; the same to be expended by said committee in the purchase of local histories, genealogies, commentaries of the Bible, and ecclesiastical histories, for said library."

The complainant contends that this clause imposed upon the American Congregational Association an absolute condition preced-

ent, namely, that it should agree to pay Sarah W. Langworthy, "in quarterly payments, during her life, the sum of \$400"; that, without so agreeing, the association could not take; and that, as Mrs. Langworthy died before the making of such an agreement, the condition became incapable of performance, and the gift was thereby defeated. The requirement of the payments to Mrs. Langworthy, however, is in its nature temporary, and such that it may be satisfied and terminated by the death of the annuitant. Were the condition to become impossible of performance, by the death of the annuitant before the testator, or before the time at which the executor was to pay over the fund, the condition, being no longer supported by the testator's sole reason for imposing it, would end. As the annuity was not the sole motive of the bequest, the testator's intention as to the disposition after his wife's death, being clear, should be upheld. *Colton v. Colton*, 127 U. S. 300, 309, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Hollinrake v. Lister*, 1 Russ. 500; *Kirk v. Kirk*, 21 Ch. Div. 431, 437. Therefore a mere allegation that the association did not make such an agreement does not negative its right to the fund. The bill alleges no refusal by the association to assume the payment of the annuity, nor can its mere failure to do so constitute a refusal, as the complainant contends, unless it had an opportunity to accept the fund from the executor prior to the death of the annuitant.

The bill alleges that on or about April 1, 1898, the executor sold property at divers times, and paid over to the American Congregational Association the sum of \$10,000, and that the executors of Mrs. Langworthy "acquiesced, and promoted the said proceedings, and permitted the same to be approved by said probate court." This being after the death of the annuitant, it appears that there was at the time of payment no existing condition for an agreement to pay an annuity.

The complainant further alleges that "the defendant had no power to make the agreement which is by the will of said Isaac P. Langworthy made a condition to the vesting of the legacy, and it did not in fact undertake, enter upon, or make any such agreement." This averment of a lack of power relates solely to the power to agree to pay an annuity, and not to the power to hold and apply to the designated uses after the death of Mrs. Langworthy. But, even were it the fact that the association was incapable of agreeing to pay an annuity, this would seem to be no reason for defeating the testator's intention to devote the fund to the purposes of the association if the condition had terminated by the death of the annuitant before the arrival of the time for paying over the fund. The association, however, had such power. The act of incorporation is referred to by its title in the bill, and was presented to the court on the argument of the demurrer. The conferred powers to hold real and personal estate would include the power to hold property burdened with an incumbrance, or a fund charged with an annuity.

It appears that the fund has been paid to the association, and that the uses to which the testator intended it to be applied after his wife's death are within the objects of the association. We will next consider whether a failure by the association to make a formal agree-

ment to apply it after Mrs. Langworthy's death to the purposes designated by the testator is a sufficient reason for compelling its repayment. It is doubtful whether the allegations of the bill are sufficient to raise this question; but we will assume that the allegation that "it did not in fact undertake, enter upon, or make any such agreement" applies, not merely to an agreement to pay an annuity, but also to an agreement to devote the fund to the purposes designated by the testator. So far as the allegation involves a conclusion of law, it is not admitted by the demurrer, and it cannot contradict a legal conclusion from facts set up in the bill. The object of the testator was to create a trust, and it is well settled that a trust may be accepted without a formal deed of acceptance. It would be a strained construction of the word "agrees," to hold it to require a written agreement, or other formal act, or any other way of assuming the obligation than would ordinarily be sufficient to constitute an acceptance of a trust. The association was incorporated under the act of April 12, 1854, "for the purpose of establishing and perpetuating a library of the religious history of New England and for the erection of a suitable building," etc. The testator provided that the income of the fund should be expended "in the purchase of local histories, genealogies, commentaries of the Bible, and ecclesiastical histories, for said library." The executor paid over the fund with the acquiescence of the executors of Mrs. Langworthy. By accepting the fund subject to these directions, the association would be bound to the fulfillment of the trust, and the trust would be enforceable by a court of equity. 2 Jarm. Wills (Bigelow's Ed.) 65; *Egg v. Devey*, 10 Beav. 444; *Gregg v. Coates*, 23 Beav. 33; *Attorney General v. Christ's Hospital*, Tam. 393. This would satisfy the intention and wishes of the testator, and meet the literal terms of the will. There are no allegations that the association did not receive the fund with full knowledge of the terms upon which it was given, or that it has not devoted the income to the purposes of the trust, or that it has in any way failed to perform the trust, or to acknowledge its obligation to do so. The fund is in the possession of the association, and it does not appear from the facts stated in the bill that the defendant's possession is unlawful, or in violation of the terms of the will. The complainant therefore fails to show any title to relief. This conclusion as to the first cause of demurrer renders it unnecessary to consider the remaining causes assigned. Bill dismissed.

DAISLEY v. DUN et al.

(Circuit Court, D. Massachusetts. December 20, 1899.)

No. 1,160.

DISCOVERY—DEMURRER TO BILL—CLAIM OF PRIVILEGE.

Where a bill solely for discovery discloses on its face reasons sufficient to justify the defendant's claim of privilege on the ground that the answers called for might subject him to criminal prosecution, and to a penalty or forfeiture, the objection may be taken by demurrer.

In Equity. On demurrer to bill for discovery.

Charles F. Choate, Jr., for complainant.

Carver & Blodgett, for defendants.

BROWN, District Judge. The defendants, who are co-partners conducting Dun's Agency, demur to a bill solely for discovery in aid of an action of libel; stating as a cause of demurrer that to answer the interrogatories "might subject them to a criminal prosecution, and to a penalty or forfeiture." The interrogatories are as follows:

"(1) What are the names and addresses of all the persons to whom the statement referred to in this bill of complaint, namely, 'James Daisley, South Framingham, Mass., has assigned to B. T. Thompson for the benefit of his creditors,' was sent on or about the 28th of March, 1898? (2) From what person or persons was any information received by you with reference to any assignment made by the petitioner on or about March 28, 1898, and what was the information so received? (3) What was done by you or your agents in Boston on or about March 28, 1898, upon the receipt of any information with reference to any assignment by this petitioner? (4) In what manner (that is, whether by mail or messenger, or otherwise) were notices of any assignment of the petitioner on or about March 28, 1898, sent to any persons by you or your agents in Boston?"

An inspection of the interrogatories satisfies me that the objection is substantial. The complainant contends, however, that this objection cannot be taken by demurrer, but only by answer under oath, and cites *Fisher v. Owen*, 8 Ch. Div. 645, and *Allhusen v. Labouchere*, 3 Q. B. Div. 658. It is true that a demurrer to discovery on the ground that it may incriminate may be regarded as involving an affirmative claim of privilege. Prof. Langdell says, however:

"A demurrer to discovery, indeed, is not in its nature a demurrer at all, but a mere statement in writing that the defendant refuses to answer certain allegations in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out." Langd. Eq. Pl. §§ 69, 97.

There would seem to be no practical reason for requiring a defendant to make oath merely that he declines to answer. Therefore, if an oath is ever necessary, it must be to supply reasons justifying the refusal. But it is obviously possible that a bill may disclose on its face reasons sufficient to justify the defendant's claim of privilege. When this is so, it would seem entirely proper to justify by reference to the bill alone, without proffering an oath. The propriety of taking the objection by demurrer seems to have been very generally recognized. Story, Eq. Pl. §§ 547, 553, 575, 583, 591, 597, 599; Bray, Disc. p. 318, note; Id. p. 325; Coop. Eq. Pl. §§ 190, 191, 202; 6 Enc. Pl. & Prac. 742; Fost. Fed. Prac. § 109. In this case the criminating tendency of the interrogatories is apparent, and the defendant's oath is not required to furnish any fact or opinion in order that the court may determine that the defendant has valid reasons to support his claim of privilege. The printed record contains no plea of justification, and therefore the complainant does not appear to be entitled to discovery to aid him in disproof of allegations made by the defendant. Moreover, the bill does not seek discovery on this ground. As this finding leads to a dismissal of the bill, it is unnecessary to decide whether the bill is objectionable on other grounds. Bill dismissed.

KIRKER et al. v. OWINGS et al.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1899.)

No. 659.

1. RECEIVERS—ENFORCEMENT OF BONDS—SUMMARY DECREE AGAINST SURETY.

A court of equity, appointing a receiver, and taking from him merely a common-law bond, conditioned for the faithful discharge of his duties and a compliance with the orders of the court, is not justified by the precedents in entering a summary decree against the surety for a default of the receiver. Unless such power is reserved in the bond itself, or by statute or rule of court, the obligation of the surety is one which can be enforced only in a court of law.

2. SAME—ACCOUNTING—CHARGING RECEIVER WITH PERSONAL LIABILITY.

A receiver for a corporation, who by leave of court continued the performance of a contract previously made by the corporation, by the terms of which a certain portion of the amount earned thereunder by the corporation was to be retained by the other party, and applied on an indebtedness of the corporation for which such other party held a lien on certain of its property, of which fact the court was not advised, and who, after paying a considerable amount on the lien in such manner, sold the property to the lienholder for a small sum in addition to the lien, without leave of the court, and leaving unpaid debts incurred by him for current expenses in performance of the contract, and also leaving equities between the corporation and the lienholder, which might have reduced the amount of the lien, unadjusted, was properly charged by the court personally with payment of such unpaid debts of the receivership.

3. SAME—ANCILLARY RECEIVERSHIPS—RELATION TO PRIMARY SUIT.

Where a court in proceedings for an ancillary receivership appoints as receiver for the property within its jurisdiction the same person appointed in the primary suit, such receiver becomes its own, as to the administration of such property, and must be governed entirely by its orders. In such case each court acts independently within its own jurisdiction, and the relation between them is merely one of comity. The court in which the primary suit is pending has no jurisdiction over property in the custody of the other; and where, under its order, the receiver sells such property, and returns the proceeds to that court, without the knowledge and concurrence of the court by whose orders the property was placed in his possession, and leaving unpaid expenses incurred by him in the ancillary receivership, he may properly be charged, as ancillary receiver, with personal liability for such expenses, and the order under which he acted affords him no protection.

4. SAME—ACCOUNTING—ORDER CHARGING RECEIVER WITH PERSONAL LIABILITY.

Where, on his accounting, a receiver is charged personally with the payment of debts incurred by him as such receiver, the proper form of order is that he pay such debts, and in default thereof stand committed for contempt, and that the creditors have leave to bring suit on his bond against him and his surety.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This is an appeal from a decree of the circuit court for the payment of \$1,300 against E. C. Kirker, personally, and S. T. Dewees, the surety on Kirker's bond as receiver of the court. The decree was entered in the suit in which Kirker had been appointed receiver. The suit was begun, by what was termed an "ancillary bill," by Robert Ballard, trustee, against the Ella Layman Towboat Company. Ballard averred that he was a citizen of Ohio, and that the Ella Layman Towboat Company, the defendant, was organized under the laws of the state of West Virginia for the business of towing and freighting coal and other commodities, and owning a number of steamboats and barges, and other plants and appliances incident to such business; that on November

23, 1896, the company had made an assignment to complainant for the benefit of creditors; that among the assets assigned was the steamboat Springhill, nine barges, and one flat, all of which were then in the Tennessee river. The remaining averments of the bill were as follows: "Your orator further shows that as the creditors of the said company are not mentioned in said trust deed, as the same gives no directions as to the manner, time, and terms of disposing of the same, it is necessary, in order that said trust may be properly executed and the proceeds of the trust properly disbursed, that the creditors of the said company should be ascertained by proper proceedings under your honors' direction and protection; your orator being ignorant of the names of said creditors, and the amounts of their claims. And it is also proper for the protection of your orator, and the due discharge of his duties as trustee, that he should have the advice and direction of this honorable court, and that said trust should be administered under its directions. Your orator further represents that he is informed, believes, and charges, that said company has on its hands a number of contracts for towing and freighting, two of which are for conveying coal from Greenville, Miss., to New Orleans and other Southern points, and for towing iron ore on the Tennessee river, which contracts are both profitable ones to the company, out of which it has been making money, and which have yet some time to run; that, as your orator is informed, believes, and charges, it will be to the advantage of the creditors of said company to carry out these contracts and others, and, pending the sale of this company's property, to keep the same occupied in a continuance of the towing and freighting business of this company. And on account of the character of the trust property and the use which your orator believes should be made of it pending its disposal, it is, in your orator's judgment, best that a receiver be appointed by this court to take charge and possession of all said property, and manage and dispose of it under the direction of your honors, which receiver should be a competent river man, acquainted with the character of the business of said company. Complainant charges that an original general creditors' bill has been filed by complainant in the United States circuit court for West Virginia, and a receiver appointed therein, and complainant asks that the receivership be extended over the property in Tennessee under this ancillary bill. Your orator therefore prays that the creditors of said company, and the amounts and priorities of their claims, may be ascertained under the direction of your honors' court; that a receiver may be appointed to take charge and possession of said trust property, and to use, manage, and dispose of the same under your honors' direction; that all proper accounts be directed, and decrees entered; and for such other, further, and general relief and decree as the equity of the case may require, and to your honors may seem meet."

On the same day that the bill was filed a certified copy of the order by the circuit court for the district of West Virginia was filed, which, after reciting that actions had been brought against the defendant company in the circuit court of Roane county, Tenn., and attachments had been issued and levied upon the steamer Springhill, and that the loss of the use of the steamer would be fatal to the profitable contract which the defendant company had for towing upon said Tennessee river, authorized the receiver to remove the case from the circuit court of Roane county to the circuit court for the Eastern district of Tennessee, and to give bond in the attachment suit for the release of the steamer Springhill, and to use the same in the towing contract on the Tennessee river. Upon the tendering of the bill and the order the court below allowed the bill to be filed, and made the following order: "The complainant is allowed to file the ancillary bill presented, and this cause will be taken and considered as ancillary to the original bill in West Virginia. The order of Judge Jackson, of December 5, 1896, will be filed in this cause as part of the record; and thereupon this cause came on to be heard on this 11th day of December, 1896, before Hon. C. D. Clark, judge, etc., upon the motion of complainant for the appointment of a receiver for the property attached; and, it appearing to the court that this is a proper case for the appointment of a receiver, it is ordered by the court that E. C. Kirker, who appears to the court to be a proper and fit person, be, and he is hereby, appointed receiver in this case, and required to give bond in the sum of \$4,000; and he is au-

thorized to take possession of the property attached, and the other property of defendant in this state, and hold the same subject to the further orders of the court in this case. And because it appears further to the court, from the admissions of both parties, that the defendant Ella Layman Towboat Company has made a general assignment for the benefit of creditors to Robert Ballard, trustee, and that said Robert Ballard, trustee, has filed a general creditors' bill to wind up the business and affairs of said Ella Layman Towboat Company, in the United States circuit court for West Virginia, and that under said bill said E. C. Kirker has been appointed receiver, and has taken possession of the property of said Ella Layman Towboat Company, except the property attached in this cause; and because it appears further to the court, from the statements of counsel for the parties, that said towboat company has a contract for towing ore on the Tennessee river from points near Kingston to South Pittsburg, which contract is believed to be profitable and advantageous to the creditors of said towboat company, to have the same carried out, and that it is impossible to carry out said contract unless said E. C. Kirker, as receiver, is allowed to use the steamer Springhill, upon which the attachment has been levied by James Heekin & Co.,—it is therefore ordered by the court that said E. C. Kirker be allowed to make all proper and necessary use of said steamer Springhill in towing said ore and carrying on said contract, and doing such other work on said Tennessee river and tributaries as it is legitimate for a steamer to engage in. But the said E. C. Kirker, receiver, is ordered and required to keep said steamer in good repair, and to keep the same insured in the sum of five thousand dollars (\$5,000), so that in the event said steamer should be destroyed by fire the amount of said insurance received shall be paid into this court, to stand in lieu and stead of said steamer, to await the determination of this suit. Said steamer shall not be taken out of the state of Tennessee, unless authorized by further order of the court. Said E. C. Kirker will be required to give bond in the sum of \$4,000, to be approved by the clerk of the court, for the faithful discharge of his duties in this case."

On December 14th, Kirker filed the following bond:

"In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

"This undertaking, made and entered into the 14th day of December, 1896, witnesseth, that we (E. C. Kirker, as principal, and Samuel T. Dewees, as security) do promise and undertake to and with the parties in interest in said cause, for the benefit of whom it may concern, in the penal sum of \$4,000, that E. C. Kirker will well and faithfully discharge the duties of receiver of the property and estates of the defendant company, particularly described in the bill in the above-described cause, and obey all orders of the court herein. Witness our hands and seals this 14th day of December, 1896.

"E. C. Kirker,

"Samuel T. Dewees.

"Acknowledged before and approved by me this 14th day of December, 1896.
Henry O. Ewing, Clerk."

On the 27th of September, 1897, Kirker, the receiver, made the following report to the court: "Your receiver begs leave to submit the following report in reference to the business and management of the property of the Ella Layman Towboat Company, embracing the jurisdiction of your honor's court: Exhibit No. 1 is a statement of the expenditures and receipts from November 24, 1896, to September 1, 1897; also, statement of the amount of ore delivered at South Pittsburg, and the amount obtained by Roberts, Sparks & Co. out of said shipments, to be applied on payment for barges; and shows, also, profit and loss, showing the net amount of the earnings of the steamer Springhill to have been \$2,500.81, showing the payment on the barge account to have been \$747.75 in excess of the earnings of the boat. When your receiver took charge of the business, he was confident that the steamer could be run, and made to pay expenses and repairs to the boat, and allow the application to the barge account as provided in the contract with Roberts, Sparks & Co.; but, on account of the various unexpected accidents that are shown in the report hereinafter,

the expectation of the receiver has not been realized, and the facts shown in this report show that the receiver cannot run this business at a profit, and continue payments on the barges. The receiver, as hereinafter stated, has therefore stopped the work under this contract until he can have instructions from your honor as to his proceeding. * * * The receiver submits to your honor whether or not the claim of Roberts, Sparks & Co. should not be required to be credited with \$1,200, the price paid for the barge which was sunk by them in loading, and which they did not raise, and which the receiver has not been able to raise, on account of the want of funds, and also whether or not they should not be charged with the value of the fuel barge which was broken up by Messrs. Roberts, Sparks & Co., allowing one of the loaded barges to get away from them at Round Island in March, 1897. * * * In Tennessee river, flat E. L. T. B. Co., No. 5, was lost under the following circumstances: Capt. Butler, in command of the Springhill, writes, under date of March 11, 1897: 'Roberts, Sparks & Co. let one of our barges get away from Round Island last Sunday morning. * * * When it broke loose it ran into our full flat, and broke it all to pieces.' Property erroneously reported as being among the assets of the said Ella Layman Towboat Company, barge H, in Tennessee river, was sunk in August, 1896, while being loaded at ore dock, but was reported as being in condition to load when repaired. Roberts, Sparks & Co. have failed to raise [repair] it, and your receiver has not had use of nor possession of it. The property on hand is the Str. Springhill, insured for \$5,000, on \$7,500 valuation made by insurance underwriters; barges A, B, C, D, E, F, G, I, upon which the Ella Layman Towboat Company had paid \$2,665.20, and on which your receiver has paid \$3,248.56, leaving a balance due to be paid, \$4,886.24, with interest. These barges were purchased new in December, 1895, at a cost of \$1,200 each. Owing to the depressed condition of steamboat business, and the prices obtained from sale of barges in Miss. river, and prices bid on steamboats and barges in Kanawha river, your receiver would value above property at about \$5,000."

The exhibits attached to the report, which included the contract with Roberts, Sparks & Co., showed that the expenditures had been \$6,585.81; that the earnings under the contract and otherwise had been \$9,085.84, making an apparent profit of \$2,500.03; but that the receiver did not have this on hand, because, complying with the terms of the contract with Roberts, Sparks & Co., he had allowed that company to retain out of the earnings \$3,248.56, which was 20 cents a ton upon every ton of ore carried, to apply on the price of the barges. The receiver, by this report, had thus incurred \$747 indebtedness in excess of his earnings, though he had reduced the lien upon the barges \$3,248. It further appeared from this report that the barges cost \$10,800, that the towboat company, before its assignment, had paid thereon \$2,655, and the receiver had applied thereon \$3,248, which left still due upon the barges \$4,897. Thereafter, on October 9, 1897, the steamboat Springhill was ordered sold. Meantime the creditors of the receiver filed their claims in the circuit court, asking to be allowed payment thereof. The court then referred the case to a master to report, among other facts, "What debts and liabilities had been incurred by the receiver since the receiver had been in charge of the property in his hands in Tennessee, and what the assets of said towboat company within the jurisdiction of this court consisted of, and where the same were located." Upon the reference the master reported that the debts of the steamer Springhill amounted to upward of \$5,000, and that the debts of the receiver remaining unpaid amounted to about \$1,300. The master further reported that, at the time of the appointment of the receiver in this cause, the said receiver took into his possession the steamboat Springhill, as well as nine barges and one flat, and the record failed to show what had become of the barges and the flat; that an order of sale had been obtained, and advertisement made, for the steamer Springhill, and that no mention had been made of the equity of the receiver in the said barges and the flat as being for sale; that the receiver had filed a petition in this cause, and asked to continue the carrying out of what was alleged to be an advantageous and profitable contract for towing with Roberts, Sparks & Co., and the said petition was granted, but the said petition failed to set out that the earnings of the receiver for this work were to be applied by him as payments on the balance due on these

barges, and yet this was what had been done; that it was within the power of the court to refuse to ratify and approve these actions of the receiver, and perhaps to compel Roberts, Sparks & Co. to pay into court a part, if not the whole, of said \$3,248.56 thus applied on the contract. Subsequently the steamer Springhill was sold for \$1,200 to the Diamond Transportation Company, and the sale was confirmed. Thereafter one of the creditors of the receiver excepted to his report above referred to as follows: "(1) Because the receiver has not accounted for all the property which came into his hands as receiver. The nine barges and flat he has suffered to be taken from him, and has not accounted for the same, and he should be charged with the full value thereof. (2) Because he has paid to Roberts, Sparks & Co. the sum of thirty-two hundred forty-eight and fifty-six one-hundredths dollars (\$3,248.56), without any authority and without order of this court, and the same ought to be paid into the registry of this court, to be distributed in accordance with the orders to be made in this cause." Another creditor of the receiver, the Lookout Boiler & Manufacturing Company, excepted to the report on the ground that "there could have been no money applicable to the claim of Roberts, Sparks & Co., under a contract existing prior to the receivership, until the receiver paid all of his own claims incurred in the proper administration of his receivership. And the receiver should be required to pay into court enough money to meet the proper claims incurred by him, because he shows he realized much more than a sufficiency for that purpose, but paid the same to Roberts, Sparks & Co."

Thereafter the receiver filed in the court below a certified copy of the order of the circuit court of the United States for the district of West Virginia, reciting the contract of Roberts, Sparks & Co., and directing the receiver to carry it out, and expressly approving the application of 20 cents a ton to the purchase price of the barges. Thereupon the whole case was re-referred to the master, to consider exceptions to the reports of the receiver, and any additional proof offered. The master was further directed to report what were the debts of E. C. Kirker, receiver, and whether the crediting of 20 cents a ton under the Roberts-Sparks contract was authorized by the orders in this case. He was further directed to report whether or not the complainants in this cause, or the receiver and his bondsmen, were liable for the debts contracted by the receiver during his receivership. Thereafter evidence of witnesses was heard,—among others, that of Kirker, the receiver, in which he explained the failure to make greater profit out of the contract by accidents to the Springhill, and by low water. He stated that he sold the barges by order of the United States court for the district of West Virginia. He further testified that there was a fund of \$4,700 in the circuit court of West Virginia, realized from the sale of the property and collection of the assets of the tow-boat company, and that none of the money had been distributed. He stated that he thought the circuit court of West Virginia had "granted a decree guaranteeing a bondsman" in the receivership suit in the court below. He said he did not know that the towing contract was unprofitable until he came to Tennessee, in August, 1897, and that he thereupon applied to the court. The last question asked him was: "The barges you sold by order of the court in West Virginia, were they not all the time in Tennessee? Ans. The barges were in Tennessee river all the time." The master reported that the West Virginia court made an order authorizing and directing the said receiver to continue the towing contract, by which 20 cents per ton was to be applied on the purchase price of the barges, and a copy of the said order filed in this cause shows that the nature of this contract was fully understood by the West Virginia court; that application was made by the receiver to the court below to continue the contract, and permission was given, but that there was no evidence before the master that it had been disclosed to the court that 40 per cent. of the freight, or 20 cents per ton, was to be applied on account of the purchase price of the barges; that the barges had been sold at private sale by order of the West Virginia court, without any authority from the court below; that the price had not been shown in the evidence before the master; that the unpaid debts of the receiver amounted to \$1,083.50, together with certain small additions, which the master could not report upon at the time. The master reported that, in his opinion, the sale of the barges without any order from this court was void; that the court below had full authority to resume cus-

tody of them; and, if that was not practicable, there existed a liability against E. C. Kirker, receiver, and his bondsman, S. T. Dewees.

Thereupon the receiver excepted to the report, and filed a certified copy of the proceedings of the district court of West Virginia, in which it appeared that Roberts, Sparks & Co. had offered \$50 cash for all the barges, subject to the mortgage of said Roberts, Sparks & Co., and that the receiver had been directed to accept this offer, and the sale had been approved. The cause then came on before the court upon the report of the master, and the exceptions of E. C. Kirker, receiver, and the court made the following order: "And thereupon the court is pleased to, and does hereby, overrule the exceptions of E. C. Kirker, receiver, to the report filed May 12, 1898, and confirm said report, for the reason that the court is of the opinion, and so adjudge and decrees, that the action of the receiver in disposing of the barges mentioned in said report, without authority from this court, was improper; it appearing from the record that said barges came into the custody of the receiver under the orders of this court, and that they were within its jurisdiction and under its control when they were disposed of. But because it appears that said receiver in making said sale was acting under the orders and decrees of the circuit court of the United States for the district of West Virginia, which court, under a misapprehension of the facts, authorized and instructed the receiver to sell said barges, as being within its jurisdiction and under its control, and that said receiver was acting in good faith, and was guilty of no intentional wrong or breach of his trust in making the sale, the court is further of the opinion, and so adjudge, that the unpaid debts due from the receiver, as shown by the master's reports hereinbefore filed, should be paid in the first instance out of the trust funds realized in the cause of Robert Ballard, Trustee, v. Ella Layman Towboat Company, in the circuit court of the district of West Virginia, if any funds are available for that purpose in said cause. And to this end the clerk of this court will certify so much of the record in this cause as may be necessary to show the action of this court on said question, and its reasons therefor, and the amount of the outstanding claims against said receiver, to the West Virginia court, for such action as it may be pleased to take in the premises. It is further ordered, adjudged, and decreed that the following named parties have and recover of the receiver, E. C. Kirker, and S. T. Dewees, the surety on his bond as such, the sums placed opposite their respective names; the same being unpaid debts contracted by said receiver, as heretofore fixed by the special master in his reports filed in the cause: [Here follows a list of claims of the creditors of the receiver.] But no execution will issue on said judgment until the expiration of sixty days from the date of this decree, after which, unless said amounts are paid into court, an execution will issue in this cause, for the aggregate amount of said claims, against said E. C. Kirker and S. T. Dewees, and when collected the same will be paid to the parties entitled. The said E. C. Kirker and S. T. Dewees objected at the hearing to the rendition of any judgment against them, because the said Kirker had acted, in making sale of the barges in question, in good faith, and under the orders of a court of competent jurisdiction, assuming the right to control and direct the disposition of said barges, and also because there was nothing in the record to show that said barges were worth as much as the amount adjudged against the receiver and his bondsman, which objections were by the court overruled; and to the action of the court in overruling said objections, and in rendering judgment against them as aforesaid, said E. C. Kirker and S. T. Dewees then and there excepted.

From this order the receiver, Kirker, and his surety, Dewees, appealed, and assigned the following errors: "First. Because there are no pleadings and no evidence in the record to justify the rendition against appellants of the several judgments contained in the second paragraph of said decree, or any of them. Second. Because in said decree judgments are rendered against appellant for sums aggregating over \$1,300, on the ground, as stated in the decree, that the receiver had wrongfully sold and disposed of certain barges, the proceeds of which were not paid into court, whereas there is no proof that said barges were worth as much as the aggregate of said judgments, or that the receiver realized so much from the sale of them. Third. Because the proof

shows that said barges were sold, under order of the circuit court of the United States for the district of West Virginia, for the sum of fifty dollars; and appellants should not, in any event, be held liable for more than was received for said barges, it being shown that the sale was made in good faith. Fourth. Because it appears that in making sale of said barges the said receiver was acting in obedience to the order of the court by which he was first appointed, and that he disposed of the proceeds of sale in accordance with the orders of said court; and he and his bondsman ought not to be held personally liable for obeying said orders, even though they may have been erroneous."

J. B. Sizer, for appellants.

Frank Spurlock, for appellees.

Before TAFT and LURTON, Circuit Judges, and THOMPSON, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The court below held the receiver personally liable for certain debts incurred by him, because, without authority of the court, he had sold at an inadequate price the property out of which the court might have realized a sufficient sum to have paid the receiver's debts. The court entered a decree in favor of the receiver's creditors, not only against the receiver, but also against the surety upon his bond. It does not appear specifically that the surety was given any notice of the hearing, but it does appear that at the time the order was made the surety appeared and excepted to its validity. No pleadings were filed against the surety upon the bond, and no process issued against him. Three questions are presented on the record: First. Had the court power to make an order against the surety, of this summary character, in the cause in which the bond had been given? Second. Was there evidence upon which the court was justified in directing that the receiver should pay the debts which he had incurred, and which were unpaid? Third. Was it a defense to the receiver in the court below that his sale of the barges was authorized by the circuit court of West Virginia? These questions we shall now consider in their order.

1. The precedents do not justify the practice in equity of giving a summary decree against the surety on the bond of a receiver for the latter's default,—at least, when such power is not reserved in the bond itself, by statute, or by rule of court. In *Thurman v. Morgan*, 79 Va. 367, a rule was issued by a court appointing the receiver against his administrator. An account was taken, and it appeared that \$3,683 was due from the receiver. The report was confirmed, and a rule was issued against the administrator of the receiver and the sureties upon the receiver's bond to show cause why a decree should not be entered against them for the sum found due. They appeared and moved to quash the rule, but the motion was denied, and a decree entered against them for the sum of \$3,663.53, with interest and costs. The court of appeals held this to be erroneous, as there was in their hands no fund subject to the order of the court; that they could not be proceeded against except by an action on their bond in a common-law court, where they could make defense in a trial by jury. In the case of *Atkinson v. Smith*, 89 N. C. 72, upon reference, it appeared that the receiver

appointed in the suit had not accounted for \$268. The report was confirmed. Plaintiff then moved for judgment against the receiver and his surety for this amount upon the bond. The court refused this remedy, and an appeal was taken. The action of the court below was sustained by the supreme court, saying:

"The regular course of procedure, according to well-settled practice, in cases like this, is to proceed against the receiver in the first instance, and, if he shall fail in the proper discharge of his duty within the scope of his bond, then to obtain leave of the court to sue upon his bond. It may be that in some cases the surety might, by order of the court, and upon reasonable notice, be brought into the action in which the receiver had been appointed, and proceeded against therein. But this is not the usual course pursued; nor is it to be encouraged, if, indeed, it could be sustained in any case."

In *State v. Gibson*, 21 Ark. 140-143, Chief Justice English states the proper course in cases like this to be that the interested party shall apply to the court for a rule against the receiver to render his account; that after the account is adjusted, and approved by the court, the receiver shall be ordered to pay the effects in his hands into court, or to the party entitled to them; that, if he fails to do so, he shall be subject to attachment as for contempt, and he and his sureties become liable to suit upon his bond. See, also, *Weems v. Lathrop*, 42 Tex. 207-213. The only exception to such a course of proceeding would seem to be where the surety has taken possession of some of the funds which came into the hands of the receiver under orders of the court. In the case of *Seidenbach v. Denklespeil*, 11 Lea, 297, it was held that because the surety on the receiver's bond had in his hands \$500, acquired from the receiver, which he knew to be part of the trust fund, the court had sufficient jurisdiction over him to make an order upon him for the restoration of that sum to the custody of the court. See, also, *Bank v. Creditors*, 86 N. C. 323; High, Rec. § 129; Gluck & B. Rec. (2d Ed.) p. 430, § 83.

In the English court of chancery the obligation taken by way of security from a receiver for the faithful performance of his duty is not a common-law bond, but is a recognizance. The court of chancery requires the receiver to account, and finds the amount due from him, and orders him to pay the same into court. Upon his failure so to do, he may be proceeded against by attachment, or the parties in interest may apply to the court for leave to sue upon his recognizance. When that leave is granted, the next step is to proceed by writ of *scire facias*, in the name of the master of the rolls and the senior vice chancellor, or the recognizee named in the recognizance, against the recognizers, who are the receiver and his sureties. This *scire facias* is a judicial writ founded upon a record, and requires the person against whom it is brought to show cause why he should not pay the debt of record. It is suable in a common-law court. The *scire facias* is accordingly sued out in the office of the petty bag, on the common-law side of the court of chancery, and is made returnable to some common-law court,—either the court of queen's bench or common pleas or exchequer of pleas,—and in that court, if a defense is made, the issue is tried to a jury. In such proceeding the penalty of the recognizance was the debt, for which execution

would go, should the issue raised upon the writ be determined in favor of the recognizees. Therefore, where the amount of the default of the receiver did not equal the penalty of the recognizance, it was for the advantage of the cognizors, who were sureties, to apply to the court of chancery, out of which general leave had been given to sue, and in which the recognizance had been taken, to stay further proceedings at law on the recognizance upon payment by the cognizors of the exact amount found due by the chancellor from the receiver. This explains why questions with reference to sureties upon receiver's recognizances, and the amount due from them, are so frequently adjudicated in a court of chancery in the cause in which the recognizance was given. A full description of the proper course in the collection of debts due from the receiver upon his recognizance may be found in 2 Daniell, Ch. Prac. (6th Am. Ed., from 6th Eng. Ed.) *1757-*1764. See, also, *Thurlow v. Thurlow*, 4 Jur. 982, where Lord Langdell, the master of the rolls, says:

"That the usual course where the party applying was an adult, as in this case, was to apply for leave to put the recognizance in suit, and not for a reference to the master to inquire whether it would be proper to do so; and that notice of the application must be personally served on the parties who were liable."

In *Walker v. Wild*, 1 Madd. 528, the receiver absconded without passing his accounts, though he was duly summoned. Upon application to the master of the rolls, his recognizances were extracted from the record, and an action was brought against the sureties; and in that case a surety, after action brought, applied to the court to restrain all proceedings in the action at law, yielding to the order to pay into the Bank of England the sum found by the master to be due from the receiver in installments. In *Dawson v. Raynes*, 2 Russ. 466, the sureties of the receiver did not delay until leave was given to sue them on the recognizance, but applied to the court to be allowed to pay in what was due from the receiver, without interest; and the question was whether the sureties were liable for interest. The case was certified to the court of king's bench upon the question whether the sureties in recognizance were bound to pay interest on the trust money which came into the receiver's hands, or any part thereof. The judges certified that, if there had been any breach of the condition of the recognizance, the penalty was the debt at law, and the question of interest did not arise. But the court held that under the peculiar circumstances of the case, and the delay in the prosecution against the receiver, the sureties might be relieved from a suit at law by paying the amount due from the receiver, without interest. In *Ludgater v. Channell*, 3 Macn. & G. 175, it was held that, upon the death of a receiver without settlement of his accounts, a recognizance might be ordered to be put in suit against his real and personal representatives and against the sureties; and this is the same rule where the receiver absconds. A similar course was taken with reference to the recognizance of a committee in *Re Lockety*, 1 Phil. Ch. 509.

It has been suggested that there is a close analogy between the power of the court in enforcing receiver's bonds, and that in re-

spect of injunction bonds; and the language of Mr. Justice Bradley in *Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060, has been referred to as justifying summary action by the court taking the injunction bond against the sureties. *Russell v. Farley* was an appeal in equity, by the respondent below, from that part of a decree dismissing a bill for an injunction which found that no damages were due defendant on the injunction bond. It was held that, as the court had inherent power to impose terms and take security from the party complainant before granting him a preliminary injunction, it had, as incident to such power, the right to modify those terms by declining to permit such security to be enforced. Incidentally the learned justice discussed the question whether the court of equity taking security in the form of a bond might itself assess the damages. The power had been denied by Chief Justice Taney in a dictum in *Bein v. Heath*, 12 How. 168, 179, 13 L. Ed. 939, and by Mr. Justice Curtis, on the circuit, in *Merryfield v. Jones*, 2 Curt. 306, Fed. Cas. No. 9,486, in a case where the point was in judgment. After referring to these authorities, Mr. Justice Bradley proceeded (page 445, 105 U. S., and page 1064, 26 L. Ed.):

"Other cases are referred to by the counsel of the appellants to sustain their position; but, upon a careful examination, we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the court of chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and, having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation. We are inclined to think that the court has the power, and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England) nor on the existence of an express law or rule of court (as adopted in some of the states) that the damages may be ascertained by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken. But, whilst the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet, if it has that power, it is in its discretion to exercise it, or to leave the parties to an action at law. No doubt, in many cases the latter course would be the more suitable and convenient one."

Now, though this language was not necessary to the cause, it is so weighty that we have felt justified in regarding it as defining the proper practice in respect to injunction bonds in the federal courts. *Leslie v. Brown*, 32 C. C. A. 556, 90 Fed. 171. But can we extend the practice by analogy to receiver's bonds in cases like the present, in which no power was reserved to the court, on the face of the bond, to assess the damages? We think not. The security tendered by a receiver stands, we think, upon a somewhat different footing from that of a party seeking an injunction. The receiver is invited by a court to assist in the discharge of the duties of the court, and, while he is required to give bond, it is not exacted as a condition of granting him, as a party, any extraordinary relief. The

plenary power of the court of equity to assess the damages in an injunction bond seems, in the view of Mr. Justice Bradley, shown by the language quoted above, and also by the earlier part of the opinion, to arise by necessary implication from the attitude of the complainant towards the court in obtaining preliminary and summary relief, and is found by him to have been exercised by the English courts of chancery for many years. Now, we have seen that no such power has been exercised by the English court of chancery in respect to receiver's recognizances, which are even more formal obligations than mere bonds. The difference in the English practice as to receiver's recognizances and bonds in injunction suits itself sustains the view that they are not entirely analogous. We do not mean to hold that a court may not adopt such a rule, or so frame a receiver's bond, as to reserve to itself the power to assess damages against the receiver and his sureties. Indeed, we are inclined to think this within the court's power. A statute permitting such an assessment of damages on a receiver's bond has been held constitutional in Mississippi. *Bank v. Duncan*, 52 Miss. 740. All that it is necessary for us here to decide, and all we do decide, is that when the court only takes from a receiver an ordinary common-law bond, with sureties conditioned for the faithful discharge of his duties and a compliance with the orders of the court, the sureties are entitled, in view of all the precedents, to regard their obligation as one which can only be enforced in a court of law. The decree of the court below, in so far as it adjudged a recovery against the surety, was erroneous. This conclusion renders it unnecessary to consider the objection that no pleadings or process issued against the surety. So far as the receiver is concerned, the objection has no weight; for it is clear that he had full notice of the proceedings, for he appeared and testified, and made no objection to the form of the order of reference until after decree.

2. The second question for our consideration is whether there was evidence justifying the court in ordering the receiver, personally, to pay the debts which he had incurred as receiver, and which were unpaid by him. The evidence shows that these debts were incurred in the performance of a towing contract made by the towboat company before its assignment, by which it purchased nine barges and a flat from Roberts, Sparks & Co. for \$10,800, and proposed to pay for the same by carrying iron ore for the vendor at the rate of 50 cents a ton, 20 cents thereof to be applied upon the purchase price; that the towboat company had itself thus earned and applied on the purchase price \$2,665; that the receiver continued the performance of the contract, and paid the same creditor on the boats \$3,248, reducing the amount due on the barges to \$4,897; that, in order to earn this credit, the receiver incurred debts, which he was unable to pay, of \$1,300; and that he then sold the barges to Roberts, Sparks & Co. for \$50, without the authority of the court. It further appears that in his first report he brought to the attention of the court, and submitted to the court, whether Roberts, Sparks & Co. did not owe to his trust considerably more than \$1,300, because of the loss of one of the barges and a flat through their negligence.

It is very clear that, so long as the court had in its custody the barges on which Roberts, Sparks & Co. claimed a vendor's lien, the court had within its power to adjust the equities between them, on the one hand, and the towboat company and the receiver, on the other, and that, if his report is to be accepted as true against him, there was a claim against Roberts, Sparks & Co. which ought to have reduced the lien of that company upon the remainder of the barges by an amount sufficient to pay the receiver's debts. Again, the master reports that it was not made to appear to the court below by the receiver that 20 cents a ton of all freight was to apply on the purchase price of the barges. This would have given the court below the right, in adjusting the equities on the barges, to require that, out of the earnings credited, the debts incurred in making them should be paid. More than this, the court might very well have found, from the evidence, that, considering the amount agreed to be paid for the barges, and the amount which had been paid on them, \$50 was an altogether inadequate price for the interest which the towboat company and the receiver had in them. The receiver's sales of the barges without the authority of the court below were acts which might properly be taken to color his proceedings, and throw upon him the burden of explaining the tremendous loss of value sustained in the barges. The receiver, after the disastrous season of 1897, reported to the court that he had property of the value of \$5,000 in his custody. This included the steamer Springhill, which sold for \$1,200, and the barges. In view of his reports, a private sale for \$50 needed explanation, and his failure to explain amply justified the court below in finding that there was at least enough due from the receiver to require him personally to pay his unpaid debts as receiver. That the power of a court of equity to make such an order upon the receiver is plenary can hardly be denied. It is amply sustained by the following cases: *French v. Harness Co.*, 184 Pa. St. 161, 39 Atl. 63; *Vanderbilt v. Railroad Co.*, 43 N. J. Eq. 669-686, 12 Atl. 188; *Hinckley v. Railroad Co.*, 100 U. S. 153, 25 L. Ed. 591; *In re Union Bank of Jersey City*, 37 N. J. Eq. 420; *High*, Rec. c. 19; *Gluck & B. Rec.* § 81; *Carr's Adm'r v. Morris*, 85 Va. 21, 6 S. E. 613; *Clapp v. Clapp*, 49 Hun, 195, 1 N. Y. Supp. 919.

3. But it is said that the receiver is protected from any liability, because, in carrying out the towing contract, and in the sale of the barges, he was acting under the order of the court of primary jurisdiction,—the circuit court of the United States for the district of West Virginia. We cannot yield to this argument. It is true that the bill which was filed in the circuit court of West Virginia was the original bill, and that the bill filed in the court below was for the purpose of assisting the administration of the trust in the circuit court of West Virginia; but the property which the receiver took possession of, and with respect to which these debts were incurred, was in the jurisdiction of the circuit court for the district of Tennessee, and the receiver applied to that court for orders with respect to that property because it was within the territorial jurisdiction of that court. He accepted an appointment as receiver of that prop-

erty from that court, and his first allegiance in respect to that property, therefore, was to that court. When the circuit court of the Eastern district of Tennessee had taken possession of the property, and the receiver was holding the property as its receiver, the property was beyond the jurisdiction of the circuit court of West Virginia to control by its own orders. The comity which public policy requires to be preserved between courts dealing with the same general trust might have led the court below to make an order carrying out the order of the court of West Virginia to sell the barges at private sale, but for the fact that the barges proposed to be sold were the only property out of which the court could hope to pay the debts which it had authorized the receiver to incur. The court below had an obligation to the creditors who, on the pledge of the court's faith, had advanced money to its officer, and this was higher than the obligation of comity to concur in the order made by the court of West Virginia. That court was far removed from the locus in quo, and much less likely to be advised of the exact situation and the proper policy in the sale of the barges than the court of Tennessee where the property was. But the receiver did not think it necessary to advise the court below that such an order had been made until the barges were sold. The court below went as far as comity required when it directed its clerk to certify the order upon the receiver to the West Virginia court before execution should issue thereon. Thus, the receiver was given 60 days in which to procure from the court of original jurisdiction the means with which to pay the expenses which he had incurred by order of both courts, and which he had deprived himself of the means of paying by an order of the court of West Virginia without authority from the court below. As the circuit court of West Virginia did not see fit to direct the payment out of the funds which it had to meet these obligations, the circuit court for Tennessee had no recourse, save to the personal liability of the receiver. It is a mistake to suppose that where an original creditors' bill is filed against a debtor having property in a number of states, and so-called ancillary bills are filed in other courts of different territorial jurisdiction, the courts exercising the so-called ancillary jurisdiction are compelled to make the same orders as those which are made in the court exercising the original jurisdiction. The whole relation of the two courts is merely one of comity, and when the court of ancillary jurisdiction has authorized its officer to incur debts owing to residents within its jurisdiction, and has impliedly pledged the faith of the court to their payment, it may and ought to exercise a jurisdiction independent of that of the original jurisdiction to secure payment of its debts of administration out of the property within its custody. An order of the court of original jurisdiction which in effect prevents this, it may properly disregard. Undoubtedly, it is necessary that in the management of large properties, extending through various districts, as a unit, there should be one court to determine the general policy thereof; and comity requires that all the other courts should yield on such matters to the opinion of the court of original jurisdiction. But this does not prevent each court, in respect of claims against

a receiver which are purely local in their character, from protecting persons who, on the faith of the court's credit, have advanced money or goods or rendered service to the trust. In such a case comity must yield to justice and right. No case has been cited to us, at all applicable to this case, from which a different conclusion can be drawn. The order of the court below should have been in a different form. It should have directed that the receiver pay the debts incurred by him, mentioned in the order, and that in default thereof he should stand committed for contempt, and that the creditors should have leave to bring suit upon his bond against him and his surety. The decree of the court below is accordingly reversed, with directions to enter an order in the form above stated against the receiver. All the costs of this appeal will be taxed against the receiver.

UNITED STATES v. CASE LIBRARY et al.

In re CASE'S HEIRS.

(Circuit Court, N. D. Ohio, E. D. December 7, 1899.)

No. 5,943.

1. DEED—TITLE CONVEYED—CONVEYANCE TO CITY FOR STREET.

A deed of land to a city, containing apt words to convey the fee, is not reduced to the grant of a mere easement by a recital that the land "is conveyed to said city as and for a public street of said city," or by the terms of an ordinance accepting and confirming as a public street "the dedication of the land specified" in the deed; such ordinance being required by the statute for the purpose of constituting the land a public street for the care and maintenance of which the city should be responsible.

2. SAME—QUALIFIED FEE—REVERSION.

A declaration in a deed of land to a city that the land is conveyed "as and for a public street of said city" does not make the title conveyed a base or qualified fee, or a fee on condition subsequent, which reverts upon the termination of the use of the land for street purposes.

3. SAME—CONSTRUCTION—CONVEYANCE TO CITY.

The fact that a city can only acquire and hold land for public uses does not prevent it from acquiring, as between it and its vendor, the absolute title to land which it is about to use for streets, so that, when such use becomes impossible, the city may alienate it for its full value or use it for other purposes, and the limitation upon the city's powers does not require that a deed to it should receive a more restricted construction as to the title conveyed than a deed between private parties.

S. D. Dodge, for the United States.

Blandin, Rice & Ginn, McKinney & Dunnigan, and Lewis J. Woods, for Case's heirs.

TAFT, Circuit Judge. The questions about to be decided arise in proceedings by the United States to condemn a public street of the city of Cleveland for post-office purposes. The land was conveyed to the city by Leonard Case "as and for a street." The heirs of Case, made parties to the proceedings, claim compensation for the fee in the street, on the ground—First, that the fee in the land never passed from their ancestor, but only an easement; and, sec-

ond, that, even if a fee passed, it reverts, on termination of the use for which it was conveyed.

My conclusions I must state most briefly, and only by way of a memorandum.

1. By the deed of Leonard Case and his wife to the city of Cleveland, dated May 18, 1859, of the land used as the street called "Case Place," a fee was vested in the city. Apt words to convey a fee are used. The recital in the granting clause, "that the parcel of land is conveyed to said city as and for a public street of the said city," cannot cut the deed down to a mere grant of an easement. It is the parcel of land which is conveyed, not a mere right in another's land. The cases of *Verplanck v. Mayor*, etc., 2 Edw. Ch. 220, and *Kittle v. Pfeiffer*, 22 Cal. 485, do not support the contention of counsel for the claimants in this behalf. In the former, the instrument relied on did not make party to it the city, but was a mere covenant between two adjoining owners that they would convey for purposes of dedication; in the latter the deed to the city was not accepted by the city, and its operation was rather by way of estoppel in favor of abutting owners, who held under conveyances describing the property conveyed as abutting on the street attempted to be conveyed to the city by the deed in question.

Nor do I think that the effect of the deed, as a conveyance of land, is cut down by the terms of the ordinance accepting the grant. Thereby the city "accepted and confirmed, as a public street," "the dedication of the land specified in the deed from Leonard Case to the city of Cleveland, being a strip of land thirty-five feet wide," etc. This ordinance was made necessary by the law of Ohio passed March 18, 1859 (56 Ohio Laws, p. 57), which imposed upon the city council the care of all public streets, and required it to keep the same open and in repair, and free from nuisance, and thus made the city responsible in damages to one injured by its failure to comply with this requirement, but which limited such responsibility by the further provision that no street thereafter dedicated to public use by its owner should be deemed a public street under the care of the council, "unless the same shall be accepted and confirmed by an ordinance specially passed for such purpose." The object of this provision is palpable. It was to protect the city from liability for the nonrepair of alleged streets which had been dedicated to the public, and which it did not deem to be of real public benefit or worth the expense of repair. But for the statute, every dedication and conveyance for street purposes would take effect without express acceptance, because of the ordinary presumption that a conveyance of land or an interest in land confers a benefit and is accepted by the grantee. The function to be performed by the council, under this statute, is merely the expression of consent by the city to accept land for street purposes, with the responsibilities thus entailed, and it was not intended that the council should be prevented from accepting a deed of the fee for street purposes. The word "dedication," used in the statute, must apply to statutory dedications, and yet, by the words of the statute, a dedication by plat conveys a fee to the city. It can hardly be held, therefore, that the council, in

using the word "dedication," found in the statute, intended to cut down the interest conveyed by the words of the deed from a fee to a mere right of user or easement. The ordinance must be construed to be merely an acceptance of the deed as it was and of the title thus conveyed.

2. Under the decision of the court of appeals for the Sixth circuit, in the case of *Board of Com'rs v. Young*, 8 C. C. A. 27, 59 Fed. 96, which is binding upon me, I must hold that the declaration in the deed that the grant of land was "as and for a public street of the city" does not make the fee conveyed a base or qualified fee, or conditional fee (as it is sometimes called), or a fee upon condition subsequent; and, further, that no termination of the use will cause the land to revert to the grantors. It is true that the street is held in trust by the city, as all streets are, for the use of the public and the abutters; but the defeat of the use is to be remedied by proceedings on behalf of the abutters or the public, not by forfeiture or reverter of the title to the original grantor. If the use becomes impossible or illegal, the city holds the land to such other uses as its charter powers will permit it to hold land. The abutters, in case of condemnation of the street, would doubtless be entitled to compensation, but, as these proceedings involve the appropriation of the only abutter's property, the price paid for his land will include the value of the appurtenant right of ingress and egress on Case Place.

The city's measure of recovery is not before me. It has been agreed on, and I am not called on to fix it. It is sufficient to hold that all right of Leonard Case and his heirs in the strip of land passed out of them by virtue of the deed; and they retained no possibility of reverter. This was the holding in the *Young Case*, and I do not see how it is to be distinguished from this. There was a common-law dedication of a cemetery, followed by an invalid law of the state attempting to vest the fee in the village of Youngstown for the use of a cemetery, to enable it to maintain trespass, followed by a quitclaim deed of the heirs of the dedicator, conveying the land to be held in conformity with the invalid law, to wit, for the use of a cemetery. It was held that the village took a fee simple absolute, and that the qualification as to use only and possibly created a trust in the grantee, enforceable by the public; that it was not either a qualified fee or an estate upon condition; and that, even if it were the latter, the condition had become impossible of performance by reason of a lawful village ordinance forbidding the use of the land for a cemetery, and so the estate was freed from the condition, and became absolute in the village.

In this case we have a deed in fee of land for use as a street, and the use has become impossible, because, by act of congress, the land on which the street is has been appropriated for the use of the United States. An attempt is made to distinguish this case on the ground that the deed in the *Young Case* was for a valuable consideration, while here this deed is said to be a voluntary conveyance. The evidence does not bear out the claim that this deed was a deed of gift. The recital of the consideration is, "in consideration of one

dollar and divers other considerations received, to our full satisfaction of the city of Cleveland." It appears that, upon the same day upon which the deed was accepted by the city council by the ordinance already referred to, the city council passed an ordinance granting to William Case and Leonard Case, Jr., "in consideration of the conveyance to said city by Leonard Case, by a deed dated May 18, 1859, of a parcel of land lying east of the post office, and between Superior and Rockwell streets, which land is to be hereafter used as a street," the right to use such portion of the sidewalks on Superior, Wood, and Rockwell streets, and the land conveyed in the deed above described, as may be necessary for the pilasters, areas, and balconies for a block of buildings about to be erected by them on the vacant lot next east of the United States buildings. This shows a valuable consideration for the deed.

The cases of *Board of Education v. Edson*, 18 Ohio St. 221, and *Gall v. City of Cincinnati*, Id. 563, are cited to show that, in Ohio, such a deed as this passes a conditional or base fee, which reverts upon the termination of the use. The remark relied on in *Gall v. City of Cincinnati* is obiter, and is not necessary to the decision. The decision in the *Edson Case* was upon the effect of the termination of the use under a statutory dedication. In the *Young Case* the court of appeals consider the *Edson Case*, and hold that its application is only to statutory dedications, and not to ordinary deeds. The case before us is that of an ordinary deed, and not of a statutory dedication. The effect of the ruling by the court of appeals in the *Young Case* is accentuated by the decision of the circuit court, which the court of appeals reversed, and which held that the deed in that case did, under the *Edson Case* and other Ohio decisions, operate to convey a base fee, which reverted on the termination of the use for which it purported to be made.

It is suggested that the declaration of a use for a street, in a deed of land, should be given some different effect from that for a cemetery or a school house or a church. No such distinction can be built up on the language or ratio decidendi of the *Young Case*. The distinction there made was between statutory dedications and ordinary conveyances by deed, like the one at bar, for a public use. If the *Young Case* is to be qualified in this regard, it must be qualified by the court which rendered it or the supreme court.

Another suggestion is that the limitations of the city's powers, as a corporation, to hold land for certain purposes, require that, in construing such a deed as this, the court should limit its operation to the duration of the use for which the city really acquired it. This position is not tenable. The city, it is conceded, may acquire, by deed, title to land, in order to use it for streets. This does not prevent the city from acquiring, as between it and its vendor, the absolute title to the lands which it may be about to use for streets, so that, when the use becomes impossible, the city may alienate it for its full value, or use it for any proper corporate purpose. The result is that the heirs of Leonard Case have no interest, or possibility of reverter, in the premises known as "Case Place," and that a verdict must be directed accordingly.

STEWART v. VILLAGE OF ASHTABULA.

(Circuit Court, N. D. Ohio, E. D. December 23, 1899.)

No. 5,272.

1. JUDGMENTS—RES JUDICATA—DECREE OF DISMISSAL IN EQUITY.

The decree of a court of equity dismissing a suit for an injunction is as conclusive on the parties as the judgment of a court of law, as an adjudication of a question put in issue by the pleadings, and shown to have been actually litigated and decided, and to have determined the action of the court.

2. MUNICIPAL CORPORATIONS—REMOVAL OF STREET-RAILROAD TRACKS—LIABILITY FOR DAMAGES.

The owner of a street railroad cannot maintain an action for damages against the municipality for its removal of the tracks from the streets with as little damage to the property removed as possible, where the ordinance granting the franchise reserved the right to make such removal in case the grantee failed to comply with certain conditions, and it has been conclusively adjudged between the parties that he did not comply with such conditions; and the adjudication is equally effective as a defense although it was not made until after the removal.

On Motion for Rehearing of Demurrer to Answer.

This is a motion for rehearing of a demurrer to the fourth defense of the answer to the plaintiff's petition. At a former hearing the court overruled the demurrer. The petition alleges that the plaintiff on July 19, 1890, and for many years prior thereto, owned and operated a line of street railway in the village of Ashtabula, state of Ohio; that it consisted of rails, ties, sleepers, ballast, turntables, switches, and other material; that he owned, and used in its operation, cars, wagons and horses, tools, and other necessary equipment, together with grounds and buildings erected thereon for the care, protection, and security of this equipment; that he was lawfully possessed of and vested with the right and franchises of continuing the maintenance and operation of the railway for a period of over 17 years from and after the 19th day of July, 1890; that the whole of the property, right, and franchises was worth \$150,000, and constituted a valuable and productive investment; that the defendant on the night of July 19, 1890, and on Sunday and Sunday night of July 20, 1890, through its city council, wrongfully and unlawfully directed the tearing up and destruction of the street railway, and its removal from the streets; that the defendant thereafter, through its officers, forcibly prevented him from restoring his line of railway to its former condition, and from the further possession of and right to operate the same; that his entire structure and equipment, and the right and franchise of operating it, were rendered valueless to the plaintiff, and unlawfully taken from him. Wherefore he asks to recover the sum of \$150,000. For a fourth defense, the defendant, the village of Ashtabula, averred: That the plaintiff ought not to maintain his action, for the reason that on the 19th day of February, 1892, the plaintiff commenced an action in the court of common pleas for Ashtabula county, Ohio, against the defendant, seeking to enjoin the defendant from preventing or in any way interfering with him in restoring to the streets his railway, which he averred had been removed by the defendant; also, to recover damages for the alleged wrongs and grievances arising from said removal, and for equitable relief. That to the petition the defendant made answer, denying that the removal was unlawful, and alleging that the plaintiff had wholly and substantially neglected to perform any of the conditions of the ordinance granting to him the right to construct a street railway. That the cause of action thus commenced and pending in the court of common pleas was duly appealed by the defendant to the circuit court of the county, and was there tried and determined. That it was a material and important issue in the trial in the circuit court as to whether or not the plaintiff had performed the terms and conditions of the ordinance under which he claimed to be the owner of the franchise to operate the railway.

That the case was heard upon its merits by the court. That before its decision the plaintiff requested the court to make special findings of law and fact. That the court made such findings. That the court found that the ordinance attached to the plaintiff's petition was duly passed by the village of Ashtabula, and was accepted by the plaintiff, and that the plaintiff constructed a railroad in the streets, which was afterwards removed; that the plaintiff continued to occupy the streets until the 19th day of July, 1890, when the railway was torn up and removed from the streets by order of the village council; that the plaintiff did not within three months after the completion of the road, or at any time, place the ballast of stone required by the ordinance upon the street, of sufficient depth to make a firm and substantial roadway; that he failed to construct his road or maintain his roadbed so as to make the top or surface of the street and the rails of uniform grade one with the other, but in fact so constructed it that, over the greater portion thereof, the top of the roadbed and the top of the rails were so much above or below the surface of the street as to be a serious obstruction and impediment to all desiring to drive upon or across the track; that in other respects, as to the use of proper ties and the use of ballast, the plaintiff failed to comply with the ordinance; that the defendant often requested the plaintiff to comply with these conditions, but the plaintiff neglected and refused to do so; that on the 3d day of December, 1889, the village, by its council, passed an ordinance declaring a rescission of the grant to John N. Stewart, a certified copy of which was personally served upon the plaintiff immediately thereafter, and that on Saturday evening, the 19th day of July, 1890, and on Sunday, the 20th, the defendant removed the plaintiff's railroad tracks, ties, and turntables from its streets, but doing no unnecessary damage to the same, and placed the same in piles at convenient places along the line of said streets, subject to the order of the plaintiff; that the removal of the tracks was not in pursuance of any judicial determination of the respective rights of the parties. That upon the foregoing facts, so found, the court made the following express finding: "That the plaintiff has failed to perform the conditions of said ordinance in the several respects mentioned, and that therefore he is not entitled to the relief for which he prays." That it was thereupon ordered, adjudged, and decreed by the court that the plaintiff's petition be, and the same was thereby, dismissed, and the plaintiff was ordered to pay the costs. That the cause was, by petition in error, taken to the supreme court, and was there fully heard, tried, and argued, and the judgment of the circuit court in all respects affirmed. That the plaintiff is therefore estopped and barred from further prosecuting the action upon the same questions and subject-matter. And that said judgment in said action is a full and complete bar to any right of action on the part of the plaintiff on the facts alleged in his petition in this action.

The ordinance under which Stewart entered upon possession of the streets is made an exhibit to the answer. It authorized him, his heirs and assigns, to construct, maintain, and operate a single-track railway, with the necessary turnouts, switches, and turntables, upon certain specified streets in the village of Ashtabula. By section 2 it was provided, among other things, that the rails should be laid in such a manner as to be no impediment to the free and ordinary use of the street, and that it should be so constructed, with bridges, drain boxes, or sewer pipes at all gutters, as to allow the free and unobstructed flow of water under the track; that within three months after the completion of the road he should ballast the road so as to make a firm and substantial roadway of the same grade as the top of the rails, and of the same grade and surface as the remainder of the roadway, and that he should maintain this uniform grade and surface; that he should keep the ballasted part of the streets in good repair, and keep all holes and ruts filled with ballast. Section 7 of the ordinance provided as follows: "In case of the neglect or refusal on the part of said Stewart, his heirs or assigns, to take up and relay said track when directed so to do by said council, for the reasons or purposes named in this ordinance, to ballast said road as herein provided, or keep the same so ballasted, and in good repair, to restore the street or track to a uniform grade and surface, the one with the other, or to pave and repave the same, as provided in this ordinance, then, and in any such case, said council may cause the same to be done at the expense of said Stewart, his heirs or assigns, or,

if in their opinion expedient, have the track removed from the streets." Section 8 provided for the occupation of Main street by any other street railroad, upon terms to be agreed upon by arbitration, should the city desire to grant such permission. Section 11 provided that the authority and privilege granted to John N. Stewart, his heirs and assigns, were to remain in force for 25 years from and after the passage of this ordinance. Section 14 provided that "John N. Stewart, his heirs and assigns, shall perform all and singular the conditions of this ordinance, together with all and singular the further and future orders of the council, as herein provided; and it is expressly understood, as a condition of this grant, that if the said John N. Stewart, his heirs or assigns, shall neglect or refuse to perform, as herein set forth, this grant shall, by that neglect or refusal, be rescinded. This ordinance becomes null and void upon the passage of an ordinance by the council of the village to that effect."

Winch & Thompson and Frederick A. Henry, for plaintiff.

A. P. Laughlin and J. M. Jones, for defendant.

Taft, Circuit Judge (after stating the facts). The main question in this case is whether the decree dismissing the bill in the state court, set up in the fourth defense of the answer, conclusively estops the plaintiff on the issue whether he complied with the conditions of the granting ordinance. I have no doubt that it does so estop him, and that as between him and the village, in any subsequent litigation, the fact that he failed to comply with the conditions of this ordinance must be taken as conclusively established. The answer shows that, in the case in the state court, Stewart affirmed that he had complied with the conditions of this ordinance, and the village denied that he had so complied, and averred the particulars in which he had failed to comply with the conditions; that a trial was had upon this issue; and that the common pleas court dismissed his petition for an injunction. It further appears that the circuit court passed upon the same issues, and in terms found that the conditions had not been complied with, and for that reason affirmed the decree of the common pleas court dismissing the petition, and that the supreme court affirmed the action of the circuit court. It thus affirmatively appears from the records of the court that the issue was made as to the compliance with the conditions, and that because of a failure to comply with the conditions the decree dismissed the bill. Now, it might very well be that if the record did not show what the reason of the court was for dismissing the bill, and what the court actually decided in dismissing the bill, it must be inferred that the court merely exercised the legal discretion which is vested in a court of equity in giving or withholding injunctive relief. In a case where it is not made to appear what was actually decided in rendering the decree, the decree is conclusive only upon that point without which the case could not have been decided as it was. But if an issue upon a particular fact is made, upon which the decree might turn, and it affirmatively appears, either from the record or by oral evidence, that it in fact did turn upon this issue, then the decree is conclusive upon the parties in respect of such issue. Decrees in equity, whether they dismiss the bill or grant the relief prayed for, are as binding, by way of the thing adjudged between the parties, as judgments at law. The necessary difference between the effect of a decree of dismissal

in equity and a judgment for the defendant at law arises from the varying grounds upon which a decree for dismissal may be based, while the judgment for the defendant at law must always rest upon the failure of the plaintiff to sustain the averments of his petition. A decree for dismissal in equity may be based on the ground that the plaintiff has an adequate remedy at law. In such a case the decree, of course, cannot be used to estop the plaintiff from affirming the truth of the averments of his bill in an action at law, for the very ground for the dismissal was that this suit was what he should have brought in the first place. Again, in cases of specific performance and in cases where the extraordinary remedy of injunction is prayed, the court may deny the relief in its legal discretion, which the court may exercise in granting or withholding such relief on equitable principles which have no application in a court of law where the same cause of action or the same defense is mooted. It is this difference between a decree of dismissal in equity and a judgment for the defendant at law on which the decisions relied upon by the plaintiff's counsel in this case, from the supreme court of Ohio, must rest. In *Cramer v. Moore*, 36 Ohio St. 347, in a suit at law on a promissory note, the maker was held not estopped from setting up want of consideration or fraud by a decree dismissing his petition in an action brought to enjoin the negotiation of the note and to obtain its surrender and cancellation, although the matter set up as a defense was relied on as the ground of relief in the first petition in equity. There was nothing to show in the case what the court actually decided, except the decree dismissing the petition in equity. As that decree might have been based on the ground that the opportunity to make a defense gave him a sufficient relief at law, the decree in equity could, of course, not estop the plaintiff in the suit at law from pleading the defense, the opportunity to plead which in a suit at law might have been made the basis for the action of the court of equity. So, in the case of *Porter v. Wagner*, 36 Ohio St. 471, it was held that the judgment of dismissal of a petition for the specific performance of an agreement, and of a counterclaim based upon an alleged subsequent agreement to rescind the former agreement and repay the money paid thereon, was no bar to an action for the recovery of the money paid on the first agreement in accordance with the second agreement. And this was put on the ground that the refusal of the court to rescind the contract as prayed in the equitable counterclaim was not inconsistent with the alleged promise of the vendor to refund the money paid in consideration of his release from the contract; that it might have been based on the ground that the remedy at law was ample, and, as it did not conclusively appear that the failure to prove a contract of rescission was the basis of the decree, it could not be inferred. If, however, the evidence shows exactly what the ground was upon which the decree was based, then the conclusiveness of a dismissal in equity upon that ground is clear. This is clearly shown by the case of *Blackinton v. Blackinton*, 113 Mass. 231, in which the issues out of chancery were submitted to a jury, and upon those issues a

decree dismissing the bill was entered. It was held that the decree of dismissal was conclusive upon the issues found by the jury in a subsequent action at law. See, also, *Herm. Estop.* § 403. It is true that the findings of fact and conclusions of law of the court, made for the purpose of an appeal under the statute of Ohio, do not bind the parties as to every fact found or conclusion of law stated; but that they may be used as evidence to enable the court to determine the exact issue which was decided, and upon which the decree of the court necessarily depended, is shown in the case of *Kashman v. Parsons*, 70 Conn. 295, 39 Atl. 179, upon which the plaintiff most relies.

It being conclusively established by the decree pleaded that the plaintiff did not comply with the conditions of his grant, the question arises, what damages is he entitled to when the village for that reason removes his track from the streets, carefully, so as to damage him as little as possible? The ordinance would seem to vest in the village the power to act, and remove the tracks from the streets, if the council concluded that the conditions had not been complied with. It may be (I do not find it necessary to decide) that, even in the face of these strong provisions of the ordinance for the benefit of the village, the defendant should have applied to a court to adjudge the existence of a ground of forfeiture. Since the act of the village, however, the ground of forfeiture has been conclusively adjudged to exist. It must be assumed that it would have been so found, had the village resorted to judicial proceedings in the first instance. I can see, therefore, no ground for holding that the plaintiff is entitled to a recovery of any damages, because his condition, with the forfeiture adjudged against him subsequent to the act, is not different from what it would have been had it been adjudged against him prior to the act complained of. The former action of the court in overruling the demurrer must be confirmed, and the motion for a rehearing is denied.

STOWELL v. ELIE R. CO.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 64.

RAILROADS—INJURY OF PERSON AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Plaintiff drove upon the crossing of a double-track railroad, immediately behind a train passing on the track nearest to her, and was struck and injured by a train on the other track, approaching from the opposite direction. Such train was in plain view from the crossing, and the approach thereto on the highway, for more than a mile before it reached the crossing, except for the temporary obstruction of such view by the train which had just passed. *Held*, that plaintiff was guilty of negligence in failing to wait until such obstruction had passed, and then looking before attempting to cross, which precluded her recovery.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon a writ of error to review a judgment of the circuit court, Southern district of New York, entered upon a ver-

diet directed for the defendant in error, which was defendant below. The facts sufficiently appear in the opinion, the action being for personal injuries sustained from collision with a moving train.

Raphael J. Moses, for plaintiff in error.

F. B. Jennings, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. On July 9, 1896, about 2 p. m., the plaintiff was driving a horse attached to a small phaeton along Englewood avenue, Englewood, N. J., proceeding southeasterly, so as to cross the tracks of the Northern Railroad of New Jersey, which road defendant conceded, for the purpose of the trial, that it was operating on that day. The crossing was at grade, some 1,500 feet from Englewood station, and 6,400 feet from Nordhoff station; and, approaching it as she did, she would first encounter the track for south-bound trains, going from Englewood to Nordhoff. A civil engineer was produced by the plaintiff, who had made careful observations and measurements, and plotted down the results thereof on a blue print, which was put in evidence. It appeared from his testimony that a person approaching this crossing as did the plaintiff would have an unobstructed view northwards towards Englewood station 565 feet, when within 18 feet of the west or south-bound track, and at 12 feet from said track could see in that direction 1,465 feet. The view towards the right hand as one approached was much more extended. The witness testified:

"The view which I have down the track towards Nordhoff as I approach the track on Englewood avenue, going east, is towards Nordhoff. You can see to Nordhoff station. That is 6,400 feet. I have a view of the entire track all the way for a mile or more. I have that view for 100 feet back from the track on Englewood avenue. I did not try the view further back, but I know there is nothing in the way for a hundred feet at least. Further back they may see at least a mile down the track. For 200 feet away from the track it is an entirely clear and unobstructed view; and from that point up to the track, and crossing the track."

It further appears from the blue print that at 25 feet west of the west track there is an unobstructed view in the direction of Nordhoff and beyond for 9,600 feet.

The situation as the plaintiff drew near the crossing was this: On the south-bound track there was a train due to leave Englewood at 2:06 p. m., and due at Nordhoff at 2:10 p. m. On the north-bound track there was a train due to leave Nordhoff at 2:06 p. m., and due at Englewood at 2:09 p. m. The speed of the first between stations was 33 feet per second. The speed of the other between stations was 44 feet per second. At this speed, if on time, they would encounter each other in about 1 minute and 42 seconds at a point 1,912 feet south of the Englewood crossing. The running time of both trains after getting under way from the station, was, of course, higher,—possibly 30 and 40 miles an hour, respectively. There is no direct evidence in the case that either train was behind time. The conductor of the north-bound train expressly testified that he left Nordhoff on time, and was running according to the time-table; the

accident delayed him some ten minutes. No one testified as to whether the south-bound train was on time or not, but in view of the fact that plaintiff, starting just as it passed her, had barely reached the east track when she encountered the north-bound train, it would seem that the south-bound train was about 15 to 20 seconds late. As to whether there was any failure to sound bell or whistle on the colliding train the testimony is very unsatisfactory, but, as the cause was disposed of below upon the question of plaintiff's own negligence, it will not be necessary to discuss such testimony.

The transactions which led up to the accident, according to plaintiff's own narrative, in which she is corroborated by the other witnesses, were as follows: She was driving towards the crossing on a slow trot, when she heard the noise of a train. It was a puffing sound, such as it would naturally have in starting. She stopped and waited to see where it was coming from, and looked both up and down the track, soon perceiving that the noise was from the south-bound train, which came in sight. The place where she stopped, as she estimated, and one of her witnesses corroborated her, was about 25 feet west of the west track. From this point, at the time she looked, the south-bound train having just left Englewood station, the north-bound train must have been in plain view, leaving Nordhoff station, but she seems not to have noticed it. Probably the train whose noise she heard, and which was close at hand, more particularly challenged her attention. The plaintiff was entirely familiar with the crossing and its surroundings. She waited where she had stopped until the south-bound train was just clearing the flagging (planking) laid between the rails for a roadway, and then started up the horse because she was in a hurry. She heard no signal whistle or bell, nor any noise of another approaching train; the noise of the down train being, as she testified, sufficient to drown any such sound from the up train. She started the horse as soon as the south-bound train had passed,—whether at a trot or a walk, she could not say. Before starting him she again looked up and down, seeing nothing except the disappearing south-bound train, which, of course, obscured temporarily the north-bound track from the crossing south towards Nordhoff. Proceeding on towards the north-bound track, plaintiff suddenly became aware of the proximity of the north-bound train, quite close to her; hearing its danger signal "just after the other train." Her horse was then on the track, but by the exertion of all her strength she pulled him around, away from the train; and he was struck, not by the engine, but by the second car.

This case is so closely parallel to *Railway Co. v. Cobleigh*, decided by this court (24 C. C. A. 342, 78 Fed. 784), that it seems unnecessary to cite any other authorities. In that case we referred to an earlier decision (*Railroad Co. v. Blessing*, 14 C. C. A. 396, 67 Fed. 277), and quoted the rule therein set forth, that a person who is about to cross a railroad track is bound to listen and look in order to avoid danger; and if he fails to do so, or if, doing so, and seeing the danger, he persists in the attempt, he is guilty of negligence that will defeat any recovery if he is injured. *Cobleigh* stopped his team while some distance from the track, and did look and listen, but a bluster of snow

coming directly in his face blinded his view. Thereupon he proceeded without any further attempt to discover whether he could cross the track without danger, and was struck by the train. The snow flurry was but a temporary obstruction, and we held that a person about to cross a railroad track "does not relieve himself from the imputation of negligence by looking when he cannot see, and omitting to look again when he could see and avoid danger." In the case at bar, when the plaintiff first looked towards Nordhoff the north-bound train must have been in full view, hauling out of the station; but there is some suggestion in the evidence that the sun would interfere with a long-distance view in that direction, wherefore her failure to see it might not by itself constitute negligence. When she looked in the direction of Nordhoff the second time, however, she saw distinctly that the track on which peril was to be anticipated was obscured from her vision by the train which had just passed her. What was hidden behind it she could not see, nor, in view of the noise made by the train passing nearer to her, could she hear. It was plainly apparent to her, also, that the passing train was going at a good rate of speed, and that as it moved along it would clear the view of the north-bound track. The obstruction to her view was of the most fleeting character. The two trains were proceeding at a combined speed of 100 feet a second, as the evidence gives it. A delay of the very briefest would have left her in a position where she could see far enough towards Nordhoff to determine whether the track was free for her to cross. She chose not to wait, however,—she "was in a hurry,"—and started the moment the rear car of the south-bound train passed her, and so drove right into the danger, which she must inevitably have seen had she looked when she ought to. We have here a case in which, as it seems to us, all reasonable men, unless swayed by sympathy or biased in some way, must draw the same conclusion from the admitted facts. This is the test laid down by the authorities. *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Elliott v. Railroad Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434. In *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, Mr. Justice Field, writing the opinion, says:

"She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others."

See, also, *Schofield v. Railroad Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224.

It is certainly no extension of this principle to hold that listening and looking at what is known to be but a temporary obstruction, when a delay of a few seconds will give one an unobstructed view, is not a proper and sufficient use of the senses under such circumstances. This question was recently before us in *Railroad Co. v. Baird*, 36

C. C. A. 574, 94 Fed. 946. The following excerpt from the opinion in that case is appropriate to the one at bar:

"While there is no supremacy in the rights of owners of railroads operated by steam over the rights of individuals who are also lawfully using the same roadway, yet the dangers from this means of transportation are manifest, while its use has become a necessity, and it is therefore simply prudent for the passer-by to exercise the caution which experience has shown to be needful. An ordinary and almost instinctive exercise of that caution is an endeavor to determine by eyesight, rather than by surmise, whether danger is at hand. It has therefore become a requirement, as a general rule, that a person of mature years and in the possession of his faculties, who is about to cross a railroad track over which steam engines are known to be in constant use, must necessarily use the precautions against danger which his eyes and ears and powers of observation provide. This is not a statutory rule, and there are probably cases in which such a compulsory regulation is not applicable, and in which other circumstances exist which control its reasonableness,—as, for instance, when the injured person, confused by the negligence of the railroad officers, has made a mistake in his means of remedy. *Elliott v. Railroad Co.*, supra. It is, however, in ordinary cases, a command of common prudence recognized by reasonable men, is reiterated by courts, and should not be frittered away by juries."

Similar conduct has been condemned as negligent by the courts of the state in which this accident happened. In *Railroad Co. v. Ewan*, 55 N. J. Law, 574, 27 Atl. 1064, the court says:

"It is apparent that the plaintiff, without any reason for haste, went upon the track when it was evident to him that he could neither see nor hear any train which he was aware might be approaching, and when the causes of his inability to see and hear were so fleeting that in a few seconds they would have gone. It seems indisputable that such conduct was negligent. In the exercise of reasonable prudence, a man could not expose his life to a peril which he knew might be imminent, if a delay of a few minutes would assure him of safety, unless impelled by some motive of extreme urgency."

To the same effect are *Railroad Co. v. Pfuelb*, 60 N. J. Law, 278, 37 Atl. 1100; *Railroad Co. v. Smalley*, 61 N. J. Law, 277, 39 Atl. 695.

The suggestion upon the argument that plaintiff did not suppose that any train was coming on the north-bound track, because the two trains, when both were sharp on time, passed each other some 2,000 feet further south, is immaterial. The authorities above cited abundantly sustain the proposition that "the track itself is a warning and a place of danger." The judgment of the circuit court is affirmed.

BRATTLEBORO SAV. BANK v. BOARD OF TRUSTEES OF HARDY TP.,
HOLMES COUNTY, OHIO.

(Circuit Court, N. D. Ohio, E. D. December 23, 1899.)

No. 5,921.

1. TOWNSHIPS—STATUS IN OHIO—CONSTITUTIONALITY OF ACT AUTHORIZING ISSUANCE OF BONDS.

A township in Ohio is not a corporation, within the meaning of the state constitution; and article 13, § 1, of such constitution, providing that the legislature shall pass no special act conferring corporate powers, does not render invalid an act authorizing a township to issue bonds.

2. MUNICIPAL BONDS—CONSTITUTIONALITY OF ACT AUTHORIZING—BONA FIDE PURCHASER.

An act of the Ohio legislature, passed in 1893, authorizing a township to issue bonds for the purpose of refunding its then existing indebtedness, was not a law of a general nature, within the meaning of the state constitution (article 2, § 26), providing that all laws of a general nature shall have a uniform operation throughout the state, under the construction previously given such provision by the supreme court of the state; and it cannot be held invalid, as in violation of such constitutional provision, as against a bona fide purchaser of bonds issued by the township thereunder.

3. SAME—DEFENSES AGAINST—ESTOPPEL BY RECITALS.

An act authorizing the trustees of a township to issue bonds for the purpose of refunding its outstanding indebtedness, which contains no reference to any record of such indebtedness, or requirement that such a record shall be kept, but provides that the bonds shall contain a recital that they are issued under and by authority of such act, must be held to confer power on the trustees, who are the officers charged with the duty of incurring the indebtedness of the township, to recite in the bonds that the valid indebtedness of the township is such as to authorize their issuance under the act, in order to refund it; and such recital is conclusive on the township, in favor of a bona fide purchaser of the bonds.

This is a suit at law brought by the Brattleboro Savings Bank against the board of trustees of Hardy township, Holmes county, Ohio, to recover the amount due on one bond of said township, of an issue of 20 bonds, for \$1,000 each, together with 40 interest coupons,—two from each of the 20 bonds,—which are averred to be due and unpaid. The bonds are in the form following:

“United States of America, State of Ohio, Holmes County, Hardy Township.
 “No. ———. Refunding Bond. 1,000 Dollars.

“Know all men by these presents, that the township of Hardy, in Holmes county, state of Ohio, is indebted to and promises to pay the bearer the sum of one thousand dollars, in lawful money of the United States of America, at the township treasurer's office of said Hardy township, Millersburg, Ohio, on the first day of July, A. D. 1——, with interest thereon at the rate of six per cent. per annum, payable semiannually on the first day of January and July of each year, upon the presentation and delivery of the proper coupon hereunto annexed, signed by the township clerk, at the township treasurer's office of said Hardy township, Millersburg, Ohio, for the payment of which sum and interest the said township is hereby held and firmly bound; and its faith and credit and all the real and personal property in said township is hereby pledged for the prompt payment of this bond and interest at maturity. This bond is one of a series of bonds of like date, tenor, and effect, issued for the purpose of procuring the necessary means to refund and pay the present existing and outstanding indebtedness of said township. This bond is issued and executed under and by authority of, and in accordance with, the provisions of an act of the general assembly of the state of Ohio passed on the first day of February, A. D. 1893. And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed, in regular and due form as required by law, and that the indebtedness which is refunded by this series of bonds does not exceed in amount the actual amount of outstanding indebtedness, and is a valid, subsisting, and legal obligation of said township, and that neither the indebtedness so refunded nor this series of bonds exceed the statutory or constitutional limitation. In testimony whereof, we, the undersigned officers of Hardy township, Holmes county, state of Ohio, being duly authorized to execute this obligation on its behalf, have hereunto set our official signatures this 4th day of February, A. D. 1893.

John Fitch,

“John P. Larimer,

“Samuel Devore,

“Trustees of Hardy Township.

“G. U. Duer, Township Clerk.”

The act under which the bonds purport to be authorized is entitled, "An act to authorize the trustees of Hardy township, in Holmes county, Ohio, to issue and sell the bonds of said township for the purpose of paying off and satisfying the present existing indebtedness of said township." It was passed February 1, 1893, and is found in 90 Ohio Laws (Local Laws) p. 291, and is as follows:

"Section 1. Be it enacted by the general assembly of the state of Ohio, that the township trustees of Hardy township, Holmes county, Ohio, are hereby authorized and empowered to issue the bonds of said township for the purpose of paying off and satisfying all, or any portion of the present, existing, outstanding indebtedness of said township. If it shall appear to the said board of trustees to be for the best interest of said township, they shall have the power and are hereby authorized to sell at not less than their par value at public or private sale, the negotiable bonds of said township at a rate of interest not to exceed six per cent. per annum, interest payable semi-annually, provided, however, that the amount of bonds issued and sold shall not exceed the amount of the present existing, outstanding indebtedness.

"Sec. 2. Said bonds shall be of denominations of \$1,000 each, shall be numbered consecutively commencing with number 1, shall contain the recital that they are issued under and by authority of this act. The bonds shall be designated as refunding bonds and shall be signed by the trustees of said township and countersigned by the township clerk; one \$1,000 bond shall become due and payable on the first day of July, 1898, and one bond of \$1,000 on the first day of July of each and every year thereafter until all of the said bonds are paid. Both principal and interest of said bonds shall be payable at the township treasurer's office in said Hardy township. After said bonds have been sold, the proceeds shall be applied to the payment of the said existing outstanding indebtedness of said township, and for no other purpose.

"Sec. 3. Said bonds shall have interest coupons attached evidencing the several instalments of interest as they become due, which coupons shall be signed by the clerk of said township. Said township trustees are hereby authorized and empowered to levy, annually, a tax on all the taxable property in said township, sufficient to pay both principal and interest of said bonds, as they severally become due.

"Sec. 4. This act shall take effect and be in force from and after its passage."

A jury was waived, and the cause submitted to the court.

It is agreed that the bonds were duly executed and signed in accordance with the provisions of the statute by the officers purporting to sign them, and that the plaintiff bank purchased the entire issue of the bonds, through Spitzer & Co., brokers, of Boston; that the interest on the bonds was paid from the date of their issue to July, 1897; that the plaintiff had no knowledge whatever of any defect in the issue of the bonds, or that the valid indebtedness of the township, existing at the time of their issue, exceeded the amount of the bonds. The defendant offered evidence to show that the only indebtedness of Hardy township which these bonds were issued to meet arose under the act of April 6, 1892, entitled "An act to authorize Hardy township, Holmes county, to issue and sell bonds of said township, for the purpose of aiding and encouraging public improvements, to an amount not exceeding \$40,000" (89 Ohio Laws, p. 597); that this act contemplated the use of the proceeds of the bonds to encourage the construction of railroads and mechanical establishments in the village of Millersburg, in said township, and the appointment of 15 trustees to superintend the expenditure of the fund thus raised; that the act contemplated a vote of the people; that the vote was had; that the bonds were issued; that there was no indebtedness whatsoever except these outstanding railroad improvement bonds thus issued under the act of 1892, as would appear by the records of the township; that the money from these bonds went to the township treasurer, and thence to the trustees for the public improvement under the act of 1892, and that the trustees of the township received and expended no part of it; that, in the contract for the sale of the first bonds under the act of 1892, there was a stipulation that the purchaser should receive for the bonds thereby about to be issued refunding bonds; and that this contract for refunding bonds was spread on the records of the township. Under this offer the evidence was held to be incompetent, in the absence

of further evidence showing that the plaintiff had actual notice of the facts offered to be proved.

Harris & Harris, for plaintiff.

Stilwell & Bailey, M. L. Smyser, and W. F. Kean, for defendant.

TAFT, Circuit Judge (after stating the facts as above). The first question which arises is whether the act of 1893, above recited, is valid; for, of course, if the act under which the bonds purport to be issued is without constitutional authority, then it could confer no power to issue the bonds here in suit. Two objections are made to the validity of the act:

1. It is said that it is in violation of section 1, art. 13, of the constitution of Ohio, providing that the general assembly shall pass no special act conferring corporate powers. It was at first contended that this imposed only a limitation upon the right to pass laws of incorporation, and did not limit the power of the legislature of conferring additional faculties upon a corporation already created. But it is now settled that an act confers corporate powers which either creates a corporation or adds to the powers of a corporation already existing. *Atkinson v. Railroad Co.*, 15 Ohio St. 21, and *State v. City of Cincinnati*, 20 Ohio St. 18, 36. If the trustees of Hardy township are a corporation, within the meaning of this section of the constitution, then the act giving them the power to issue bonds for refunding purposes is certainly a corporate power. It appears that for certain purposes the trustees of a township in Ohio are created a body corporate. Section 1376. Thus, it is argued that the power conferred upon them must be a corporate power. The contention must fail, however, upon clearly-settled authority. The section of the constitution in question applies only to powers conferred upon private corporations and powers conferred upon public municipal corporations. The constitution recognizes both of these classes of corporations as such. It treats as entities, or quasi entities, of a different character, counties, townships, and school districts; and even though the legislature sees fit by statute to create these so-called quasi corporations, which are mere instrumentalities or branches of the state government for local purposes, into corporations by name, it does not thereby bring them within the inhibition of the section under consideration, which applies only to such corporations as were covered in the constitution under that name. It is settled in Ohio that neither the township nor its trustees are invested by section 1376 with the general powers of a corporation. *Trustees v. Miner*, 26 Ohio St. 452, 456. In *State v. Powers*, 38 Ohio St. 54, the question was whether an act which conferred upon a particular school district in the township of New London, in Huron county, Ohio, certain powers, was a special act conferring corporate power, within the inhibition of the constitution. Judge McIlvaine, in delivering the opinion of the court, said:

"Whether powers conferred by the legislature upon a common-school district be corporate or not, within the meaning of the provisions of the constitution, cannot be determined definitively by the mere fact that such district or its board of education is declared by statute to be a corporation, but rather by

the object of its creation and the nature of its functions. The district is organized as a mere agency of the state in maintaining its public schools, and all its functions are of a public nature. The evils which this provision was intended to prevent are not found in the special privileges conferred upon such public agencies. The evils sought to be prevented were such as resulted from special privileges conferred upon private corporations. That the inhibition extends to municipal corporations, cities, and villages, has been settled by adjudications. See *State v. City of Cincinnati*, 20 Ohio St. 18, and 23 Ohio St. 445; *State v. Mitchell*, 31 Ohio St. 592, and cases there cited. In reference to these decisions, it is proper to remark that many of the powers and franchises of municipal corporations are of a private and local character, essentially different from those of mere political subdivisions of the state, commonly called 'quasi corporations.' And, again, cities and villages are classified as corporations, and provided for in article 13 of the constitution, which relates solely to corporations, section 6 of which provides for their organization by general laws; so that the decisions referred to, in which the inhibition of the 1st section is held to apply to municipal corporations, are of no weight on the proposition that school districts or other political subdivisions of the state are subject to the same inhibition. On the other hand, school districts are constituted so as to partake rather of the character of counties and townships, which are provided for in the tenth article of the constitution, not as corporations, but as mere subdivisions of the state for political purposes, as mere agencies of the state in the administration of public laws. *Hunter v. Commissioners*, 10 Ohio St. 515; *State v. City of Cincinnati*, 20 Ohio St. 18. In this article reference is made to 'similar boards' in connection with the commissioners of counties and trustees of townships. It is quite obvious to us that county and township organizations, although quasi corporations, are not within the meaning of this provision of the constitution; and, upon full consideration, we are unanimous in the opinion that school districts, as similar organizations, though declared by statute to be bodies politic and corporate, are not within the reason or meaning of this inhibition of the constitution. *Beach v. Leahy*, 11 Kan. 23, a case exactly in point."

The case cited by the supreme court, with approval, from 11 Kan., involved the validity of an act authorizing school district No. 2, Neosho county, Kan., to issue bonds to build a school house. The constitution of Kansas contained a clause exactly like the one under consideration, forbidding the legislature to pass "any special act conferring corporate powers." By statute the legislature of Kansas had provided that every school district organized in pursuance of the act should be a body corporate, and should possess the usual powers of a corporation for public purposes. It was held by the supreme court of Kansas (Mr. Justice Brewer delivering the opinion) that school districts, though created into corporations by the legislature, were not corporations within the meaning of the constitution, and that power conferred upon them by the special act was not thereby inhibited. See, also, *Hunter v. Commissioners*, 10 Ohio St. 515; *State v. City of Cincinnati*, 20 Ohio St. 18, 37; *Finch v. Board*, 30 Ohio St. 37.

The opinion of Judge Scribner in delivering the opinion of the circuit court of Huron county in the case of *Eckstein v. Board*, 10 Ohio Cir. Ct. R. 480, 490, expressing the view that an act conferring upon the authorities of the Chicago Junction village school district power to borrow money and issue bonds is a special act conferring corporate power, within the Ohio constitution, cannot, in view of the cases already cited, be regarded as an authoritative exposition of this constitutional limitation. It seems to be

held by the court, through the learned judge, that the power to issue bonds and borrow money is a corporate power, upon whomsoever it may be conferred, and therefore that, if conferred upon a school district, it is within the constitutional restriction. In this view I cannot concur. There is no reason why a natural person may not issue bonds and secure them by mortgage. The power thus exercised is not corporate, therefore, except when it is conferred upon a corporation; and it is not corporate, within the Ohio constitution, except when it is conferred upon a corporation such as that instrument contemplated in the inhibition. The point to which the case is cited was clearly in judgment by the court, but it was a question ancillary to the main question considered in the opinion, and did not, evidently, have the careful consideration which the main question had.

2. A more serious objection to the validity of this act is based upon article 2, § 26, of the Ohio constitution, providing that all laws of a general nature shall have a uniform operation throughout the state. In the case of *Cass v. Dillon*, 2 Ohio St. 607, it was held that an act of the general assembly, passed on March 24, 1851, to authorize the county of Muskingum to subscribe to the capital stock of the Cincinnati, Wilmington & Zanesville Railroad Company, upon the condition that such subscription should be first approved by a majority of the qualified electors of the county, to be ascertained at an election held upon notice for that purpose, was not an act which, having been passed by the legislature prior to the going into effect of the constitution of 1851, was repealed by section 1 of the schedule, providing that all laws in force on the 1st day of September, 1851, not inconsistent with this constitution, should continue in force until amended or repealed. It was held expressly in this case that such a law was not inconsistent with article 2, § 26, providing that all laws of a general nature shall have a uniform operation throughout the state. Judge Thurman, delivering the majority opinion of the court, said:

"We are also referred to section 26 of article 2, which provides that 'all laws of a general nature shall have a uniform operation throughout the state; nor shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except as otherwise provided in this constitution.' That the first branch of this section has had the effect to abolish certain laws of a general nature, whose operation was confined to particular localities, I have not the least doubt; but the act under consideration is not a law of that character. That it is a public law, of which the courts *ex officio* take notice, may well be admitted; but it does not follow that it is of a general nature. It is no more of a general nature than would be an act to authorize the construction of a bridge or the erection of a poor house. As well might it be said that the act authorizing Hamilton county to build a jail (49 Ohio Laws, p. 130) was of a general nature, and therefore repealed. All such acts are, of necessity, local in their character. The origin of this section is perfectly well known. The legislature had often made it a crime to do in one county, or even township, what it was perfectly lawful to do elsewhere, and had provided that acts, even for the punishment of offenses, should be in force, or not, in certain localities, as the electors thereof respectively might decide. It was to remedy this evil and prevent its recurrence that this section was framed. How far it reaches, it is not now necessary to decide. That it may be difficult sometimes to say whether an act is within the meaning, or not, is very probable. But certainly it cannot

be doubted that where, in the nature of things, the character of an act is necessarily local, the first branch of the section has no application."

Cass v. Dillon was followed in a number of cases thereafter presenting substantially the same question.

In *State v. Trustees*, 8 Ohio St. 394, the question was whether an act conferring authority on the trustees of Union township, Fayette county, to subscribe for stock in a railroad company, and to issue bonds, was invalid, as being inconsistent with the constitution of 1851, though passed before the going into effect of the constitution; and the act was sustained. In *State v. Judges*, 21 Ohio St. 1, it is held that an act limiting the compensation of certain officers therein named, intended to apply to Hamilton county only, was not a law of a general nature, but of a local nature, and therefore not in conflict with the section under consideration. In *State v. Covington*, 29 Ohio St. 102, it was held that an act to regulate the police force in cities of the first class was not a law of a general nature, which should have uniform operation throughout the state. In *McGill v. State*, 34 Ohio St. 228, the act of May 7, 1877, regulating the selection of jurors in the county of Cuyahoga, was held not to be a law of a general nature, within the meaning of this section. In *State v. Hoffman*, 35 Ohio St. 435, an act providing for the relief of W. M. Corry from an assessment under public improvement in the city of Cincinnati, in Hamilton county, is held to be an act of local and temporary nature, and that the relief was not of the character which should necessarily be granted by general law. In *State v. Commissioners*, 35 Ohio St. 458, it is held that an act providing for the improvement of a certain designated county road was local in its nature, and not in conflict with this section. In *State v. Board*, 38 Ohio St. 3, it is held that an act requiring the board of education of a city to release the sureties of a county treasurer from liability for school funds of the board which came to the hands of the treasurer for disbursement was not a general act. In *State v. Powers*, 38 Ohio St. 54, an act to consolidate the territory comprising the township of New London, Huron county, into a special school district, was held to be in conflict with the section in question, on the ground that the public schools in the state of Ohio, and their conduct and management, were matters of a general nature. The case of *State v. Powers*, in this regard, was expressly overruled in the case of *State v. Shearer*, 46 Ohio St. 275, 20 N. E. 335, in which it was held that the subject of dividing territory into school districts is in its nature local, and hence the formation of a special school district from territory within the limits of a township, by special act, was not in conflict with section 26, art. 2, of the constitution. The first paragraph of the syllabus in the *Shearer Case*, which, in Ohio, states the law of the case, is as follows:

"(1) A law is not necessarily of a general nature by reason simply of its being upon a general subject. (2) Special legislation upon a subject-matter in its nature local is not prohibited by section 26 of article 2 of the constitution, notwithstanding the subject-matter is the subject of a general law."

The case of *State v. Shearer* was cited approvingly in the case of *Metcalf v. State*, 49 Ohio St. 586, 31 N. E. 1076.

In *Hart v. Murray*, 48 Ohio St. 605, 29 N. E. 576, it was held that an act providing for compensation for justices of the peace in certain cities of the second grade of the first class in the state, in lieu of fees, was not a law of a general nature, but was local in its character, and did not come within the constitutional inhibition. In *State v. Kendle* (decided in 1895) 52 Ohio St. 346, 39 N. E. 947, it was held that the act of the general assembly requiring common pleas judges in the several subdivisions of the common pleas districts of the state to appoint jury commissioners was not in conflict with the section under consideration, although it did not operate in six counties of the state. On the other hand, it has been held, under the same section, in *Ex parte Falk*, 42 Ohio St. 638, that a statute providing punishment for an act which is *malum in se* wherever committed, being a law of a general nature, cannot be made local on the ground that the inhibited act is of greater evil in a large city than in other parts of the state. In *State v. Winch*, 45 Ohio St. 663, 18 N. E. 380, it was held that an act passed April 12, 1876, to prevent gambling and the selling of intoxicating liquors on or within a certain distance of Chippewa Lake, in the county of Medina, was a law of a general nature, and invalid. In *State v. Ellet*, 47 Ohio St. 90, 23 N. E. 931, it was held that an act to require the county commissioners of a certain county to provide a depository for the county funds was a law of a general nature, for the reason that the funds there deposited were part of the state funds, and concerned the people of the state. In *Commissioners v. Rosche*, 50 Ohio St. 103, 33 N. E. 408, it is held that an act to provide for refunding of taxes erroneously paid under section 2742 of the Revised Statutes in counties containing a city of the first grade of the first class was legislation of a general character, not having uniform operation, because there could be no reason why a taxpayer of Hamilton county should have any more speedy remedy for the recovery of illegally paid taxes than the taxpayer of any other county of the state.

These cases show the condition of the law down to the time when the bonds in the present case were issued and paid for. It seems to me that a consideration of this act shows clearly that its object was of a local and temporary nature. At this time townships were not authorized by general law to refund their indebtedness. It might very well be (and we must assume in support of the law that it was the case) that the indebtedness of this township was of such a character that it could not be paid off readily by taxation, and needed to be refunded in long-time obligations. The law does not apply to the future indebtedness of the township, but only to that which was in existence at the time of the passage of the act. Now, while it is true that the refunding of township indebtedness may be provided for by general laws, this, under the decisions already quoted, and especially that in *State v. Shearer*, 46 Ohio St. 275, 20 N. E. 335, is not a reason for holding that the subject-matter of the special law is necessarily general. In accordance with these decisions, it seems to me clear that at the time these bonds were issued the result of judicial construction of the constitution was that particular township indebtedness, as well as particular county indebtedness,

might be provided for by special act. Any other view cannot be reconciled with *Cass v. Dillon*, 2 Ohio St. 607, and *State v. Trustees*, 8 Ohio St. 394. It is true that in two decisions some years subsequent to the issuing of these bonds, to wit, in *Hixson v. Burson*, 54 Ohio St. 470, 43 N. E. 1000, and *State v. Davis*, 55 Ohio St. 15, 44 N. E. 511, the operation of section 26, art. 2, of the constitution, has been given a much broader effect, and the subject-matter of an act authorizing a particular county to build a county road, and a particular county to build a county bridge, and issue bonds therefor, has been declared to be of a general nature, and so invalid, because not having uniform operation. These decisions, however, expressly overrule the decision of the supreme court in *State v. Commissioners*, 35 Ohio St. 458, and are undoubtedly to be regarded as a change in the judicial construction of this section by the highest court of the state. I do not think it necessary to consider the question whether, even under these decisions, the legislation under discussion might not still be regarded as of a local nature, though the fact that the power might be conferred by a general act would seem, under those decisions, to render the special act conferring it invalid. It is quite sufficient to hold, in favor of a bona fide purchaser for value, that, under the judicial construction of the constitution in force at the time the bonds were issued, this act was not to be regarded as an act of a general nature, and was not, therefore, invalid. This principle is so well established that a reference need only be made, without discussion, to the cases. See *Douglass v. Pike Co.*, 101 U. S. 677, 25 L. Ed. 968; *Loeb v. Trustees* (C. C.) 91 Fed. 37.

3. Reliance is had upon section 7 of article 10, whereby it is provided that the commissioners of counties, trustees of townships, and similar boards, shall have such power of local taxation for police purposes as may be prescribed by law. It is said that this limits the power of the trustees of townships to incur any indebtedness except for police purposes, because it is implied that the township cannot contract debts except for purposes for which it may levy a tax. This contention cannot be reconciled with the language of Judge Thurman in the case of *Cass v. Dillon*, 2 Ohio St. 607, 622, already referred to. But it is immaterial, in this case, whether the township has power to contract debts for other than police purposes, because there was nothing on the face of the bonds to show that the existing indebtedness was contracted for anything but police purposes.

The act under which the bonds were issued being valid, for the purposes of this suit by the plaintiff, the question next arises whether, in the face of the recitals of the bonds, the defendant is entitled to show that there was no valid existing indebtedness at the time the bonds were issued, and that the real purpose of issuing the bonds was to obtain money with which to comply with another act of the legislature authorizing the township to issue bonds for railroad purposes,—a purpose plainly in violation of the constitution of Ohio. The act contains no express provision as to who shall determine what was the amount of the present existing, outstanding indebtedness. The bonds, however, were to be issued by the trustees of the township. They were the officers of the township properly charged

with the duty of incurring the indebtedness of the township, and therefore with the duty of determining, primarily at least, what was its valid indebtedness, in fixing the tax rate for its payment. There is no provision in the act referring to a public record of the indebtedness, and no requirement that such a record should be kept in the act itself. The second section does contain a provision that the bonds shall contain a recital that they are issued under and by authority of this act. It seems to me clear that this provision intends to confer upon the trustees of the township, in issuing the bonds, power to make a recital which shall show that the bonds have been duly issued under the act, and therefore that the limit of indebtedness prescribed by the act has not been exceeded in their issue. In other words, the act confers, by implication, upon the township trustees, the power to recite the fact which they do recite in the bond, to wit, that the valid outstanding indebtedness of the township is such as to justify the issue of the bonds in order to refund it. The case therefore comes clearly within the decision of the supreme court of the United States in *Commissioners v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; and not within the cases of *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040; *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; and *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065. It comes, also, within the case of *City of Cadillac v. Woonsocket Institution for Savings*, by the circuit court of appeals for this circuit (7 C. C. A. 574, 58 Fed. 935), and within the case of *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272, and the cases there cited.

It is plain that it was not the legislative intention to refer the purchasers of these bonds to the records of the township, from which it might be possible to make out the liabilities of the township accruing from time to time; but it was intended by the recital on the face of the bonds to save the purchaser from this necessity, and to justify him in relying upon the honesty of those recitals, which were to be made, it may be observed, by the same officers of the township who, under the law, would contract that indebtedness, and must provide for its payment.

These views lead me to the conclusion that the plaintiff is, in this case, entitled to a judgment for the full amount of the bonds and coupons sued upon, with interest, as claimed in the petition.

REISS et al. v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 77.

1. CARRIERS—CONSTRUCTION OF BILL OF LADING—PROVISIONS CHANGING COMMON-LAW LIABILITY.

Plaintiffs delivered cotton to defendant railroad company at a point in Texas for carriage over its line to New Orleans, and from there over a connecting steamship line to a foreign port. Defendant maintained a wharf at New Orleans, upon which it unloaded from its cars and piled cotton for export, and from which such cotton was taken by the steamship companies, being checked out from the piles, and receipted for at the

time it was loaded on the vessel. It was defendant's custom to notify the several steamship companies of the arrival at its wharf of cotton billed for shipment over their lines. After plaintiff's cotton had arrived and had been piled on the wharf, but before the steamship company had been notified of its arrival, it was destroyed by fire. The conditions of the bill of lading for such cotton were divided into two classes, one relating to the service until, the other to the service after, delivery at the port of New Orleans. Among the former was a clause providing that "no carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits further conveyance." *Held*, that under such provision defendant's liability as carrier was not changed to that of warehouseman prior to notification of the steamship company that the cotton was ready for delivery; that both the exemption from liability for delay and the substitution of liability as warehouseman must be construed as taking effect only after the service of defendant had been completed, and the property awaited the action of the connecting carrier.

2. **SAME—PLACE OF DELIVERY—PORT OF NEW ORLEANS.**

The delivery of the cotton by defendant at its wharf at West Wego, which is on the opposite side of the river from New Orleans, was a compliance with the bill of lading requiring its delivery at the port of New Orleans, although West Wego was not at that time within the boundaries of the port of New Orleans, as defined in the statute, it being, in a well-understood commercial and business sense, the part of that port where steamship companies rightfully expected to receive cotton from Texas for transportation to European ports.

In Error to the Circuit Court of the United States for the Southern District of New York.

Treadwell Cleveland, for plaintiffs in error.

Rush Taggart, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The plaintiffs, who are cotton merchants in the city of Liverpool, and aliens, delivered on October 30, 1894, at Temple, in the state of Texas, to the defendant, a railroad corporation created by virtue of an act of congress, and a common carrier from places in Texas to New Orleans, 200 bales of cotton, to be carried by the defendant from Temple to the port of New Orleans, and thence by Elder, Dempster & Co.'s line of steamships to Bremen, Germany. The conditions of the bill of lading which was issued for this cotton were divided into two classes, one relating to the service until, and the other relating to the service after, delivery at the port of New Orleans. All the bales arrived at West Wego on November 6, 1894, and 160 bales were unloaded on the next day, and the remaining 40 were also unloaded, but the day of unloading does not appear. All the bales were placed on the defendant's wharf, 120 bales at one point, and each lot of 40 bales at separate and different points. All the cotton was destroyed by fire on the evening of November 12th. At this time the wharf was loaded to its full extent with cotton, there being on the wharf over 20,000 bales, and 206 cars containing 8,000 bales. West Wego is in the parish of Jefferson, on the west bank of the Mississippi, opposite the upper end of the city of New Orleans. Before the construction by the defendant of a wharf and terminals at this point, it delivered all export cotton at its freight depot and warehouse on the east side of the river, in New

Orleans proper. The West Wego structure was completed in the early spring of 1893, and thereafter all export cotton coming from Texas was delivered to the steamship companies at West Wego, which was the port of New Orleans for export cotton in the popular business and commercial sense, though it was not included by statute of the United States in the customs district or port of entry of New Orleans until March 30, 1896. The conditions of the bill of lading which are important in this case "with respect to the service until delivery at the port of New Orleans" are as follows:

"(1) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damages thereto by causes beyond its control, or by floods, or by riots, quarantine, strikes, or stoppage of labor, or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet, or decay, or from any cause if it be necessary or is usual to carry said property upon open cars."

"(3) No carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee."

"(11) No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits further conveyance; and, in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of said property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer."

"(12) This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port; and the inland freight charges shall be a first lien, due and payable by the steamship company."

The defendant was in the habit, in 1894, of making contracts with divers steamship companies, including Elder, Dempster & Co.'s line, in New Orleans, by which they were to transport to European ports cotton received by them at the defendant's wharf at West Wego. The particular contract under which Elder, Dempster & Co. were to transport the plaintiffs' bales was dated October 19, 1894, and was in the form of a letter to the agents of the steamship company from the agent of the defendant, saying that he had engaged 1,000 bales of cotton for shipment by their line to Bremen at a specified rate. The course of business between the steamship lines and the defendant was stated in *Texas & P. Ry. Co. v. Clayton*, 28 C. C. A. 142, 84 Fed. 305, and was as follows:

"This wharf was at the terminus of a branch of the defendant's line of railway on the bank of the Mississippi river, and was built out over the river far enough so that cars could be run upon the tracks in the rear of the wharf and unloaded, and vessels come to the front of the wharf and receive the freight thus unloaded. It was controlled exclusively by the defendant, and used by it for the temporary storage of freight of all kinds brought over its railway and awaiting delivery to the consignees or for transportation by vessels. * * * Upon the shipment of the cotton in Texas, bills of lading would be issued to the shipper. Thereupon the cotton would be loaded in cars of the defendant, and a waybill giving the number and initial of the car, the number and date of the bill of lading, the date of the shipment, the names of consignor and consignee, the number of bales forwarded on that particular waybill, the marks on the cotton, the weight, etc., would be given to the conductor of the train bringing the car to West Wego. Upon the receipt of the waybill and car at West Wego, a skeleton would be made out by the defend-

ant's clerks at West Wego, for the purpose of unloading the car properly, containing the essential items of information covered by the waybill, and the date of the making of the skeleton. When this skeleton had been made out, and the car had been side-tracked at the rear of the wharf, the skeleton would be taken by the defendant's check clerk, and he would proceed with a gang of laborers to open the car. The cotton would then be taken from the car, examined to see that the marks corresponded with the items upon the skeleton, and deposited in one of the sheds upon the wharf designated by the check clerk, and the check clerk would mark upon the skeleton the location of the cotton. The sheds were subdivided into fifteen sections, and the location of the cotton was left to the check clerk. The skeleton would then be transmitted to the general office of the defendant, and the defendant would make out a 'transfer sheet,' containing substantially the information contained in the waybill, and transmit the transfer sheet to the steamship line. The steamship line, upon receiving the transfer sheet, understood that cotton for their vessels was on the wharf at West Wego, and would collate the transfers relating to such cotton as was destined by them for a particular vessel, return the transfer sheet to the defendant, and advise defendant what vessel would take the cotton. Thereafter the steamship company, when it was ready to take the cotton, would send the vessel, with their stevedores, to the wharf, the defendant's clerk would go with the master of the vessel, and identify and count out the particular lots of cotton designated for his vessel, the master would O. K. them, and the stevedores would thereupon take the cotton and put it on board the ship. Before the cotton left the wharf, the defendant would obtain a receipt for it from the master of the ship."

No transfer sheets respecting the cotton in suit, and no notice of its arrival at West Wego, were ever sent to the steamship company. A practice has grown up since the fire for a vessel to receive cotton which had arrived in accordance with the bill of lading for which the ship had room, although the steamship company had not received transfer sheets; that is, to receive any cotton which entirely corresponded with the bills of lading for which it had room, and receipt for it. This cannot be stated as at any time a general usage. The case turned in the circuit court upon the construction of clause 11 of the bill of lading, and the circuit judge was of opinion that the term "awaiting further conveyance" meant not only when the next carrier was about to take possession, but when the property had been unloaded from the cars, and placed in proper position for future transportation, although notice of arrival or tender of delivery has not been made. He therefore directed a verdict for the defendant, and to review the judgment which was entered upon the verdict this writ of error was taken.

The subject of the obligation of a carrier, at common law, towards property while it is in transportation to its ultimate destination, and is to be taken by a connecting carrier, was considered in *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318, 21 L. Ed. 297; *Texas & P. Ry. Co. v. Clayton*, 173 U. S. 348, 19 Sup. Ct. 421, 43 L. Ed. 725; *Id.*, 28 C. C. A. 142, 84 Fed. 305; and *Goold v. Chapin*, 20 N. Y. 259. In the first-named case it is said:

"In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier beyond; and that public policy requires that the rule should be enforced, and will not allow the carrier to escape responsibility at the end of his route without delivery or an attempt to deliver to the connecting carrier."

Furthermore, in the like absence of a special contract, it was said in the *Clayton Case*, in this court:

"Although the second carrier, after notice and a request to do so, has neglected for an unreasonable time to receive the goods, the first carrier must, to exonerate himself as an insurer, in some way clearly indicate his renunciation of the relation of carrier."

The mere unreasonable delay of the connecting carrier is not sufficient to convert the first carrier into a warehouseman. This renunciation is ordinarily shown by notice to the connecting carrier that the property will be kept or stored at its risk until compliance with the request to remove. *Texas & P. Ry. Co. Cases*, *supra*. This rule of law being admitted, it is said by the defendant that a special contract was clearly stated in its bill of lading, by which it became a warehouseman from the time that the cotton was unladen and piled upon the wharf to await cartage to the steamship. It is not claimed that the facts bring the carrier's liability within clause 3 of the bill of lading, which says that the liability shall end after the property "is ready for delivery" to the next carrier, for it is conceded that the goods are not awaiting delivery before any notification of their arrival to the connecting carrier. *McKinney v. Jewett*, 90 N. Y. 267. It is, however, insisted that the fair construction of clause 11 is that, when the act of transportation of the cotton to the wharf at West Wego has been accomplished, and it has been stacked on the wharf, and "is awaiting further action in the way of notification and advice to the succeeding carrier," it awaits further conveyance. By this construction the parties substituted an immediate cessation of the liability of a carrier, and the assumption of the liability of a warehouseman for the liability imposed by the common law, and doubtless they were at liberty to make a contract of limitation which will be enforced if the language of the bill of lading clearly indicates that such was their intention. In order to justify the defendant's construction, the claimed extent of the departure from the implied contract of the common law must clearly appear in the language which is used in the special contract. The clause, "no carrier shall be liable for delay," when applied to the facts in this case, meant that the defendant should not be liable for the delay of the steamship company, but delay would not occur until it knew or had heard of the time of arrival of the cotton. The same idea of notification to the connecting line must also run through the entire paragraph, and, while the term "awaiting further conveyance" literally means "awaiting the time when the next carrier shall take the property in hand," it seems improbable that it was the intent of the language that the liability of the carrier should terminate upon the deposit of the property upon the wharf. The language is too indefinite to support the conclusion that notice to the connecting line was not a prerequisite to the change of liability to that of a warehouseman. It may well be that such change would take place when the property was awaiting conveyance by the connecting line which had been notified to receive and convey, but until then it is not awaiting conveyance; it is awaiting the action of the first carrier. The term must mean awaiting conveyance by the person upon whom the duty of conveyance devolved, and no such duty devolved until notice of the arrival of the property had been given. The pro-

visions of the bill of lading in *Draper v. Canal Co.*, 118 N. Y. 118, 23 N. E. 131, which was construed to free the carrier from liability from the time the property reached the point of destination, were far more definite than those in this case. In the direction of a verdict for the defendant, when no notice of the arrival of the property had been given to the next carrier, or had been received by it, we think that error was committed.

The plaintiff in error also made the point that by the bill of lading the cotton was to be delivered at the port of New Orleans, and that, therefore, the defendant had no right to unload it at West Wego. It is true that West Wego was not, in 1894, within the boundaries of the port of New Orleans, as defined in the statute of the United States, but it was, so far as export cotton is concerned, that port in the well-understood commercial and business sense, and was the part of the port of New Orleans where steamship companies rightfully expected to receive cotton from Texas for transportation to Europe. A kindred subject in regard to the limits of the port of New York was carefully considered in *Devato v. 823 Barrels of Plumbago* (D. C.) 20 Fed. 510; *Sailing Ship Garston Co. v. Hickie*, 15 Q. B. Div. 580; *Price v. Livingstone*, 9 Q. B. Div. 679. If the circuit judge should be of opinion that the liability of the defendant was that of a warehouseman, the plaintiff asked to go to the jury upon the question of negligence of the defendant as a warehouseman in not taking larger precautions against fire when an accidental fire might reasonably have been expected. Inasmuch as we are of opinion that the defendant was not a warehouseman, any expressions upon the subject of negligence would be obiter. The judgment of the circuit court is reversed, with the costs of this court, and the case is remanded to that court for a new trial.

TEXAS & P. RY. CO. v. CALLENDAR et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 87.

CARRIERS—CONSTRUCTION OF BILL OF LADING.

A provision of a bill of lading that "cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire," affects not only such other provisions of the contract as relate to the subject of fire, but the latter clause applies to all other provisions which modify the common-law liability of the carrier,—such as that it shall not be liable for loss or damage to the property after it is ready for delivery to another carrier or the consignee, or shall only be liable under certain circumstances as warehouseman; and where the subject of the shipment is cotton, and it is destroyed by fire, the liability of the carrier is in all respects governed by the common law.

In Error to the Circuit Court of the United States for the Southern District of New York.

Rush Taggart, for plaintiff in error.

Treadwell Cleveland, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The defendants in error, who were the plaintiffs in the circuit court, and are hereafter called the "plaintiffs," who are partners doing business in Liverpool, and are aliens, delivered, in October, 1894, to the plaintiff in error, hereinafter called the "defendant," a railroad corporation organized under an act of congress, and a common carrier of merchandise from sundry places in Texas to the port of New Orleans, 207 bales of cotton, to be carried to New Orleans by the defendant, and thence to Liverpool by the Elder, Dempster & Co.'s line and the Harrison line of steamships. All the cotton arrived at West Wego between October 17 and October 29, 1894, and was unloaded between the 17th and the 30th days of the same month. Notification by "transfer sheets" of the arrival and unloading of the cotton was sent to the steamship companies for most of the cotton as early as November 2d, and for a few of the bales as late as November 10th, and by the return of the transfers was acknowledged by one of the companies. One hundred and eighty-seven bales of the plaintiffs' cotton were burned in a fire which broke out on the wharf on the evening of November 12th, and to recover damages for the loss this suit was brought. The relation of West Wego to the port of New Orleans, the ownership and manner of use of the defendant's wharf and terminals at West Wego, and the course of business between the defendant and the steamship lines in regard to cotton for export, were fully stated in the opinion of this court in *Texas & P. Ry. Co. v. Clayton*, 28 C. C. A. 142, 84 Fed. 305, affirmed in 173 U. S. 348, 19 Sup. Ct. 421, 43 L. Ed. 725, and in *Reiss* and others against the same company (98 Fed. 533), which has recently been decided in this court, and need not be restated here.

The clauses in the bill of lading which bear upon the question in this case are as follows:

"(1) No carrier or party in possession of all or any of the property herein described shall be liable * * * for loss or damage to property of any kind at any place occurring by fire, or from any cause except the negligence of the carrier."

"(3) No carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee.

"(4) Cotton is excepted from any clause herein on the subject of fire, and the carrier shall be liable as at common law for loss or damage of cotton by fire. No carrier shall be liable for differences in weights, or for shrinkage of any grain or seed carried in bulk."

"(11) No carrier shall be liable for delay, nor in any other respect than as warehouseman, while the said property awaits further conveyance, and, in case the whole or any part of the property specified herein be prevented by any cause from going from said port in the first steamer of the ocean line above stated leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer.

"(12) This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port; and the inland freight charges shall be a first lien, due and payable by the steamship company."

The circuit judge, being of opinion that the exception in clause 4 in regard to cotton controlled the provisions not only of clause 1,

but controlled also that portion of clause 3 and of clause 11 which altered the obligations of a common carrier as established by the common law, directed a verdict in favor of the plaintiffs, and denied the request of the defendant to go to the jury upon the whole case, or upon the question of delivery. To review the judgment upon the verdict, this writ of error was taken.

The principal question in the case is upon the proper construction of the sentence in clause 4 in relation to the liability of the defendant for loss of cotton by fire. The bill of lading was prepared for a contract in regard to property of any kind, and in clause 1 the carrier was exempted from liability from loss by fire except through his negligence. The part of the sentence in clause 4, "cotton is excepted from any clause herein on the subject of fire," probably refers only to clauses wherein fire is mentioned; but the concluding part of the sentence, "and the carrier shall be liable as at common law for loss or damage of cotton by fire," has a wider sweep, and means that the carrier, notwithstanding limitations of its common-law liability which are provided in the bill of lading, retains such liability in regard to damage to cotton by fire. The clause, as a whole, intended to leave and did leave unaltered the implied liability of the carrier for loss to cotton by fire. The limitations which the parties did permit were contained in clauses 3 and 11, which said that the carrier should not be liable for damage after a readiness to deliver, or otherwise than as a warehouseman after the property awaited further conveyance. Whatever may be the extent of these limitations, they were, to a certain degree, modifications of the common-law liability of the first carrier, but its liability at common law for loss to cotton by fire remained intact. The request of the defendant to go to the jury upon the question of delivery of the cotton was properly refused. There was no evidence of a delivery. The cotton was never in the actual or constructive possession of either of the steamship companies, and neither was ready to take it from the defendant's possession, and therefore clause 12 has no bearing upon the question of the defendant's liability. The judgment of the circuit court is affirmed, with costs.

JUDSON et al. v. GAGE, Secretary of the Treasury.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 114.

1. JUDGMENT—WHAT CONSTITUTES—ORAL OPINION OR FINDING.

An orally expressed opinion or finding of a judge in a case not tried to a jury does not, according to the practice of the federal courts, constitute a judgment, and is subject to modification or change until it has become a written order of the court.

2. SAME—POWER TO SET ASIDE.

Where a formal written judgment is not made and signed until the term succeeding the one at which the matter was orally determined, the judgment comes into existence only at the later term, and remains subject to the control of the court until the close of such term.

8. APPEAL—APPEALABLE JUDGMENT OR ORDER.

After having orally approved the report of a committee selected to appraise the value of real estate in condemnation proceedings, the cause was continued. At the succeeding term a formal judgment was entered on the award, which was subsequently, at the same term, vacated, and the award of the committee set aside. *Held* that, conceding the action of the court in setting aside the award to have been erroneous, it was not without jurisdiction or void, and hence there was no final decision in the cause which could be reviewed on a writ of error.

In Error to the District Court of the United States for the District of Connecticut.

On motion to dismiss a writ of error.

Geo. P. Carroll, for the motion.

Robert E. De Forest, opposed.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The proceeding is a motion to dismiss a writ of error upon the ground that the judgment which is sought to be reviewed was not a final judgment. The plaintiff in error has brought, and there is now pending, a petition for a writ of mandamus to require the settlement of a bill of exceptions in regard to matters not apparent in the record of the judgment. The secretary of the treasury brought an application to the district court for the district of Connecticut for the condemnation of described land in Bridgeport, Conn., which he had selected for an addition to the post office in that city; being thereunto authorized by acts of congress approved June 4 and July 19, 1897 (30 Stat. 11, 112). The land belonged to R. M. Judson. The statute of Connecticut, under which the condemnation proceedings were conducted, provides that the court shall appoint a committee of three men, who shall ascertain the value of the land, and the damages to the owner from the taking, and report their doings to the court, which may accept the same, or, in case of irregular or improper conduct on their part, reject the report and appoint another committee. The United States district attorney and the attorney for Judson selected three persons, called, in the written submission signed by the said attorneys, "arbitrators," and submitted to them the question of damages to Judson by reason of the enlargement of the post office, who heard the parties, and on August 8, 1898, awarded to Judson \$32,000. At the December term, 1898, viz. on January 3, 1899, a judgment was entered of the acceptance of the award by the court, and for the payment to Judson of \$32,000. Subsequently, at the same term, the secretary of the treasury moved that the judgment be opened, and that the award should be set aside. The counsel for Judson moved that the motion to open the judgment be denied for want of jurisdiction, which was denied, the judge making the following memorandum:

"Counsel for defendant contend that this court has no jurisdiction, because the award was presented to the court during the preceding term, and they claim judgment was then rendered thereon. In support thereof they rely upon the following entries in the minute book of the judge:

"Oct. 5. (517) Gage, Sec'y Treasury, vs. Judson. Award of \$32,000 in favor of Judson, and U. S. is satisfied with award, and asks report be accepted, and discontinue as to others. Order discontinuance granted. Balance continued.

"Oct. 7. U. S. (Gage) vs. Judson. Award approved and accepted; \$32,000."

"These minutes are not in any sense the entries of a judgment. They are the mere memoranda of the judge as to the proceedings in court, and as to the course to be pursued when the judgment file shall be presented."

After a hearing upon the motion to set aside the judgment, the court, on May 23, 1899, ordered:

"That inasmuch as the court was never called upon to appoint any committee to assess damages for the taking of the land in question, and inasmuch as the arbitrators herein acted without any authority from or appointment by the court, an order may be entered vacating said award, and vacating the judgment as appears of record, approving and accepting said award."

Thereupon the secretary of the treasury applied for the appointment of a new committee, but the hearing was postponed during the pendency of this writ of error. The proceeding under the statute of Connecticut is simply for the ascertainment of damages to the owner of the land, and can be styled an action at law, in which a writ of error is the proper mode of procedure by which the judgment of the trial court may be reviewed.

Upon the facts, as disclosed in the record, it is manifest that no final decision has been rendered in the district court. In behalf of Judson it is asserted that a bill of exceptions would show that a final judgment accepting the report of the committee had previously been made at the August term, 1898, viz. on October 7, 1898; that the court was without jurisdiction to proceed further in the case; and that the order of the succeeding term was void. The court was asked on May 26, 1899, to settle a bill of exceptions. The substantial facts which Judson desires to have appear in his proposed bill of exceptions were the agreement of the parties upon the so-called arbitrators,—facts from which the sanction of the court to the appointment of such persons as a committee may be inferred; that the report of this committee was presented to the court for acceptance by the plaintiffs' attorneys; that the court on October 7, 1898, orally accepted it, and made a memorandum thereof; that afterwards, at the following term, on January 3, 1899, upon the plaintiffs' motion, the formal judgment was signed; and that no objection was made to said report until February 6, 1899. We are of opinion that, assuming all the facts set forth in the petition for mandamus to be true, there has been no final decision by the district court which can now be reviewed by writ of error. The contention of the plaintiff in error is that an orally expressed opinion or determination of the judge to accept the report is an acceptance which operates as a judgment, although no judgment or order of acceptance was made a matter of record. Such is not, according to the practice of the federal courts in the district of Connecticut, or, as it is believed, elsewhere, the effect of a mere oral opinion or oral finding of a court in a case without trial by jury. It does not take effect, and is liable to be modified or changed, or

delayed, if, in the opinion of the judge, there is reason for change, until it is entered of record. The oral expression of the district judge in regard to the propriety of the acceptance of the report is not a judgment until it has become a written order of court. Until then, it has not taken the form of an authoritative decree, and is not operative. *Anglo-California Bank v. Mahony Min. Co.*, 5 Sawy. 255, Fed. Cas. No. 392; *U. S. v. Gomez*, 1 Wall. 690, 17 L. Ed. 677. A judgment in form was not asked for. The cause was continued until the next term of court, when some one, apparently recognizing that the cause was not at an end, prepared a written judgment, which was signed by the judge, and which spoke from that term. The entry of a written judgment or order of court is now, under the existing rules of practice of the state courts in Connecticut, apparently required, upon the ground that, until the decision of the court has become a written judgment, it is not operative. *Vincent v. McNamara*, 70 Conn. 332, 39 Atl. 444. The cause, having been properly and necessarily continued to the December term, 1898, was within the court's control. The judgment of January 3d was entered and was set aside during the same term; for, if a proper cause is made, a "control of the court over its own judgments during the term is of everyday practice." *Bassett v. U. S.*, 9 Wall. 38, 19 L. Ed. 548. It is said in behalf of Judson that no proper cause was shown, and that the committee had been sanctioned or approved by the court, which had no jurisdiction to set aside their report, unless for their irregular or improper conduct. In taking this position, the learned counsel for Judson do not recognize the distinction between error on the part of the trial court and lack of jurisdiction. The district judge, because, in his opinion, "the arbitrators herein acted without any authority from or appointment by the court," vacated the judgment which had been entered. It may be that the judge drew an erroneous conclusion from existing facts, but his jurisdiction existed, and his act in setting aside his previously entered judgment is not void. He said, in substance:

"This committee not being of my appointment, or created by my act, they were without authority to act as a committee of the court. Therefore, having been mistaken as to the character of their report, I vacate the decree of acceptance."

The conclusion, if erroneous, was not void or beyond his jurisdiction. *Humphries v. District of Columbia*, 174 U. S. 190, 19 Sup. Ct. 637, 43 L. Ed. 944; *Maxwell v. Stewart*, 21 Wall. 71, 22 L. Ed. 564; *Ex parte Bigelow*, 113 U. S. 328, 28 L. Ed. 1005; *In re Eckart*, 166 U. S. 481, 17 Sup. Ct. 638, 41 L. Ed. 1085. The decision simply said that the committee, as theretofore created, was not a committee of the court. It did not prohibit their appointment, did not limit the amount of damages, and the case is now awaiting the appointment and the action of a new committee, no final decision having been reached. The motion to dismiss the writ of error is granted, without costs of this court.

PAINTER v. NEW RIVER MINERAL CO.

(Circuit Court, W. D. Virginia. December 14, 1899.)

1. PLEADING—AMENDMENT OF DECLARATION—CHANGING CAUSE OF ACTION.

Where the original declaration in an action of trespass sought to recover damages for injury to plaintiff's realty and its use and occupation by reason of the deposit thereon of refuse and washings from defendant's ore washers, an amended declaration, which counts on the same injuries, merely stating the facts in more amplified form, is one a recovery upon which would have been barred by a recovery on the original declaration, which would be supported by the same evidence, is governed by the same rules as to damages and subject to the same plea, and hence does not state a new cause of action.

2. REMOVAL OF CAUSES—TIME OF APPLICATION—EFFECT OF AMENDMENT OF DECLARATION.

Where the time for filing a petition for the removal of a cause has expired, the cause is not rendered removable by the filing of an amended declaration, which does not state a new cause of action:

On Motion to Remand to State Court.

J. C. Wysor and Waller S. Poage, for plaintiff.

Walker & Caldwell and J. C. Blair, for defendant.

PAUL, District Judge. A motion is made to remand this case to the circuit court of Wythe county, from which it was removed into this court. The record, as it stands on the docket of this court, commences with a summons issued by the clerk of the circuit court of Wythe county on the 18th day of June, 1898, requiring the defendant to appear on the next rule day, July 3, 1898, to answer an amended declaration filed by W. M. Painter. The original declaration in this case was filed in the state court at June rules, 1893. The case was then removed by the defendant into this court, where it continued on the docket until the May term, 1898, when, on motion of the plaintiff, it was remanded to the state court. The grounds of the motion to remand were that no transcript of the record from the state court had been filed in this court, as required by act of congress of March 3, 1887 (24 Stat. 554), and that no petition had been filed in the state court, as required by the statute. The original papers in the case had been taken from the clerk's office of the state court, and delivered to the clerk of this court. After the case had been remanded, and the plaintiff, Painter, had filed an amended declaration in the case in that court, the defendant appeared at the rules to which the summons on the amended declaration was returnable, and filed its petition and bond for the removal of the case into this court, and the same was removed. The transcript of the record from the state court includes only the proceedings on the amended declaration, and omits all of the record in the case beginning with the original writ and declaration. The plaintiff moves to remand the case on the grounds that the record is incomplete; that, the case having been once remanded because of the failure of the defendant to comply with the requirements of the statute, the defendant cannot remove the case again into this court on the amended declaration; that it is one and the same case, and that the original and amended declarations are parts of the same rec-

ord; that no removal can be had on an amended declaration five years after the original declaration was filed. The defendant claims that the amended declaration makes a new cause of action, and that it had a right to appear, and have the case removed into this court, in the same way, and within the same time, as in the case made by the original declaration. Whether the case made by the amended declaration constitutes a new cause of action can best be ascertained by comparing the original and amended declarations. The defendant, in pursuance of an order of this court, has filed for its inspection a copy of the record as made in the state court on the original declaration.

The original declaration is as follows:

"Virginia, Wythe County, to wit: In the Circuit Court of said County. Wm. M. Painter, the plaintiff, complains of the New River Mineral Company, defendant, of a plea of trespass on the case, for this, to wit: That heretofore, to wit, on the ——— day of April, 1892, and within twelve months before the bringing of this suit, and at the time of the committing of the grievances hereinafter mentioned, and up to the time of the issuance of the writ in this case, was lawfully possessed in fee of a certain tract of land at Ivanhoe, in Wythe county, Va., upon which was and is situated a certain valuable spring (and also a certain other valuable spring near by), situated on the lands of the West Ivanhoe Land and Improvement Company, plaintiff having purchased the same from said company, the said two springs being used by plaintiff for domestic purposes; and also a certain storehouse building at Ivanhoe, in said county; and also of certain lands upon which dwellings and other buildings have been erected and are now situated, and through which a certain stream or branch flows. And the said plaintiff avers that he, being so possessed of right, ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit, use, and advantage of the waters of the said springs for the purpose aforesaid, free from injury, pollution, overflow, or diversion, and enjoy the benefit, use, and advantage of the said storehouse building, and enjoy the benefit, use, and advantage of the said lands upon which the said dwellings were and are now situated, and through which the said stream or branch flows, all free from injury, hurt, pollution, diversion, or damage, save and except at such times and on such occasions when it might be reasonable and necessary for the defendant company to use such quantities of the waters of the said branch as might be necessary for its legitimate and proper purpose and uses; yet the defendant company, intending to injure the plaintiff, established and erected at and near the plaintiff's two springs, storehouse building, and lands, and the stream aforesaid, large ore washers, to be used for the purpose of washing and cleansing iron and other ores, and separating the same from the dirt, mud, and refuse matter; and the said defendant company, having so established and erected the said ore washers, unlawfully and wrongfully pumped and conveyed from New river, which is near by, large quantities of water, by means of engines, ditches, and flumes, to said washers, and unlawfully and wrongfully diverted and turned and conveyed large quantities of the waters of a certain stream or branch from its ordinary and natural bed, and carried and conveyed the same to the ore washers aforesaid. And plaintiff avers, that said defendant company, having pumped and conveyed the water from the river aforesaid, and having diverted the stream as aforesaid, then and there, at the said ore washers, used the said large quantities of water at the said place for the purpose of washing daily very large quantities of dirt, mud, ore, and matter. And plaintiff avers that said defendant company, having used the water at said place for the purpose aforesaid, so carelessly, negligently, and in such an improper manner carried and conducted and conveyed the polluted water filled with mud, dirt, sediment, and refuse matter from the ore washers aforesaid to said New river that large quantities of the dirt, mud, sediment, and refuse matter were thrown out upon and on the lands of plaintiff, and the two springs aforesaid were daily overflowed and polluted in the manner aforesaid, and large quantities of mud, sediment, dirt,

and refuse matter were thrown into and deposited near and around the same, so as to render the waters thereof wholly unfit for the use of plaintiff and family, or for any domestic use; and plaintiff was and is wholly dependent on the use of said water or springs, and the health of the members of plaintiff's family was and is greatly endangered, injured, and impaired by the overflow and pollution and deposits aforesaid. And plaintiff avers that large quantities of the dirt, mud, sediment, and refuse matter from the ore washers aforesaid have been, by the water aforesaid, cast up and deposited under the storehouse building aforesaid to such an extent that in cold weather the same, by freezing, raised the floor of said building, and warped the sides thereof, and injured the pillars of same, and damaged the same. And plaintiff avers that large quantities of the dirt, mud, sediment, and refuse matter from the ore washers aforesaid have been, by the water aforesaid, cast up and deposited on the lands of plaintiff, where the other buildings aforesaid are located, to the great damage and injury of the same. And plaintiff further avers that, as a consequence of the pollution and injury and damage and destruction of the springs aforesaid, a large reservoir at plaintiff's house, to which the water was pumped from the springs aforesaid, was totally destroyed, so as to be rendered valueless to plaintiff. And plaintiff alleges that by reason of the matters and things in this declaration set out he has sustained injury and damage to the amount of \$5,000, and therefore he sues."

The following is the amended declaration:

"Virginia, Wythe County, to wit: In the Circuit Court of said County. Wm. M. Painter, plaintiff, complains of the New River Mineral Company, defendant, a duly-incorporated company, in this amended declaration of a plea of trespass on the case, for this, to wit: That heretofore, to wit, on the ——— day of April, 1892, and within twelve months' time from the bringing of this suit as set forth in the original declaration in this case, and at the time of the committing of the grievances hereinafter mentioned, and up to the time of the issuance of the writ in this case, was lawfully possessed in fee of a certain close, and was the owner thereof, situated in the town of Ivanhoe, Wythe county, Va., and upon which was and is situated a certain dwelling house, and in which dwelling house plaintiff and his family at the time hereinafter mentioned dwelt and inhabited, and still do inhabit and dwell in, and upon which there is situate a certain storehouse in which plaintiff at the time mentioned in this declaration carried on the business of merchandising, and in which he still carries on said business, and upon which there are also situate three tenement houses which plaintiff at the time of the grievances hereinafter mentioned kept for rent, and also a certain valuable spring, from which plaintiff and his family obtained water for household and domestic purposes. Nevertheless the said company, contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said plaintiff and his family in the possession, use, and enjoyment and occupation of his said storehouse and stock of goods therein, and in the use and enjoyment of the said waters of said spring for the purpose aforesaid, and in the use and occupation of his said tenement houses, and to render the same unfit for habitation, and whilst the said plaintiff was so possessed thereof, and so resided with his family aforesaid, the said defendant company, to wit, on the ——— day of April, 1892, and divers other days and times between that day and the day of the institution of this suit, wrongfully and unjustly, and without the right or authority to do so, deposited at its ore washers and machinery for conducting its operations near plaintiff's said premises and buildings on the water of a certain stream known as the 'Nuckolls Spring Branch' vast quantities of earth, dirt, mud, gravel, iron ore, and other waste material, and refuse matter from the washers aforesaid, which being carried by the waters of said branch and the water conveyed by said company from a certain branch known as the 'Powder Mill Branch,' and also from New river, to the plaintiff's close, and through which the waters of said Nuckolls Spring Branch flow, was, by the waters of said branch and the water pumped to said ore washer from the branch and said New river, cast in large quantities upon and about the premises, and lands, and close, and storehouse, and tenement houses, and spring of plaintiff, and continued therein and thereon during all the time aforesaid, whereby the wa-

ters of said spring became polluted, and impure, and unfit for household and domestic uses and purposes, and the plaintiff and his family vexed, annoyed, and discommoded in the use and enjoyment of plaintiff's dwelling house; and also the said plaintiff's storehouse became thereby damaged by the deposit under the storehouse building aforesaid and around the same, in large quantities, of dirt, earth, mud, sediment, and refuse matter from the ore washers aforesaid, so that in cold weather the same, by freezing, raised the floor of said building, and warped and twisted the sides thereof, and injured the pillars of the same, and damaged the same, and he was thereby prevented and hindered from carrying on his trade and business as a merchant in as profitable and beneficial a manner as, before the committing of said grievances by the said defendant company, he had been used and accustomed to do. And so the plaintiff says that by the acts and conduct of the said defendant company in committing the grievances in this count set forth, he hath sustained loss and damage to a large amount, to wit, in the sum of \$5,000. Second count: And for this also: That the said plaintiff, before and at the time of committing the grievances hereinafter mentioned, and from thence hitherto, hath been, and still is, the owner in fee of a certain close and of certain lands in and near the town of Ivanhoe, in Wythe county, Va., upon which are located two certain valuable springs from which plaintiff and his family obtain water for household and domestic purposes and uses, the water from said two springs being forced and pumped to the dwelling house of said plaintiff by means of rams and pipes. Nevertheless the said defendant company contriving and wrongfully and unjustly intending to injure, prejudice, damage, and aggrieve the said plaintiff and his family in the possession, use, and enjoyment of said two springs, and in the use and enjoyment of the water of said two springs for the purpose aforesaid, whilst the said plaintiff was so possessed thereof, and whilst the said water was forced and pumped to the house of said plaintiff as aforesaid, and whilst the said plaintiff resided with his family in his said dwelling house located on said land, said plaintiff, to wit, on the _____ day of April, 1892, and at the time of the filing of the original declaration in this case, and up to the time of the bringing of this suit set out in said original declaration, wrongfully and unjustly, and without any right to do so, deposited at its ore washers and machinery, for conducting its mining and washing operations, near plaintiff's said premises, and close, and springs on the waters of a certain stream known as 'Nuckolls Spring Branch,' vast quantities of earth, dirt, mud, gravel, iron ore, waste material, and refuse matter from the washers aforesaid, being carried by the water of said branch and the water conveyed by said company from a certain branch known as the 'Powder Mill Branch' and from New river to the plaintiff's close, and through which the water of the said Nuckolls Spring Branch flows, was by the waters of said branch, and by the waters of the Powder Mill Branch, and by the waters pumped and conveyed from said New river by the defendant company, cast in large quantities in, about, and upon the lands, premises, and close of the plaintiff, and thereby the waters of his said two springs became polluted, impure, and unfit for household and domestic use, and the reservoir wherein the said waters were pumped and conveyed became wholly ruined and destroyed, and plaintiff's said two springs, located as aforesaid, were filled up and destroyed by the mud, gravel, waste material, and refuse matter aforesaid, and the said water pipes were also covered up and filled up with mud, earth, dirt, gravel, waste material, and refuse matter, so as to become wholly worthless. And so the plaintiff avers that by reason of the destruction of the said two springs by the defendant company, as set out in this declaration, in the manner and form aforesaid, and by its acts and conduct in this behalf in committing the grievances aforesaid, he hath sustained loss and damages to a large amount, to wit, the sum of \$5,000, and therefore he sues."

From an inspection of the original and amended declarations it is seen that the parties are the same; that both declarations are in trespass, and the damages alleged the same; that the recitals as to the plaintiff's premises, the buildings and the springs thereon, the statement of the alleged injury, and the means by which the same was

caused, are substantially the same in both declarations. In both it is alleged that the injury complained of was caused by deposits on the plaintiff's premises, from the defendant's ore washers, of dirt, gravel, and other waste material and refuse matter. In the original declaration it is alleged that the injury was done by the defendant conveying large quantities of water from New river to its ore washers, and by diverting a certain stream from its natural bed, and conveying the waters thereof to its ore washers. In the amended declaration it is alleged that the water was conveyed to the ore washers from Powder Mill Branch and New river to Nuckolls Spring Branch, which flowed through the plaintiff's premises, and by which dirt, gravel, iron ore, and other waste material were carried on the plaintiff's premises, to his injury. The full extent to which the amended declaration goes is to vary the manner of stating the cause of action. It does not introduce a new cause of action, and thereby make a new case. It simply amends the pleading of the original declaration, and in considering the question of removal to this court it must be regarded as part of the original declaration, and subject to the same limitations as to the time within which, under the statute of 1887, action must be taken to secure a removal from the state to the federal court. The doctrine as to what constitutes a new cause of action is thus stated in 1 Enc. Pl. & Prac. 556, 557:

"It has been declared to be a fair test in determining whether a new cause of action is alleged in an amended declaration to inquire if a recovery had upon the original complaint would be a bar to any recovery under the amended complaint, or if the same evidence would support both, or if the same measure of damages is applicable, or if both are subject to the same plea; and in some cases the intention of the plaintiff when he instituted the suit may have a distinct potency in deciding whether an amendment constitutes an unwarranted departure."

Applying this test to the amended declaration, it is clear that a recovery on the amended declaration would bar a recovery on the original declaration; the same evidence showing that injury had resulted to the plaintiff by overflowing his property with water and waste material from the defendant's ore washers. The same measure of damages is applicable under both declarations; that is, compensation to the plaintiff for injury done him by the wrongful acts of the defendant. Both declarations are subject to the same plea, which is the general issue of not guilty. The intention of the plaintiff was manifestly the same when he instituted the suit as when he filed the amended declaration. That was to recover damages for injury done him by the overflow of his premises, and the deposit of damaging materials thereon, from the ore washers of the defendant company. The merits of the cause of action stated in the original complaint are preserved in the amended declaration, but are set forth in a more amplified statement. The causes of action are of the same nature, and the same judgment could be given in each. 4 Minor, Inst. pt. 1, 365; *Id.* pt. 2, 946; *Chamberlain v. Mensing* (C. C.) 51 Fed. 511. The petition for removal of the original action not having been filed within the time prescribed within the statute, and the amended declaration not making a new cause of action, the case must be remanded to the state court.

CREBS v. CITY OF LEBANON.

(Circuit Court, W. D. Missouri, S. D. October 3, 1898.)

No. 136.

1. MUNICIPAL CORPORATIONS—ORDINANCES—FAILURE TO RECORD.

The validity of a city ordinance or resolution is not affected by the fact that, through an oversight of the clerk, it is not copied upon the city records.

2. SAME—MODE OF ACTION BY COUNCIL—ORDINANCE OR RESOLUTION.

It is immaterial that an ordinance required to be submitted for ratification to the electors of a city is submitted by a resolution of the council, instead of by an ordinance, where the resolution contains all the essentials of an ordinance.

3. SAME—ESTOPPEL TO AVOID CONTRACT—IRREGULARITY IN ELECTION.

Where a city election called for the purpose of voting on the ratification of an ordinance entering into a contract with a water company was called and held at a single voting place, as had been the custom for a number of years, instead of at separate places in each ward, the city cannot avail itself of such fact to defeat the contract after the result of the election in favor of the ordinance has been declared by the proper officers, and the company has been notified of such result, and has accepted the ordinance and fulfilled the contract on its part.

4. SAME.

A city cannot avoid a contract with a water company, which was ratified by its electors, after it has been accepted and performed by the company and has also been complied with by the city for a number of years, on the ground that a number of ballots cast at the election for the ratification of such contract were defective, where the rejection of such defective ballots would not have affected the result of the election.

5. SAME—VALIDITY OF CONTRACT—BURDEN OF PROOF.

Where a city defends an action against it on a contract on the ground that such contract is invalid because it created an indebtedness in excess of the limit fixed by the constitution of the state, it has the burden of proving all the facts necessary to establish such defense; and the court cannot find the contract invalid on that ground, where there is no evidence before it showing the assessed valuation of the city, which is made by the constitution the measure of its legal indebtedness at the time the indebtedness under the contract was created.

6. SAME—INCOME APPLICABLE TO DEBTS—MISSOURI STATUTE.

Rev. St. Mo. 1889, § 4977, which provides that a municipal corporation may be compelled by mandamus to levy a tax for the payment of a judgment against it, and that the whole amount raised within the constitutional limit may be applied in satisfaction of such debt, "except such amount as may be necessary to pay reasonable salaries allowed by law to the mayor, council, marshal, constable, attorney and a reasonable police force," fixes the amount which a city is entitled to expend from its revenues and income for current municipal expenses, as against a contract creditor; and it cannot defend against an action by such creditor on the ground that it levies taxes to the full constitutional limit, but has no surplus after paying the expenses of its government which can be applied on such debt, where it has expended money for purposes other than those enumerated in such statute.

7. SAME—RIGHT OF ACTION FOR DAMAGES—INJURY TO STREET.

Under a provision of a city ordinance granting a franchise to a street-railroad company, that "in case of any removal or change of trackage on any streets or crossings the grantee shall leave the same in as good condition as before such removal or change was made," the city has no

right of action for damages against one who purchases the rolling stock and rails of such company at foreclosure sale, and sells the same to another, who removes the rails, leaving the ties in the street.

Adiel Sherwood, for plaintiff.

J. W. Farris and J. D. Bovar, for defendant.

PHILIPS, District Judge. This is an action in assumpsit to recover on contracts for furnishing light and water to the defendant city. The defendant is a city of the fourth class under the General Statutes of Missouri. On January 5, 1891, the city by ordinance granted to the Lebanon Light & Water Company, a corporation constituted under the statutes of Missouri, the right for a period of 20 years to erect and operate a plant for making and furnishing electric light, and contracted thereby with said company for supplying the city during said term with light at a fixed price per annum. On September 1, 1890, the defendant by ordinance entered into a like contract with said company for supplying the city with water at a fixed price per annum. The electric light and water works were duly erected by the company, and lights and water were by it furnished to the defendant in accordance with the terms of said contracts; and payments for electric lights, as provided by ordinance, were made by the city up to about April 5, 1895, and payments were made for the water supplied up to some time in the year 1894, after which the city defaulted in said payments; and this suit is brought by plaintiff, a nonresident of the state, as successor in law and estate of the company, to recover the balance alleged to be owing and due under said contracts up to March 16, 1896. It was agreed by the parties at the trial that if, under the law, the plaintiff is entitled to recover, the amount due on account of electric lights is \$1,183.83, and on account of water \$1,431.17.

The defendant defends on the principal grounds: (1) That said contracts, if made, created an indebtedness against the city in excess of the limitations imposed upon the city by the state constitution; (2) that the election held by the electors of said city for ratifying said water ordinance was irregular, for the reason that on the 3d day of February, 1892, the city was divided into three wards, and that the said election was held in but one ward; (3) that the tickets first voted at said election contained only the words, "For electric light contract; yes—no," whereas the form of the vote prescribed by the ordinance contained the words, "For electric light contract and tax levy; yes—no," and that a part of the votes cast at said election contained only the words, "For electric light contract; yes;" and (4) that no ordinance was adopted by the board of aldermen submitting to a vote of the city the ratification of the waterworks ordinance. The answer further alleges that the defendant has annually levied and collected upon all the taxable property of the city 50 cents on the \$100 valuation from the time said contracts were entered into, and that, after paying the necessary expenses of the city government, it has paid the balance of its income on account of said contracts, and that, after paying the necessary expenses of the city government, no revenue was left to apply to the payment of said debts.

A jury being waived by written stipulation filed herein, the cause was submitted on the pleadings and evidence to the court.

In respect of the contention made by the defendant that no ordinance was adopted by the city authorizing the contract for supplying it with water, it is sufficient to say that, in the stipulation of facts agreed upon and filed herein by the respective counsel, it is expressly agreed that Ordinance No. 86, of date September 1, 1890, printed on pages 93-99, among the published ordinances of the city, was "duly passed." And it is further stipulated "that thereafter an election was held in said city to vote upon said ordinance, and the same was duly adopted by a vote of 269 to 3, on September 16, 1890, of the qualified voters of said city; that said water ordinance and contract were accepted by said Lebanon Light & Water Company as thereby required." It is true, the stipulation provides that the "defendant does not waive any of its defenses as to the legality of the ordinance and contracts above mentioned"; but what defense can be made to the legality of an ordinance, where there was power in the governing board of the city, as in this instance, to adopt such ordinance, when it is admitted that the city council duly passed the ordinance? Even could the court go outside of this express admission, to inquire into the actual facts as developed by the proof offered by the defendant against the objection of plaintiff, they amount only to this: That the ordinance or resolution submitting said Ordinance No. 86 to a vote of the qualified electors of the city was in fact duly presented to the board of aldermen, and by them adopted, and duly signed by the mayor. But the only objection thereto rests on the fact that the ordinance, through an oversight or the neglect of the clerk of the board, was not spread upon the record book of the corporation. As said by the supreme court in *Handley v. Stutz*, 139 U. S. 422, 11 Sup. Ct. 532, 35 L. Ed. 232, "The failure to enter this resolution at the time it was adopted did not affect its validity, as most corporate acts can be proven as well by parol as by written instruments." *Moss v. Averell*, 10 N. Y. 449. It is likewise immaterial that the order of submission to a vote may have been in the form of a resolution, when the resolution contained the essentials of an ordinance duly passed by the board of aldermen, and signed by the mayor. *Illinois Trust & Savings Bank v. City of Arkansas*, 22 C. C. A. 171, 76 Fed. 272, 34 L. R. A. 518.

The objection as to the place of holding the election in question is predicated of the fact that in 1892 the city of Lebanon was divided into three wards, and instead of establishing voting places in each ward, and holding the election therein, the election on the water ordinance was, pursuant to notice, held alone at the county court house in the city, with the presence of the necessary complement of judges and clerks of all the wards. The evidence shows that all the elections held in the city prior to the one in question, for a number of years, were held and conducted at said court house, precisely as in this instance. The evidence further shows that after said election the city notified said company of the ratification of said ordinance by the requisite number of voters at said election, and thereupon the company notified the city of its acceptance of the provisions of the ordi-

nance, and proceeded to perform the contract thereafter up to the time of this controversy, and that the city thereafter recognized the existence and validity of the contract by paying the contract price for the water furnished. Under such circumstances, and where the legally constituted authority of the municipal government has passed upon and asserted the result of the election, as against the party so contracting with it and furnishing it with the necessary supplies called for by the contract, it is estopped from controverting the regularity of such election. *Illinois Trust & Savings Bank v. City of Arkansas*, supra; *Brown v. Ingalls Tp.*, 30 C. C. A. 27, 86 Fed. 261.

It is further objected to said election that the tickets first employed contained only the words, "For electric light contract; yes—no," instead of the words, as required by the ordinance, "For electric light contract and tax levy; yes—no." The evidence shows that when the polls were first opened the tickets used contained only the words first above named, but after about 20 of them had been deposited the mistake was discovered, and thereafter the tickets properly prepared were voted. The evidence shows that the voting population of the city of Lebanon is only about 400; and as the returns showed that 269 votes were cast for the proposition, and only 3 against it, the rejection of the 20 irregular votes in no wise can affect the result. And, even if there was such irregularity, the city could not, in this collateral proceeding, after it had declared the result of the election, and acted thereon under the contract for a series of years, and received the benefit of the contractor's labor and supplies, go back of the returns. To hold otherwise would be to assert that a municipal corporation, contrary to the established rule, can take advantage of its own neglect and wrong. Artificial beings, clothed with the power to do certain acts and to determine when they are done, are, and should be, as much bound and concluded by their action and assurance as a natural person. In law, as in morals, there is in this respect no distinction.

The remaining and important question for decision is that of the limitation placed by the state constitution on the amount of revenue a municipal corporation may raise to meet its indebtedness. Section 12, art. 10, of the state constitution, declares that:

"No city or town," etc., "shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness."

The burden of developing the facts showing that the indebtedness incurred under these contracts exceeded the income and revenue provided for the city rests upon the defendant. The 5 per cent. on the value of the taxable property, it is to be observed, is to be ascertained "by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness." Without stopping to determine whether or

not this indebtedness accrued at the time of the making of the contracts, or in the years 1895 and 1896, when the defendant defaulted in the payment, it is sufficient to say that if the indebtedness accrued in 1895 the valuation would be based upon the assessment for state and county purposes made in the year 1892, and for that which accrued in 1896 upon the assessment for either 1892 or 1894. Or, if it be that the indebtedness accrued at the time of the making of the contracts, the valuation would have to be based upon the assessment of 1888. See *Prickett v. City of Marceline* (C. C.) 65 Fed. 471 et seq. There is no evidence before the court as to what was the assessment for state and county purposes as to property in said city for either of those years, and for that reason this defense must fail. The only tangible evidence presented by the defendant touching this issue is found in the testimony of the witness Stebbins, who was city clerk from June, 1895, up to the time he testified. He was inquired of as to the assessed valuation of the taxable property of the city for the year 1890, and he answered by saying, "I will read from the tax book for 1890, as returned by the county clerk to the city council." This is the only reference in his testimony to any returns from the assessment made by the county. He testified that the total value of the taxable property of the city for that year was \$406,614.40, and that the total income from taxes collected that year was \$2,201.60, to which should be added incomes from licenses; and he further testified that the total income on the levy from all sources, including the tax levy of 50 cents on the \$100, for the year 1895, was \$4,948.59. But whether or not this was based upon the assessment made for state and county purposes, and especially for the year 1892, does not appear from any evidence in the case. And, even if it were conceded that this income was based upon the returns of the proper assessment made for state and county purposes, I do not perceive how it would help the case of the defendant, as this amount of income would be amply sufficient to enable the defendant to meet its obligations under the contracts in question. The amount due on account of electric light, running through part of the year 1895 and the first quarter of 1896, it is agreed, amounts to the sum of \$1,183.83; and for water furnished prior and up to April, 1896, the sum of \$1,431.17; making a total of \$2,615. Under the terms of the contract, the city was to pay \$3,000 per annum for the electric light, and \$420 for water; making an aggregate of \$3,420. And, consequently, if this whole sum were deducted from the total income of the city for the year 1895, amounting to \$4,948.59, it would leave a balance of \$1,528.59. The defendant tried the case upon the theory that it was competent for the city to spend its entire income derived from taxation and other sources upon itself, for what it deemed to be proper governmental expenses; but this is a misconception of the law. The state statute (Rev. St. Mo. 1889, § 4977) provides that an execution issued out of court against such city may be enforced by the writ of mandamus, compelling the levy for the satisfaction of the judgment, and that the whole amount within the constitutional limit may be applied to the satisfaction of such debt, "except such

amount as may be necessary to pay reasonable salaries allowed by law to the mayor, council, marshal, constable, attorney, and a reasonable police force of any such town or city." The supreme court of the state in *Webb City & C. Waterworks Co. v. City of Cartersville*, 142 Mo. 101, 43 S. W. 625, has applied this section to the defense made in this case respecting the amount the city may expend out of its income for municipal purposes, and has limited such deduction to the payment of the salaries specified in said section. The evidence in this case shows that the only salaried officers of the city who are paid out of the revenues of the city are the marshal, who receives \$175; deputy marshal, who received in the year 1895 the sum of \$17.50; city attorney, \$117; and assistant attorney, \$100; and the city clerk, \$91.35; and street commissioner, \$141.50. Two of these officers to whom salaries were paid, to wit, street commissioner and city clerk, are not among the officers enumerated in the statute, and therefore should be excluded, which would leave the aggregate sum allowed by law to the designated officers of \$409.50; thus showing that out of the revenue of 1895, and presumptively out of the revenue of 1896, there was ample revenue raised by the city, within the constitutional limitation, to pay the balance sued for in this action, together with interest thereon, based upon the facts given by the witness Stebbins as to the total income for the year 1895. Be this as it may, the witness Stebbins, when inquired of as to the assessed values of property in the city for the years between 1890, 1891, and 1895, stated that he did not have before him the data by which to determine this question,—thereby emphasizing the fact that the defendant failed to show what was the valuation of the assessment for state and county purposes for the proper year anterior to 1895 and 1896, and even anterior to the time when the ordinances were passed and the contracts in question were executed; and, therefore, in any legal view of the case as made out on the trial, this defense must fail.

The defendant also pleads in its answer a counterclaim for damages growing out of the following state of facts: The said company was authorized by the franchise granted it by the city, under Ordinance No. 83, adopted July 8, 1890, to construct a street railway along the streets of said city. Section 19 of this ordinance provided that "in case of any removal or change of trackage on any streets or crossings the grantees shall leave the same in as good condition as before such removal or change was made, and in as good condition as the balance of such street." The plaintiff, under foreclosure sale against the company, became the purchaser of the rolling stock and rails of said street-railway company, which he sold to a third party, who afterwards took up and removed the rails, leaving the ties on the street as theretofore. The claim of the defendant is that it was damaged thereby. Even if it were conceded that such counterclaim would lie against this plaintiff in this action, there is no reliable evidence to support it. By the mere removal of the rails from the ties, without disturbing the ties or the grade of the street, it is not perceivable why the condition of the street was not as good thereafter as it was with the rails lying

on the ties. Under said section 19, "in case of any removal or change of trackage on any streets" the duty was devolved upon the grantees of the franchise to leave the same in as good condition as before such removal or change was made. The plaintiff is not the grantee of the franchise, nor does it appear that he became the purchaser thereof; so that there would be no devolution of the terms of the contract upon him; and, certainly, as it does not appear that he removed the rails, or directed the same to be removed, no cause of action is presented against him, arising on the simple fact that a purchaser of the rails from him removed the same. In any aspect of the case, therefore, this claim is not supported by the law or any evidence. Judgment for plaintiff as prayed.

EVERHARD v. DIAMOND MATCH CO.

(Circuit Court, N. D. Ohio, E. D. December 23, 1899.)

No. 5,955.

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.

Plaintiff, as an employé of defendant, had been engaged for six months in operating a band saw. Above the table at which he worked was suspended an electric drop light for his use on dark days, the cord of which hung near the saw, and was so long that it required to be looped up to bring the light in proper position. In attempting to so loop it up, plaintiff's hand came in contact with the saw, and he was injured. *Held*, that the danger was as obvious to plaintiff as to defendant, and, in the absence of any allegation of complaint by him on that account, he must be deemed to have assumed the risk therefrom.

At Law. On demurrer to petition.

O. D. Everhard, for plaintiff.

Musser & Mohler, for defendant.

TAFT, Circuit Judge. This is a suit by an employé of the Diamond Match Company, engaged for six months or more in the operation of a band saw, to recover damages for an injury sustained by him while engaged in the discharge of his duties. An electric drop light hung from the ceiling by a cord, so as to throw light upon the saw, and enable the operator to work upon dark days. The cord was so long that, unless it was looped, the light would come down too near the saw and the table on which the operator worked. It was necessary for him, therefore, to loop the cord around a beam or board, through a hole in which the cord of the light passed. The accident occurred while the operator, the plaintiff, was attempting to throw the light and cord over this beam. The cord hung quite close to the band saw, and his hand was caught in its teeth, and he was injured. There is no averment that the plaintiff complained to his employer of the danger. The plaintiff had been working upon the machine for six months, and was as familiar with the danger as his employer could have been. It was perfectly obvious. The plaintiff sets out these facts at length in his petition, and a demurrer is filed thereto. I think, from the statement, it necessarily follows that the accident resulted from the negligence of the plaintiff, or was one

of the risks of his employment, which, as a term of the contract, he assumed. The case is to be distinguished, on its facts, from that of *Clow v. Boltz*, 34 C. C. A. 550, 92 Fed. 572, because there it was much more doubtful whether a man of the skill and knowledge of an ordinary laborer would have realized the danger to which he was subjected in working where he did. The demurrer is sustained. If the plaintiff desires to amend, he may do so, and will be given 10 days therefor. If, however, he does not desire to amend, or fails to amend at the close of 10 days, judgment will be entered for the defendant.

MARTIN v. HUGHES et al.

(Circuit Court of Appeals, Third Circuit. December 5, 1899.)

No. 36.

1. BOUNDARY—EVIDENCE TO LOCATE SURVEY.

Under the settled law of Pennsylvania, which permits a surveyor, after the survey of a warrant, while it remains in his hands unreturned, to change the survey with the consent of the warrantee, when the change does not interfere with mesne rights, where warrants returned in 1808 showed the survey thereof to have been made in 1794, on an issue as to the location of one of the lines of such survey, it is competent to show that in 1808, before the return of the survey, the owner of the warrants directed the deputy surveyor, in whose hands they had remained, to "complete the survey," and have return thereof made, and that the surveyor did work upon the ground in compliance with such directions; and, in the absence of proof definitely fixing the line as run in 1794, marks shown to have been made in 1808 may properly be considered by the jury in determining the true location of such line.

2. SAME—PLAT MADE BY SURVEYOR.

A plat shown to be in the handwriting of a deputy surveyor, and to have been made while he was acting as agent for the owners of warrants which were then in his hands, and which he had assisted in surveying, purporting to show the location of such surveys, is admissible in evidence on the question of the boundary of one of the tracts covered by such survey.

3. TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE.

Where all questions of fact are submitted by proper instructions to the ultimate determination of the jury, it is within the discretion of the trial judge, under the federal practice, to express his opinion upon the facts in his charge whenever he thinks it necessary to assist the jury in reaching a just conclusion.

4. SAME.

It is not error for a judge in his charge to the jury to state that the action of a former owner of land in pointing out a line as its boundary and in making a deed conveying it by reference to such boundary constitutes "strong evidence" of the true boundary against a party who claims through such deed.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

C. Heydrick and A. O. Furst, for plaintiff in error.

Thos. H. Murray, for defendants in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. John C. Martin, the plaintiff below and in error, brought this action of ejectment on August 31, 1894,

against Charles A. Hughes and others, to recover a piece of land 44 perches in width and 273 perches in length, containing about 75 acres, situate in the county of Cambria, and state of Pennsylvania. The plaintiff claimed under a warrant of survey granted on March 25, 1794, to Isaac Brannan, and a return of survey thereunder into the land office on November 28, 1808. The certificate to the returned plot of this survey reads thus:

"Situate on the headwaters of Little Conemaugh, in the township and county of Cambria, and surveyed the ——— day of June, 1794, by George Woods, Jun., deputy surveyor, in pursuance of a warrant dated the 25th day of March, 1794. Examined the 23rd day of June, 1808. William O'Keeffe, D. S."

The defendants claimed under a warrant of survey granted on March 25, 1794, to James Duncan, and a survey thereunder, made on January 4, 1853. These two tracts of land—the Brannan and the Duncan—are contiguous, and this controversy concerns the boundary between them. The case turns upon the question of the location of the eastern line of the Brannan tract. The Brannan survey calls for a "cedar" at its southeast corner, and the eastern line of the survey runs north from the cedar. The parties differed as to the position of this Brannan cedar, their respective locations claimed for it being about 44 perches apart in an east and west line, the plaintiff claiming the more eastern of these locations. There was evidence tending to show that formerly two cedar trees, now decayed stumps, stood in an east and west line about 44 perches apart, each bearing corner marks of an unknown age on its north, east, south, and west sides; that at a point 1.6 rods north of the more western of these two cedar stumps there stood until lately a beech tree, marked in 1808 as a north and south line tree; and that at a point between 3 and 4 feet northeast of the more eastern of the two cedar stumps there stood until recently a beech tree bearing on its west side a mark of 1794, and marks of 1808 on its west, south, and east sides, but bearing no mark whatever on its north side. This beech tree is the northwest corner of a tract of land surveyed on a warrant granted on December 21, 1792, to William Smith, D. D., and returned into the land office on November 28, 1808, the certificate to the plot of survey stating:

"And surveyed the ——— day of June, 1794, by George Woods, Jr., deputy surveyor, in pursuance of a warrant dated the 21st day of December, 1792. Examined the 24th day of June, 1808. William O'Keeffe, D. S."

This Smith survey calls for a beech at its northwest corner. The plaintiff claimed that the southeast corner of the Brannan and the northwest corner of the Smith were located at the same point, and that the two named tracts and a third tract, designated in this record as the "John Nicholson," have a common corner there. The last-mentioned tract was surveyed on a warrant granted on December 21, 1792, to John Nicholson, and returned into the land office on June 26, 1811, the certificate thereto stating:

"Surveyed the ——— day of June, 1794, by George Woods, Jr., D. surveyor, in pursuance of a warrant dated December 21st, 1792, and examined the 6th day of June, 1811, by William O'Keeffe, D. S."

The Nicholson survey calls for "cedar near a beech" at its northeast corner. The parties respectively claimed their location by virtue of actual work on the ground, alleged to have been authoritatively made, for the purpose of location, before return of survey into the land office.

The case, as presented to this court by the present record, is materially different from what it was when here upon a former writ of error. *Martin v. Hughes*, 33 C. C. A. 198, 90 Fed. 632. Then there was no evidence whatever connecting the owners of the warrants with any survey or resurvey made in 1808, nor did it appear by whom the marks of 1808 were made, or for what purpose. Upon the retrial of the case the defendants offered and the court admitted (we think, rightfully) documentary evidence tending to show that in 1794 William Smith, D. D., and John Nicholson owned in partnership 49 warrants of survey, including the Isaac Brannan, William Smith, D. D., James Duncan, and John Nicholson warrants, already mentioned, all of which 49 warrants were put into the hands of George Woods, Jr., deputy surveyor, and were located in Cambria county, on the headwaters of the Conemaugh; that Thomas Vickroy, a surveyor, was an assistant to Woods, the deputy surveyor, in 1794, and assisted in the field work which was done in that year under the said 49 warrants; that William O'Keeffe was the successor to George Woods, Jr., in the office of deputy surveyor; that on August 10, 1800, William Smith, D. D., addressed a letter to Thomas Vickroy, requesting his attendance at Lancaster at a meeting of the board of property, "with the drafts and field work of the Conemaugh surveys," to "have directions how the returns are to be made," and whether by George Woods, the letter stating, "I desire that you will keep all the papers of your work in your own hands till I assist you in applying the warrants;" that thenceforth and until after the return of surveys in November, 1808, Thomas Vickroy, in respect to these Conemaugh warrants, surveys, and lands, was the agent, first, of Dr. William Smith, and then, upon his death, the agent of Charles Smith, executor of Dr. William Smith; that on January 18, 1808, Charles Smith addressed a letter to Thomas Vickroy, containing this instruction: "The surveys in Nicholson partnership ought to be completed and returned. This must be done by O'Keeffe, who will, under your direction, apply them properly to the warrants;" and this letter, in speaking of a proposed division of the partnership lands, named, among others, the aforementioned Brannan, Smith, Duncan, and Nicholson tracts; that on April 6, 1808, Charles Smith addressed a letter to Thomas Vickroy, informing him that a division of the partnership lands had been made, and stating, "I have been entirely guided by your opinion and advice in the division of the lands as marked in the red dotted lines in your draft," and further stating, "Below I shall give you a complete list of all the partnership warrants, and the division of them, and shall most earnestly request a speedy survey and return of them,"—the subjoined list of "partnership warrants" including the Smith and Nicholson of December 21, 1792, and the Brannan and Duncan of March 25, 1794; that the said Brannan and Smith

warrants fell to the legal representatives of William Smith, D. D., and the said Nicholson and Duncan warrants to the estate of John Nicholson; that in a paper in the handwriting of Thomas Vickroy, obtained from the wife of a great-grandson of Dr. William Smith, and having this heading, "Memorandum of expenses and costs and taxes paid on partnership land of William Smith, D. D., and John Nicholson, Esq., on Conemaugh, in Cambria county, by Thomas Vickroy," there is the following item: "1808, June and July. To surveying and finding hands and provisions, £35. 6. 0."; and that the returns of 30 surveys purporting to have been made by George Woods, Jr., deputy surveyor, in 1794, and examined by William O'Keeffe on certain days in June and July, 1808, and which, in the division of the said partnership lands, went to the legal representatives of Dr. William Smith (including the Isaac Brannan), are in the handwriting of Thomas Vickroy, except the signature William O'Keeffe. In connection with the documentary proofs, there was the evidence of lines actually run and marked upon the ground in the year 1808. Evidence was produced of marks of 1808 on the line running north from the more western of the two cedar stumps, the one claimed by the defendants as the remains of the Brannan cedar.

There was, we think, ample evidence in the case to justify the finding that the work of 1808 upon the ground was done before the return of the surveys, by the authority of the owners of the warrants, for the purpose of completing and definitely fixing the location thereof. As we have seen, Charles Smith, in his letter of January 18, 1808, to Thomas Vickroy, significantly said, "The surveys in Nicholson partnership ought to be completed and returned." And in his letter to Vickroy of April 6, 1808, speaking of the "partnership warrants" and the division of them, he urged "a speedy survey and return of them."

The plaintiff in error, we think, has no good reason to complain of the instructions of the trial judge in respect to the effect which the jury might give to the marks of 1808. The jury were instructed that the survey of the Brannan tract in 1794 by George Woods, Jr., was conclusively evidenced by the return, and could not be gainsaid, and that the marks of 1794, if found, were controlling. Among other like instructions in the charge, the judge said:

"Such survey of 1808, if you find it, would not control or change any such line of 1794 if the line is found."

The court unqualifiedly affirmed the plaintiff's fifth point, which reads:

"(5) The position of the eastern line of the Isaac Brannan tract is the matter in dispute. If the preponderance of the evidence which the jury deem credible satisfies them that the line was run in June, 1794, by George Woods, Jr., deputy surveyor, north from the cedar near the beech corner of the William Smith, D. D., their verdict should be for the plaintiff without further inquiry upon the question of boundary."

And in the general charge the jury were distinctly told that the marks of 1808 were not to prevail as against those of 1794, if the latter were found, but that, in the absence of marks of 1794, the marks of 1808, if made before the return of survey, and by the au-

thority of the legal representative of Dr. William Smith, deceased, might be considered by the jury in determining the true location. Certainly, in these instructions, the court kept well within the established rule in Pennsylvania governing the location of surveys. It is the settled law of the state that, although a warrant has been surveyed, yet the deputy surveyor, if the warrant is unreturned, and still in his hands, may change the lines of the survey with the consent of the warrantee, if such alteration does not interfere with mesne rights. *Mining Co. v. Auten*, 188 Pa. St. 568, 582, 41 Atl. 327.

In view of Thomas Vickroy's relation as an assistant to George Woods, Jr., the deputy surveyor, his connection with the field work done in the year 1794 under the Smith-Nicholson warrants, his relations to Dr. William Smith and the latter's executor, Charles Smith, and the reference in Charles Smith's letter of April 6, 1808, to Vickroy's draft, we think that the old draft (with the red dotted lines upon it), in the handwriting of Thomas Vickroy, was clearly admissible in evidence upon the question of the location of the eastern line of the Brannan tract. *Sweigart v. Richards*, 8 Pa. St. 436; *McCausland v. Fleming*, 63 Pa. St. 36, 38. Now, this old Vickroy draft shows the cedar corner of the Isaac Brannan tract to be 44 perches west of the beech corner of the William Smith, D. D., tract.

In answer to the plaintiff's first and second points, and also in its general charge, the court gave proper instructions to the jury upon the subject of original marks and existing monuments, and calls for adjoining surveys, as fixing the location of a survey. Complaint, however, is made to the refusal of the court to affirm the plaintiff's sixth, sixteenth, and seventeenth points, which related to the calls for adjoiners by the Isaac Brannan, William Smith, D. D., and John Nicholson surveys, respectively. As we have seen, the two former surveys were returned into the land office on November 28, 1808, and the latter survey on June 26, 1811. The three points just mentioned ignored altogether the marks of 1808 and the evidence relating thereto. They also ignored marks of 1811, found on the John Nicholson, the location of which tract, the defendants claimed, was not completed until the latter year. The sixth point, after reciting the calls of the Brannan and Nicholson surveys, concluded in these words:

"In the absence of marks of 1794 elsewhere, fairly corresponding with the returns, these several calls necessarily tie the Nicholson and the Smith together, and determine that the cedar of the Brannan is the cedar of the Nicholson near the beech corner of the Smith, the position of which is undisputed, and, consequently, that the eastern line of the Brannan is a line running north from the cedar near the beech."

The sixteenth and seventeenth points were to the like effect. We are of opinion that the plaintiff was not entitled to the affirmance of these points, or any of them. They asked for practically binding instructions upon the disputed question of location. That question, however, under the evidence here, was not one of law, but one of fact. Undoubtedly, the calls for adjoiners were to be taken into consideration by the jury, but in connection with the other pertinent evidence bearing on the question of location. These points wholly

excluded from consideration the other evidence, and, in effect, asked the court to declare as matter of law that the calls were conclusive. Moreover, it is to be observed that the Brannan does not call for the Smith, neither does the Smith call for the Brannan. Apparently, they are two wholly disconnected surveys. Then again, the Brannan calls for a cedar, while the Smith calls for a beech, at the alleged point of meeting. These calls were for living corners in surveys, made about the same time, and by the same surveyor. Vickroy's old draft, which was here pertinent evidence, puts these two corners 44 perches apart. Still further, the Nicholson survey does not call for a beech, which was the only living corner of the Smith survey, but for a cedar near a beech. In view of these differing calls, how could the court declare as matter of law that these three surveys have a common corner at or near the Smith beech? Clearly, the question of the location of the eastern line of the Isaac Brannan tract was to be determined by the jury, and with reference to all the evidence on the subject. The court therefore rightly refused to affirm the plaintiff's sixth, sixteenth, and seventeenth points. The facts upon which these points were based the court referred to the jury. No question of fact was withdrawn from them. In so far as the judge intimated or expressed any opinion upon matters of fact, he kept strictly within the approved practice which permits the trial judge, at his discretion, whenever he thinks it necessary to assist the jury in reaching a just conclusion, to express his opinion upon the facts, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury. *Railroad Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257.

The eleventh, sixteenth, and twenty-third assignments of error relate to portions of the charge touching the acts and declarations of Dr. David T. Storm, who, with George S. King, purchased the Brannan tract from Dr. Smith's estate in 1843, and owned it for many years. There was evidence to show that in 1859, during his ownership, Dr. Storm went along the line running north from the more western cedar—the boundary line claimed by the defendants—for the purpose of seeing whether any timber had been cut on his land, and directed the person who accompanied him to keep people from cutting the timber on his land; that he went on the land with a surveyor, Thomas McConnell, and ran off a piece containing 52 acres by the line claimed by the defendants, and that on July 9, 1860, he and King conveyed to Frank Grimes this 52-acre piece by a deed which bounded it by that line, and that in 1862 or 1863 he stated that "the cedar was the corner of his tract,—the cedar where McConnell ran the line." It was with reference to this evidence—not simply the oral declarations of Dr. Storm, but his acts, and the calls contained in his deed to Grimes—that the judge spoke in the portions of his charge complained of. We do not think that he went too far when he said that they were "weighty matters of evidence," to be considered by the jury in determining the true boundary line, if it could not be fixed by marks of 1794, and that they were "strong evidence" of where the then owners of the property regarded

their line to be. Not only was Dr. Storm the plaintiff's predecessor in the title, but the plaintiff took title also from Frank Grimes' vendee. In *Kennedy v. Lubold*, 88 Pa. St. 246, 257, a recognition of boundary in proceedings in partition and in deeds under which a party held title was declared by Chief Justice Agnew to be "strong evidence" against him. Upon a careful examination of this entire record, we have reached the conclusion that none of the assignments of error should be sustained. The judgment of the circuit court is affirmed.

HINDMAN v. FIRST NAT. BANK OF LOUISVILLE, KY., et al.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 650.

1. BANKS—LIABILITY FOR TORTS—FALSE STATEMENTS IN REGARD TO CUSTOMER.

If a bank, in order to increase its deposits or to sell its collateral, through its board of directors makes or causes to be made false statements concerning the financial condition of one of its customers, to a third person, for the purpose of misleading him, it is liable for deceit if loss results; or if, having made such statements, it conspires with its customer to make the same public, to accomplish the same purpose, it is liable to one who acts upon it to his injury.

2. SAME.

A petition against a bank and the officers of an insurance company which alleges that the directors of the bank caused its cashier to make a certificate or statement to the insurance commissioner, falsely representing that the company had a certain amount of paid-up capital and surplus, all of which was on deposit in such bank in cash subject to check, when in fact a large part of such capital was represented by notes of the other defendants and other subscribers to the stock, indorsed by the company, of which the bank had made a pretended discount, and to secure which it held the stock as collateral, and that after thus securing from the commissioner a license to do business the bank and the other defendants conspired together, and caused such statement to be published in the newspapers, for the purpose of inducing third persons to purchase the stock so held as collateral, and that plaintiff, being misled thereby, purchased a number of shares of such stock from one of the defendants, the payment for which was received by the bank, and which stock was in fact worthless, because the company did not have the capital represented, states a cause of action against the bank for deceit.

In Error to the Circuit Court of the United States for the District of Kentucky.

This is a writ of error brought to review the judgment of the circuit court of Kentucky sustaining the demurrer to the reformed and amended petition of Thomas C. Hindman against the First National Bank of Louisville and others, seeking to recover damages for loss sustained by the plaintiff in the purchase of 80 shares of the capital stock of the Columbian Fire Insurance Company, which purchase was induced, the petition alleges, by certain fraudulent misrepresentations of the bank and other defendants. The petition originally was ordered by the court to be reformed. A demurrer was filed to the reformed petition, and was sustained. The plaintiff then asked leave to amend, which was granted. The amendment was filed, and a new demurrer filed. This was sustained, and judgment entered for the defendant. (C. C.) 86 Fed. 1013. The reformed petition makes parties defendant the First National Bank of Louisville; C. B. Sullivan, A. W. Hart, and James S. Ray. Ray is made a defendant simply as receiver of the Columbian Insurance Company, and not as a party to the transactions charged against the other defendants. The petition,

after setting up the necessary jurisdictional facts as to the diverse citizenship of the plaintiff and defendants, avers that in January, 1893, certain persons duly organized the Columbian Fire Insurance Company under the laws of Kentucky, and applied to the insurance commissioner of that state to do business as such therein, with a capital of \$200,000 and a surplus of \$50,000; that the commissioner entered upon an investigation of the affairs of the company; that the incorporators falsely represented that the capital had been paid in full, and that in addition the company had \$48,000 surplus in cash, free from debts and liabilities, and that the whole sum of \$248,182.90 was on deposit in the First National Bank of Louisville, and subject to check; that the commissioner applied to the bank for confirmation of this statement; that the board of directors of the bank, knowing the object of the inquiry, caused the bank cashier to make a sworn certificate to the insurance commissioner that the insurance company had on deposit \$248,000 of capital paid in and net surplus; that the statement was untrue, and was made for the fraudulent purpose of enabling the insurance company to deceive the commissioner and secure a license to do business, when it was not lawfully entitled to one; that it was done in pursuance of a conspiracy between the bank and the officers of the insurance company, C. B. Sullivan, A. W. Hart, and others; that, to give the false appearance of such a deposit as was certified, the insurance company and the bank pretended to make certain discounts of promissory notes of notoriously insolvent persons, each of which had been given, as the bank knew, in payment of the maker's subscription to the stock of the insurance company; that the bank had gone through the form of discounting the notes on the indorsement or guaranty of the insurance company, and of placing the proceeds to the credit of the latter on the bank's books; that many of the said notes were not discounted in good faith; that the proceeds thereof were never intended to be, and were never in fact, subject to checks of the insurance company, and the bank had at all times retained a lien on the fund thus apparently standing to the credit of the insurance company. The petition proceeds:

"Plaintiff says that the said First National Bank united with said insurance company and other named defendants, except Ray, in this said fraud, for the purpose of obtaining the benefit that would result to it from having said insurance company keep a large deposit with said bank; it having been previously agreed and understood between said bank and said insurance company that the latter would, if licensed to do business, keep a large amount of cash on deposit with said bank at all times. Plaintiff says that in compliance with this agreement said insurance company did thereafter at all times during its existence keep a large amount of cash on deposit in said bank, which deposit was of great value and benefit to said bank. Plaintiff says that said insurance company, having, in the fraudulent manner herein recited, obtained license to do business in Kentucky and in other states, commenced at once to engage in the fire insurance business throughout the various states in which it was licensed. Plaintiff says that said defendants, except Ray, further represented to the plaintiff and to the public, by publications, that the said company had said cash capital and surplus amounting to \$248,182.90, which publications were made in the public prints and scattered over the country, and which were seen and relied upon by plaintiff, and falsely represented that there were no mortgages upon the same or liens upon the same, and that the stock had been paid for at \$125 a share, and that the company was organized and ready for business, and made representations to the effect that the said company was a bona fide company, with a sound capital, properly organized; and plaintiff alleges that all the parties named in the caption hereof co-operated with said insurance company and said bank and the officers thereof, and the other defendants, except Ray, in setting said company on foot, and publishing that said cash capital and surplus of \$250,000 had been paid up in cash, bona fide, in accordance with said representation. * * * And this plaintiff alleges that by the representations and publications of the defendants, and by the issue of the said statement by said bank to the said Duncan, and the licensing of said company by said Duncan, insurance commissioner, he was deceived, * * * and while deceived by the false representations and deceit and false and fraudulent conspiracy of said defendants in setting on foot and floating said company, and while ignorant of the fraud practiced upon him and the public, and when he

believed the representations and publications aforesaid to be true, and the false and fraudulent insurance company to be a bona fide and genuine insurance company, properly licensed, purchased on February 6, 1893, eighty shares of the capital stock of the said Columbian Fire Insurance Company of America at the price of \$125 a share, making a total of \$10,000, * * * all of which said shares were paid for in cash by said plaintiff, and were issued to him on the 6th day of February, 1893.

"Plaintiff says that it was the purpose of all the said defendants, except Ray, to put stock of said insurance company on the market to be sold, to make up said capital stock, which was short, as hereinbefore alleged, and that the defendants A. W. Hart and C. B. Sullivan, representing themselves and the said other defendants, and acting in collusion with all the other defendants, except Ray, represented to the plaintiff that the said stock thus sold to him had been paid for, bona fide, in cash by the original subscriber therefor, which representation was false, and known to them and the other defendants to be false, and that said original certificates would be taken up, and new certificates issued in lieu thereof to the plaintiff; and plaintiff alleges that, as a matter of fact, the shares of stock which were so canceled, and in place of which the certificates filed herewith were issued to him, were shares of stock which had been originally issued to C. B. Sullivan, and for which he had subscribed and not paid, and which had never been paid for by him or any person whomsoever; and alleges that said stock which was thus sold to him was a part of the stock used as collateral in the pretended discounting of notes, by which, on the guaranty or indorsement of the insurance company, money was placed to the credit of said insurance company, to make up the fictitious capital thereof, by the First National Bank, and said bank participated in said frauds, and got the benefit of said payment made by said plaintiff for his stock. All of the defendants, except Ray, knew of the shortage in said capital stock, and fraudulently conspired and contrived the setting on foot of the said insurance company, and the selling of said stock to this plaintiff; and plaintiff alleges that said stock, at the time of the sale to him, and at all times during the existence of the company, was absolutely worthless, and known to be so by all said defendants, who knew that said company started in said fraudulent manner, and was unsound. Plaintiff alleges that said company continued in business as a fire insurance company for about fourteen months, but by reason of its not having its capital stock as aforesaid, and of the aforesaid shortage in its capital stock, it was forced to make an assignment on February 27, 1894, and did so assign, and became and was at all times from its inception insolvent, and the stock was and is absolutely worthless."

By amendment to the petition, plaintiff further averred as follows:

"Plaintiff alleges that it was a part of the plan and design of said defendants, among whom was said bank, to have said stock put in the name of parties who did not intend in good faith to take the same, and this was the case with the said stock of C. B. Sullivan, which was sold to plaintiff; and the purpose of so doing was to put off upon plaintiff and sell to him the stock in the said fraudulent insurance company, the said Hindman, plaintiff, to pay cash therefor, and under said plan the said plaintiff was in reality the first allottee of said stock; the said C. B. Sullivan, as plaintiff alleges, being in league with and co-operating with the said bank and other defendants to so sell stock which he had never intended to pay for himself, and to put on foot said insurance company without the alleged capital and surplus, and without the capital paid in as required by law, and knowing that the same had not been paid in. Wherefore plaintiff prays as heretofore, and for all proper relief."

Judge BARR, who presided in the circuit court, sustained the demurrer on the ground that the misrepresentations set forth were addressed to the original allottees of the stock, and not to the plaintiff, who was a purchaser from an original allottee; following in this the authority of the case of *Peek v. Gurney*, L. R. 6 H. L. 378.

W. W. Thum, for plaintiff in error.

A. P. Humphrey, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The so-called reformed petition and its amendment are inartificially drawn, and are full of redundancy and evidential averments, but we think that they state with sufficient clearness the following case: Several of the defendants other than the bank organized a fire insurance company under the laws of Kentucky. Before the company could do business under the laws of Kentucky, it was necessary for it to procure a license from the state insurance commissioner. The license could only issue upon proof that the capital (\$200,000) of the insurance company had been paid in in cash. But a little over \$100,000 of the capital had been paid in cash and deposited in the defendant bank. To make up the needed remainder, the defendant bank accepted notes of various subscribers to the stock for the amount of their respective subscriptions, with the stock pledged as collateral therefor. The notes were indorsed by the insurance company. Though the proceeds of the notes were credited to the latter on the books of the bank, the amount of them was not, according to the understanding between the bank and the insurance company, subject to check. In order to start the insurance company in business, and thereby secure for itself a large deposit account, and for the further purpose of selling the stock of the insurance company pledged to it as collateral, the defendant bank, through its board of directors, assisted the insurance company to obtain a license by directing its cashier to certify to the insurance commissioner that the insurance company had on deposit with it, subject to check, \$200,000 paid-up capital and \$48,000 net surplus. The license was issued upon the faith of this certificate. In further pursuance of its purposes the defendant bank united with the other defendants in procuring the publication in newspapers of general circulation in Kentucky and elsewhere of statements similar to those contained in the cashier's affidavit. The plaintiff, induced by such publications and by the statements in the cashier's affidavit, and relying thereon, bought 80 shares of the stock of the insurance company, which the bank then held as collateral security for a note of one of the defendants given for his stock subscription. Plaintiff paid \$10,000 for the stock. The stock was worthless when he bought it, and has never been worth anything since. The insurance company, owing to the fact that it never had the amount of capital required by law, became wholly insolvent, and was wound up under the laws of Kentucky. The statement of the cashier was plainly false, and known to be so by the bank, for it clearly implied that the capital and surplus were in cash over and above all liabilities.

The argument of counsel for the defendant in error is: First. That the statement of the cashier, in so far as it certified that the insurance company's deposit was for capital and net surplus, was *ultra vires*, and could not be made ground for holding the bank for deceit. Second. It is contended that neither the cashier's affidavit

nor the newspaper publications were addressed to the plaintiff, and he had no right to rely on them; that the former was directed to the insurance commissioner only, and the latter to the possible subscribers to the stock, and not to one who, like the plaintiff, bought stock already issued.

First, it is to be observed that the question here is not of the authority of the cashier, as was the case in *First Nat. Bank v. Marshall & Ilsley Bank*, 54 U. S. App. 510, 28 C. C. A. 42, 83 Fed. 725. The petition specifically avers that the certificate was made by order of the board of directors. This was the governing body of the bank, and although, of course, in a certain sense, it is an agency or representative of the bank, it is for all practical purposes the bank. *Goodspeed v. Bank*, 22 Conn. 530, 540, 541; *Burrill v. Bank*, 2 Mete. (Mass.) 163; *Bank Com'rs v. Bank of Buffalo*, 6 Paige, 502; *Pollard v. Vinton*, 105 U. S. 7, 12, 26 L. Ed. 998; *Railway Co. v. Prentice*, 147 U. S. 101, 114, 13 Sup. Ct. 261, 37 L. Ed. 97; *Railway Co. v. Harris*, 122 U. S. 597, 610, 7 Sup. Ct. 1286, 30 L. Ed. 1146. The question here, therefore, is whether a national bank can make itself liable in an action for deceit by causing a knowingly false statement to be made concerning the financial condition of one of its customers. In England it is said that a corporation may be held liable for the commission of any wrongful act within the scope of its incorporation. *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290; *Edwards v. Railway Co.*, 6 Q. B. Div. 287; *Clerk & L. Torts*, 49. By this is meant, not that the charter must specifically authorize the wrongful act, but only that it must be committed by the corporation in pursuance of a power lawfully conferred, though wrongfully and tortiously exercised. The same view is taken by Mr. Justice Campbell, speaking for the supreme court of the United States, in *Railway Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73, as follows:

"The result of the case is that for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances."

The limits of a corporation's liability for a wrong are somewhat less strictly laid down in later cases in our supreme court. In *Bank v. Graham*, 100 U. S. 699, 702, 25 L. Ed. 750, Mr. Justice Swayne, speaking for the supreme court, said:

"Corporations are liable for every wrong they commit, and in such cases the doctrine of ultra vires has no application." "An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation, or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel."

In *Salt Lake City v. Hollister*, 118 U. S. 256, 260, 6 Sup. Ct. 1055, 30 L. Ed. 176, Mr. Justice Miller, speaking for the court, said:

"The truth is that with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When

such acts are not founded on contract, but are arbitrary exercises of power, in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."

The latest expression of the court on this subject is found in *Gaslight Co. v. Lansden*, 172 U. S. 534, 544, 19 Sup. Ct. 296, 43 L. Ed. 543, in which it is said:

"The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to employ the corporate powers actually exercised."

It is not necessary for us to consider or discuss the difference, if any, between these measures of corporate liability for torts, because we think that the case made by the petition is within the most conservative of them. It is a part of a bank's business to secure as large deposits as possible. It is also part of a bank's business to sell at as high a price as may be the collateral held by it to secure its bills receivable. If the bank, in order to increase its deposits or to sell its collateral, makes or causes to be made false statements concerning the financial condition of one of its customers and depositors to a third person, for the purpose of misleading that person to his injury, we think the bank is liable in deceit if loss ensues. The relation of a bank to its depositors and customers is one which gives it exceptional opportunity to acquire most reliable information of their business and financial affairs. It is a common practice for the cashier of one bank to apply to the cashier of another to learn the financial standing of customers of the latter bank, or, indeed, of any person doing business in the city of the latter bank. When the answers made are not made for the benefit or in the business of the second bank, but are merely matters of courtesy between the two cashiers, the second bank is not responsible for their inaccuracy or falsity. This was found to be the state of the case in *First Nat. Bank v. Marshall & Ilsley Bank*, 54 U. S. App. 510, 28 C. C. A. 42, 83 Fed. 725. But the ratio decidendi of that case was that if the false answer to the query had been made by the cashier, with the privity of the president, in the business and for the benefit of the bank, the bank would have been liable. It is the usual practice for depositors and customers of a bank to refer others to the bank for information as to their financial responsibility. To give such information to third persons or to the public at the instance of the customer or depositor is certainly not beyond the scope of banking powers. It is argued that, while the bank might properly certify to the amount on deposit to the credit of one of its depositors, it has no power to certify how much of the deposit is for capital and how much for net surplus. This is too refined. The bank's relation to the insurance company as a customer might very well enable it to learn with reasonable certainty how and for what purpose the money deposited had been paid in, and whether it was net capital or surplus, or was likely to be reduced by outstand-

ing liabilities, and to give this information to whom it might concern, with the consent of the depositor. It certainly had the amplest knowledge of the fact that the insurance company was a large debtor of the bank,—so large as to make the statement that it had a paid-in cash capital and net surplus of \$248,000 utterly false. If it made such a statement to the insurance commissioner to obtain a license, and was privy to the publication of the same statement in the public press, as is alleged, all for the purpose of securing a large bank deposit and of selling stock held by it as collateral, it seems to us that this was done in the course of the business of the bank, and was “within the scope of its incorporation.” In *Barwick v. Bank*, L. R. 2 Exch. 259, the action was for deceit against a bank. The plaintiff furnished feed to the horses of a government contractor, who was a customer and depositor of the bank, on the written assurance of the manager of the bank that if the plaintiff would do so the bank would pay him out of the first money received by the contractor from the government after the bank had satisfied any claim of its own. The bank then held a note of the contractor for £12,000, but the manager did not disclose this. The court held that the case should be left to the jury to say whether the manager had not given the plaintiff to understand that there was a probability that out of the government payment there would be enough to pay plaintiff, when he knew there was not. This case shows clearly that a bank’s statement concerning the financial condition of its customer is an act within its corporate capacity, at least when made to further the business interests of the bank. The petition charges the bank not only with falsely making the false statement to the insurance commissioner, but also with conspiring with the other defendants to repeat the statements to the public in the newspapers in furtherance of the two purposes already stated. It is now well settled that a corporation may be held for torts in which express malice or intent to defraud is a necessary element. *Barwick v. Bank*, L. R. 2 Exch. 259; *Goodspeed v. Bank*, 22 Conn. 530; *Railway Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Railway Co. v. Prentice*, 147 U. S. 101, 114, 13 Sup. Ct. 261, 37 L. Ed. 97; *Railway Co. v. Harris*, 122 U. S. 597, 610, 7 Sup. Ct. 1286, 30 L. Ed. 1146. It is a necessary corollary from these cases that a corporation may be held for a conspiracy with others resulting in injury to a third person. The point is expressly adjudged by the court of appeals of New York in *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 106 N. Y. 669, 12 N. E. 825; same case in supreme court, 42 Hun, 153. See, also, to same effect, *Moores v. Bricklayers’ Union*, 23 Cin. Law Bul. 48, affirmed by supreme court of Ohio, without report, 31 Cin. Law Bul. 208; *Dodge v. Bradstreet Co.*, 59 How. Prac. 104. If a bank may make a false statement concerning the financial condition of one of its customers for its own benefit, and may conspire with another to accomplish its business purposes, it follows that it may conspire with others to circulate the statement already made by it to deceive the public, and that any one of the public to whom the statement is addressed, and who acts upon it to his injury, may hold the bank for his loss.

The second ground urged in favor of the demurrer was that the statements concerning the financial condition of the insurance company were not addressed to the plaintiff, but only to the insurance commissioner, on the one hand, or to the probable subscribers to the stock of the insurance company, on the other. The plaintiff, it is said, was not the insurance commissioner, and was not a subscriber to the stock, but was a purchaser from an original subscriber. In the case of *Peek v. Gurney*, L. R. 6 H. L. 377, one who, misled by false statements in a prospectus issued by the directors of an intended company, had bought shares therein from an original allottee and suffered severe losses, attempted to hold the directors for his injury. It was held that a prospectus was addressed to the original allottees; that when the allotment was completed the office of the prospectus was exhausted, and one purchasing from an original allottee could not rely on it and hold those issuing it for his loss. The case has not met with entire concurrence by the courts of this country. Dissent from its conclusion is based on the view that one issuing a prospectus or statement calculated to mislead others to their injury ought to be charged with liability to any person or class of persons whose action on the faith of it he might reasonably and naturally anticipate, and that purchasers from original allottees are quite as likely to act on the prospectus as the allottees themselves. We do not find it necessary, however, to discuss the principles of *Peek v. Gurney* in deciding this case, for we think it clear that the averments of the petition make it unnecessary. The newspaper statements of the condition of the insurance company, repeated from the cashier's statement to the insurance commissioner, to all of which the bank is alleged to have been privy, were not issued or addressed to original subscribers to the stock. The petition and its amendment in effect aver that the original subscriptions were made by defendants and others engaged in promoting the company, and that the purpose of the company and the bank was not so much to secure original subscribers, as to sell the stock which had been pledged to the bank to secure payment of the original subscriptions, and which the bank was therefore especially interested in selling. The false statements are thus averred to have been made for the very purpose of reaching and influencing purchasers like the plaintiff, and *Peek v. Gurney* has no application. See *Andrews v. Mockford* [1896] 1 Q. B. 372. Even if it be conceded that the plaintiff had no right to rely on the certificate to the insurance commissioner, the repetition of the contents of the certificate in newspaper publications by the bank and others for the very purpose of misleading probable purchasers of the stock is quite sufficient to hold the bank and the other defendants.

A third objection to the sufficiency of the petition and its amendment is that it shows no damage to plaintiff, and fraud without damage gives no action. The contention is that the measure of the recovery in such a case is the difference between the price paid and the value of the stock when bought (*Peek v. Derry*, 37 Ch. Div. 591), and that there is no averment in the petition that the stock was not worth what plaintiff paid for it when he bought it. For subsequent losses due to misfortune or mismanagement defendants can-

not, it is said, be made responsible in this action. This objection must fail for the reason that the petition expressly alleges that the stock was worthless when plaintiff bought it. The judgment of the circuit court is reversed, with directions to overrule the demurrer to the reformed petition and its amendment, and to require the defendants to answer. The costs of the proceeding in error should be paid by defendants.

COTTAM v. OREGON CITY et al.

(Circuit Court, D. Oregon. December 14, 1899.)

No. 2,553.

1. FALSE IMPRISONMENT—DEFENSES—EXERCISE OF JUDICIAL AUTHORITY.

The recorder and chief of police of a city cannot be held personally liable in damages for the issuance and service of a warrant for the arrest of a person charged with the violation of an ordinance imposing a license tax upon occupations, although the person arrested was engaged in interstate commerce, and was not, therefore, subject to the provisions of such ordinance. In such case, the ordinance being valid as to occupations which it was within the power of the city to tax, the officers charged with its enforcement were not without jurisdiction of the subject-matter, and are exempt from civil liability for an error in the exercise of such jurisdiction.

2. SAME—MOTIVE OF OFFICERS.

The exemption of judicial officers from civil liability for their official acts cannot be affected by the motives with which such acts are performed, which is a matter for which they are responsible to the public only.

3. SAME—LIABILITY OF MUNICIPAL CORPORATION—VOLUNTARY SUBMISSION TO ARREST.

One who submits to arrest and imprisonment rather than pay a small license fee illegally exacted from him under a city ordinance, and which if paid he might have recovered back without serious injury or damage to himself, cannot maintain an action against the city for false imprisonment.

This was an action to recover damages for alleged false imprisonment. On demurrer to complaint.

Bauer & Greene, for plaintiff.

A. S. Dresser, for defendants.

BELLINGER, District Judge. This is an action brought against Oregon City, a corporation, and against Ryan, who is the recorder, and Burns, the acting chief of police, of the city, for damages resulting from the arrest and imprisonment of the plaintiff on what is admitted to have been a groundless complaint. The action taken by the officers grows out of an ordinance passed by the city requiring all persons selling goods, or soliciting the sale of goods, to pay a license tax therefor. It is alleged that the plaintiff is a citizen of the state of California, and is engaged in soliciting contracts for the sale of merchandise, by the use of samples, in the states of Oregon and Washington, for the M. J. Keller Company, a corporation organized and existing under the laws of the state of California, and a resident and citizen of said state of California, engaged in the business of tailors and manufacturers of shirts. The material allegations of the complaint are:

"That on the 28th day of December, 1897, at Oregon City, Clackamas county, Oregon, the defendants Thomas F. Ryan and Chas. E. Burns, while acting in their official capacities as recorder and chief of police, respectively, of defendant Oregon City, and within the scope of their authority and powers as such officers of said Oregon City, falsely and maliciously, and without reasonable or probable cause, arrested and imprisoned the plaintiff, and deprived him of his liberty for the space of a portion of two days, unlawfully and with force, on a pretended charge of soliciting contracts for the sale of goods, wares, chattels, and merchandise, by canvassing from house to house in Oregon City, without first having obtained a license from said city. That, at said time and place, defendants maliciously, unlawfully, and with force imprisoned plaintiff in the city jail of defendant Oregon City, and forcibly confined him there, in a foul and loathsome cell, during the night of December 28, 1897, whereby plaintiff was subjected to great suffering, pain, and humiliation, and to the great danger of his health. That thereafter plaintiff filed his petition in the county court of the state of Oregon for Clackamas county for a writ of habeas corpus, and on the 30th day of December, 1897, upon the trial of said cause, the plaintiff was released and discharged from the custody of defendants, and said prosecution, arrest, and imprisonment of plaintiff by defendants is wholly ended and determined."

To this complaint the defendants demur.

It is claimed that the ordinance under which the license tax was attempted to be collected from the plaintiff for soliciting orders for goods manufactured in another state is an attempted restriction upon interstate commerce, and is therefore void; that the proceeding under such an ordinance was not for the enforcement of a police regulation, but for the collection of a license tax, and was solely for the private and pecuniary benefit of the city, as distinguished from the public good, public morals, peace, and good order; and that it is only when the acts complained of are in the exercise of this general or police power that the city and its officers are exempt from civil liability.

It is established, upon the authority of the supreme court of the United States, that an ordinance of the character in question, so far as it applies to persons soliciting the sale of goods in behalf of those doing business in another state, is a regulation of interstate commerce, and void. *Robbins v. District*, 120 U. S. 489, 7 Sup. Ct. 592, 32 L. Ed. 292. The rule does not extend so far as to make the ordinance void, except as it is applied to interstate business, and not then if the solicitor carries his goods with him, and thereby becomes a peddler, and so comes within reach of the general or police power of the state,—a distinction, whether wise or otherwise, that is clearly made, although there was a strong dissent from the chief justice, concurred in by Justices Field and Gray.

If the officers of the city acted without any jurisdiction, if there was a clear absence of jurisdiction, if the ordinance was of such a character that any authority exercised under it was a void authority, the defendants are liable, and this would result in any such case, whether the court was of general jurisdiction or was inferior. There is a presumption that a court of superior jurisdiction acts within its jurisdiction, unless a clear absence of jurisdiction is shown. This presumption does not arise where the jurisdiction of the court is limited, and this puts upon the latter a liability that does not exist in other cases. *Cooley on Torts* states the reason why the law should

protect the one judge, and not the other, and why, "if it protects one only, it should be the very one who, from his higher position and presumed superior learning and ability, ought to be most free from error," to be because, "a limited authority only having been conferred," "he best observes the spirit of the law by solving all questions of doubt against his jurisdiction"; that, "if he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review"; that, therefore, "the rule of law which compels him to keep within his jurisdiction at his peril cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so." But what is to happen when the inferior judicial officer acts upon the opinion that the authority which he exercises is not questionable? When there is not a clear absence of all authority, but merely the exercise of an erroneous judgment in determining the extent of his authority? What is "questionable" jurisdiction, for the exercise of which judges of inferior courts are liable in damages? Does it mean such jurisdiction as may be or as is in fact questioned, or does it mean such a clear absence of jurisdiction as is at once apparent to the ordinary understanding, —such as the taking cognizance of criminal matters by a court of probate? In other words, does "questionable" jurisdiction mean an unquestionable want of jurisdiction? Does the inferior court exist merely for the purpose of refusing jurisdiction, or may it exercise the right to determine as to the particular case where jurisdiction of the subject-matter is clearly conferred, without making the judge liable for damages for an erroneous judgment? The reasons which exempt the court of superior jurisdiction apply equally to the courts of inferior jurisdiction. If, as is stated, "this rule of exemption from civil liability exists for the benefit of the community, which must have the services of judges unharassed by the continual questioning of their conduct and motives by disappointed litigants" there seems to be no reason why the courts of limited jurisdiction should not, as well as those of superior jurisdiction, be relieved from the consequences of the disappointment caused by the erroneous exercise of their judicial judgment. The distinction between the two cases is confined to the mere presumption that exists in favor of the court of superior jurisdiction,—to the presumption, in other words, that the court of superior jurisdiction, in acting, has acted within its jurisdiction, unless the absence of all jurisdiction is shown; but, where there is an absence of all jurisdiction in either case, the liability is equal. Nor is there any reason for the exemption of judges of the superior court of record from liability to civil suit for their judicial acts exercised when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of this jurisdiction, that does not equally apply in cases where the jurisdiction is an inferior one. What is meant by the absence of all jurisdiction is illustrated in the case of *Bradley v. Fisher*, 13 Wall. 352, 20 L. Ed. 646, where the court say:

"But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the

jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority."

In this case, so far as appears, there was jurisdiction under the ordinance of the city to collect license taxes, and that was what was done, and what is complained of in the present case; but in the enforcement of that ordinance the recorder and chief of police erred in the conclusion that the plaintiff was within its provisions, and for this erroneous judgment they are sought to be held liable in damages. Now, can it be said to be clearly apparent that there is no jurisdiction in such case? Technically construed, it does not appear from the complaint that the plaintiff was soliciting orders for goods manufactured in another state. It is immaterial, except for the purposes of jurisdiction in this court, that the plaintiff was a citizen of the state of California. The material thing with reference to this liability is the soliciting of orders for goods manufactured out of the state, and this does not appear. But, for the purposes of this demurrer, I will assume that it does appear. Now, upon such a state of facts, might not the recorder issue a warrant for the arrest of the plaintiff, and might not the chief of police execute such warrant, in ignorance of the fact that the business in which the plaintiff was engaged was interstate business? And the conclusion might reasonably be reached by the officers charged with the enforcement of this ordinance that even such business was not exempt from the payment of a license tax. Such was the opinion of the chief justice and two of his associates in the case of *Robbins v. District*. If there was convincing reason for such a conclusion on the part of these learned men, why should a recorder and chief of police of the city of Oregon City be held liable in a civil action in damages for taking the same view? It is clearly not a case where there is a clear absence of jurisdiction of the subject-matter, since, as already stated, the city is authorized to collect license tax from persons soliciting business, and, at the most, it is only in the case of persons soliciting for the sale of merchandise outside of the state that the party would be exempt from liability to pay the license. It seems very clear that the officers, in the execution of this ordinance, are within the rule of exemption from civil liability. They are certainly within the reason of the rule, and, so being, are exempt.

The allegation that the officers of the city acted falsely and maliciously in what was done is immaterial. It is held in *Bradley v. Fisher*, *supra*, that the exemption of judges from civil liability cannot be affected by the motives with which their judicial acts are performed:

"If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection

essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

For reasons affecting the public interest, the responsibility of a judge for malice or corruption in office is to the public, through impeachment or other judicial proceeding, involving, among other penalties, a judgment of removal from office.

In the case of *Trescott v. City of Waterloo* (C. C.) 26 Fed. 592,—a case like this,—it was held that an action could not be maintained against a municipal corporation for false imprisonment, where the party, on conviction, served out his fine in prison; and, as one of the grounds for its decision, the court says:

"Not questioning that the ordinance adopted by the city of Waterloo comes within the ruling thus made, and is therefore void, counsel have discussed the question whether the city can be held liable for damages to the plaintiff, under the state of facts alleged in the petition. It will be borne in mind that the plaintiff could, by proper action on his part, have defeated the assessment of a fine against him for selling without a license. If the decision in the police court was adverse to him in this particular, he could, by appeal, have carried the case to a higher court, and thereby have caused the reversal of the judgment assessing a fine against him. Had he paid the fine under protest, he might have recovered the same in a proper action. He did not pursue either of these courses. Having undertaken to peddle goods without a license, and having been arrested for a violation of the ordinance, he suffered a fine to be entered against him, and, rather than appeal or pay the fine in money, he discharged the fine by suffering imprisonment under the provisions of the state statute."

In this case the plaintiff could have relieved himself from the damages which he has sustained by the payment of the license tax, in which case he would have had his remedy against the city to recover the money thus paid, without serious injury or damage to himself; and so he ought not to be permitted to make use of imprisonment, which has, in a sense, been voluntarily submitted to by him, for the purpose of recovering damages. The demurrer is sustained.

CONNAWAY v. OVERTON et al.

(Circuit Court, N. D. California. December 4, 1899.)

No. 12,581.

ABATEMENT—DEATH OF DEFENDANT BEFORE SERVICE OF PROCESS.

Under Code Civ. Proc. Cal. § 416, which provides that, from the time of the service of the summons in a civil action the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings, where a defendant dies after issuance of summons, but before its service, the court has acquired no jurisdiction, and cannot make an order substituting the executor of the deceased defendant, and awarding an alias summons against him.

On Motion to Set Aside Order of Substitution and Alias Summons.

J. T. Morgan and Curtis Hillyer, for plaintiff.

Jesse W. Lilienthal and Thomas Rutledge, for defendants.

MORROW, Circuit Judge. This is an action at law, brought by the receiver of the Moscow National Bank, of Moscow, Idaho, against the defendants herein, who are alleged to be the holders of 100 shares of capital stock of the said bank, of the par value of \$100 per share. It is alleged that the comptroller of the currency of the United States made an assessment of \$100 per share on all shares of the capital stock of the Moscow National Bank on June 14, 1897, for the purpose of paying its liabilities, and this assessment the stockholders were ordered to pay on or before July 14, 1897, due notice of which assessment and order was given to defendants; that defendants have become indebted to plaintiff in the sum of \$10,000, with the interest thereon at 7 per cent. per annum, since June 14, 1897, and have paid no part of the same. Plaintiff prays for judgment accordingly.

This complaint was filed on March 28, 1898, and on the same day plaintiff filed a praecipe directed to the clerk of the court for a summons and two certified copies of summons directed to defendants in the cause, and for two certified copies of the complaint for service. The clerk thereupon issued the summons and the certified copies thereof, together with copies of the complaint, as requested. On April 5, 1898, the marshal returned the summons into the clerk's office, with the certificate that on the 30th day of March, 1898, he had served the defendant Hoffer, and that "he was unable to make personal service on the defendant O. P. Overton, as he was very sick, and he was not permitted to see any one, under instructions of his physician." No service of process was ever made upon the defendant O. P. Overton. On September 3, 1898, the default of C. A. Hoffer was entered. On March 15, 1899, a writ of scire facias was, on motion of plaintiff, issued out of this court to John P. Overton, executor of O. P. Overton, deceased, which writ was subsequently quashed. On June 6, 1899, plaintiff filed the suggestion that on the 13th day of April, 1898, defendant O. P. Overton died, and that since that time John P. Overton had been appointed and qualified as executor of his estate. On June 12, 1899, the court entered an order that John P. Overton, executor of the last will and testament of the defendant O. P. Overton, deceased, be substituted as a defendant in the place of said O. P. Overton, deceased, and that alias summons issue directed to said John P. Overton, as executor, etc., requiring him to appear and answer the complaint within the time allowed by law. An alias summons was thereupon issued to John P. Overton, executor, on July 14, 1899. This case now comes before the court upon the motion to set aside the attempted service of this alias summons on the order of the court substituting John P. Overton, as executor, as defendant in place of O. P. Overton, deceased, herein. John P. Overton appears specially for the purposes of this motion, and expressly protests that this court has not acquired jurisdiction over him.

Section 416 of the Code of Civil Procedure of California provides:

"From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is or-

dered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him."

In the case at bar the summons was not served upon the defendant O. P. Overton. Where the death of the defendant occurs before the service of the summons is completed, the court has acquired no jurisdiction, and the action abates, unless saved by the statute. 5 Enc. Pl. & Prac. 823. In the case of *White v. Johnson*, 27 Or. 282, 40 Pac. 511, the facts bear a close resemblance to those of the case at bar, in the matter of the service of the summons. Defendant had died after the issuance and prior to the service of summons upon him. His executrix was served with the summons, and judgment was rendered against her by default upon her refusal to appear, or plead thereto. In the course of the opinion in this case, Justice Wolverton quotes from the case of *Auerbach v. Maynard*, 26 Minn. 421, 4 N. W. 816, in which case it is said by Berry, J.:

"Then, under section 69, Gen. St. Minn. 1878 (section 5209, Gen. St. 1894), from the time when the service is thus complete 'the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings.' If the party upon whom the service is being made dies before it is complete,—that is, before the required publications have been made,—the service cannot be completed, there being no person in being upon whom to make it; and whatever has been done short of complete service is of no avail, and the court acquires no jurisdiction through it." Whereupon the learned justice adds: "Thus it appears that the court is without power or authority to take any action looking to the rendition of a personal judgment merely, without first attaining jurisdiction through the service of a summons upon the defendant. Aliter, from the time of the service of the summons, the court has control of all subsequent proceedings."

The facts in the case at bar and the law stated in the section of the Code of Civil Procedure quoted above lead to the same conclusion as in the case cited. This court has acquired no jurisdiction in this case that will authorize it to proceed against the personal representative of the deceased. The service of the summons upon the defendant O. P. Overton was an essential preliminary to the proceedings necessary to acquire such jurisdiction. The order of substitution and the attempted service of the alias summons herein will therefore be set aside.

In re LEWENSOHN.

(District Court, S. D. New York. December 27, 1899.)

1. BANKRUPTCY—ELECTION OF TRUSTEE—FILLING VACANCY.

Under Bankr. Act. 1898, § 44, providing that the creditors of a bankrupt shall appoint a trustee "at their first meeting after the adjudication, * * * or if there is a vacancy in the office of trustee," if a person chosen as trustee by the creditors is disapproved by the court, or declines to act, or fails to qualify, there is a vacancy in the office, and a new election must be had by the creditors, if that is practicable. An appointment cannot be made by the court unless the creditors neglect or fail to make a choice upon opportunity afforded them, when practicable, so to do.

2. SAME—CONSENT OF PROPOSED TRUSTEE.

Creditors of a bankrupt, before the meeting at which a trustee is to be chosen, should obtain the consent of the person whom they propose to elect to that office, if practicable, in order to avoid the necessity of a new meeting of creditors, caused by his declining to act.

3. SAME—OBJECTIONS—ADJOURNMENT OF MEETING.

When, at a meeting of creditors of a bankrupt, objections are presented against the person chosen as trustee, and are taken under advisement by the referee, the meeting should be adjourned to a future day, when a new election may be had in case the objections are sustained and the appointment disapproved.

4. SAME—QUALIFICATIONS OF TRUSTEE.

When one of the bankrupt's creditors has been chosen as trustee by the unanimous vote of a large body of creditors present at the meeting, and nothing appears to impugn his competency or integrity, his election will not be set aside by the court, at the instance of the bankrupt, on allegations by the latter of hostility and bias against him on the part of such trustee, especially where such animosity, if it exists, may have been caused by the bankrupt's own fault.

In Bankruptcy. On motion to set aside an order of the referee in bankruptcy disapproving the trustee chosen by creditors and appointing another trustee.

Blumenstiel & Hirsch, for the motion.

Meyers, Goldsmith & Bronner, opposed.

BROWN, District Judge. At the first meeting of creditors in the above proceeding, on December 5th, all who had proved their claims being 38 in number and representing debts to the amount of about \$150,000, voted for Francis M. Bacon, Jr., of this city as trustee. His firm of Bacon & Co. was one of the four largest creditors, having a claim of \$11,450. On December 12th, to which day the meeting was adjourned, objections were for the first time made on behalf of the bankrupt, and the referee was asked to disapprove of the trustee elected on the ground that he was not competent, impartial and unbiased. The matter was taken under consideration by the referee, and the meeting adjourned without day. On the next day the referee disapproved of the trustee elected on the ground above stated, and appointed another trustee. A motion is now made to set aside this appointment. The subject has been argued at length, both as respects the right of the referee to appoint a trustee upon such a disapproval, as well as upon the sufficiency of the objections raised against the confirmation of the trustee chosen by the creditors. Substantially the same question has been previously presented to me as to the referee's power to appoint, when an elected trustee declines to serve, or fails to qualify. The same considerations apply to all these cases, and I shall treat them as one.

1. Section 44 of the bankrupt act provides that the creditors shall appoint one or more trustees

"At their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, * * * or if there is a vacancy in the office of trustee":

and that if the creditors do not appoint, the court shall do so.

Whatever may be the reserved or implied power of courts of bankruptcy under the last paragraph of section 2, to appoint a trustee

when necessary, resort to such an implied power cannot ordinarily be had in cases where the statute itself designates a different mode of appointment; and in doubtful cases the general intent of the law, as gathered from its express provisions, should be observed so far as possible.

If upon the referee's disapproval of an elected trustee, or upon the trustee's refusal to accept, or failure to qualify, "there is a vacancy in the office of trustee," the case falls within one of the clauses of section 44 above cited, and a further election by creditors must be had where, as in this case, such an election is practicable; and in my opinion these cases do fall within both the letter and the spirit of section 44. See *Coll. Bankr.* 246; *Loveland, Bankr.* p. 214, § 107; *Id.* p. 270, § 142.

In the case of *In re Smith*, 1 N. B. R. 243, 247, 2 Ben. 113, 22 Fed. Cas. 381, *Blatchford, J.*, says of the act of 1867,

"The policy of the bankrupt act, as clearly shown in its provisions, is to give to the creditors of the bankrupt the free, deliberate, unbiased choice, in the first instance, of the person who is to take the assets and manage them. The importance of this policy has been uniformly recognized by this court. It is especially incumbent upon registers in no manner to interfere with or influence either directly or indirectly the choice of an assignee by creditors."

This general intent is still more strongly manifested by the act of 1898, since the latter act has largely curtailed the former power of the court to appoint, and correspondingly extended the right of creditors. Section 13 of the act of 1867 (section 5034, Rev. St.) provides for an election by creditors at the first meeting only, and authorizes the court to fill all vacancies; at the same time it expressly treats a failure to qualify as a case of "vacancy." The act of 1898, however, provides for an election by creditors not only at their first meeting, but in five other contingencies, viz.: (1) "After a vacancy has occurred in the office of trustee;" (2) after an estate has been reopened; (3) after a composition has been set aside; (4) or a discharge revoked; or (5) "if there is a vacancy in the office of trustee." These clauses seem designed to cover all situations.

The authority of the court to fill vacancies, given by the act of 1867 is wholly omitted; no such authority is anywhere to be found in the act of 1898; while section 2, par. 17, in defining the jurisdiction of the court in this regard, authorizes it to appoint trustees only

"Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees * * * and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them."

From what the act provides, as well as from what it omits, therefore, the necessary inference is that it designs to give creditors in all cases an opportunity to choose the trustee, and to authorize the court to appoint only where they neglect or fail to do so. This was one of the merits of the act that was urged upon its passage. *Coll. Bankr.* p. 33. The general orders are framed on this view; No. 14 (32 C. C. A. xviii., 89 Fed. vii.) forbidding any official trustee, or trustee for any class of cases, and No. 25 (32 C. C. A. xxvi., 89 Fed. xi.) authorizing a meeting of creditors to be called whenever there is a "vacancy in the office of trustee." The particular

language of the two clauses of section 44 as respects "vacancies" shows the same intent. The first clause, "after a vacancy has occurred," imports that the office was previously filled; but the revisers apparently not being satisfied with this limitation, the second clause was added in order to secure an opportunity of choice to creditors in every case "where there is a vacancy," i. e. where the office, from whatever cause, is unfilled. For the word "vacancy" alone does not import that the office has been previously filled. Bouv. Law Dict. defines the word as

"A place which is empty. The term is principally applied to cases where the office is not filled."

In the Century Dictionary it is defined,

"(d) An unoccupied or unfilled post, position or office."

So long as the office is unfilled, therefore, "there is a vacancy," whether previously filled or not, and this second clause as respects vacancies, therefore, applies. If this clause were not broader than the first, it would be mere surplusage. The two clauses indicate the composite origin of the text; and the latter in effect supersedes the former. That the word "vacancy" is used in the broad sense above stated, is further shown not only by the act of 1867 (section 5034), which provides that if the assignee chosen fails to accept the trust the judge or register may fill the vacancy, (that is, a "vacancy" though the office had not been previously filled); but section 50 of the present act, after requiring a bond from the trustee before entering upon the performance of his official duties (subdivision b) provides (subdivision k) that

"If any trustee fail to give bond he shall be deemed to have declined his appointment and such failure shall create a vacancy in his office."

"There is a vacancy," therefore, within the second clause of section 44 relating to vacancies, whenever the trustee chosen refuses to accept, or fails to qualify, or is disapproved by the court, whether the office has been previously filled or not; and in such cases the court cannot appoint until after opportunity is afforded creditors for a new election, where that is practicable.

In order to prevent the delay incident to the call of a new meeting of creditors under general order 25, it is advisable that the consent of the proposed trustee should be obtained if practicable before his election; and if objections to a trustee elected are reserved by the referee, the meeting should be adjourned to a future day when a new election can be had, in case the previous choice is disapproved.

2. The objections to Mr. Bacon seem to me insufficient for setting aside the creditors' unanimous choice. His firm was one of the four largest creditors, and he was unanimously elected by a large body who had proved their claims. These objections were stated by the bankrupt's counsel in an address to the referee at an adjourned meeting, and in the reply of the creditors' counsel they were claimed to be incompetent and frivolous. No notes were then taken; the meeting was adjourned without day, and the referee took the objections under advisement. On the next day the bank-

rupt's attorney submitted to the referee an affidavit purporting to state the objections made the day before, which is annexed to the referee's report. The referee received this affidavit, and on the same day entered his disapproval of Mr. Bacon, and the appointment of another trustee, without notice to the other side of the affidavit filed, or giving opportunity to reply to it. Without such notice and opportunity of reply, I think the affidavit should not have been received.

The charges made in the affidavit are that Mr. Bacon had a hostile animus towards the bankrupt; that he had caused him to be dogged by private detectives; had received from them false reports, which he insisted upon though disproved; that he would not and could not be a disinterested person, maintaining the interest of the bankrupt and his welfare and personal liberty; that he had obstructed the expected composition, and being proposed as a trustee under the composition, that he had claimed compensation if he acted as such.

The latter charge not only states no improper claim, but is foreign to the subject in hand. The alleged hostile animus seems based only upon the watch by detectives on the bankrupt's transactions in his business, and some indefinite threats based upon their reports; and from the other papers submitted in the bankrupt's own behalf, it appears that the watch, animus and threats complained of, were mostly, if not wholly, on the part, not of Mr. Bacon individually, but of the credit superintendent of Mr. Bacon's firm, who might naturally enough be indignant at having been led into a credit of over \$11,000, and afterwards finding unexplained discrepancies to the amount of above \$175,000, in assets, as compared with the bankrupt's statements less than six months before.

If it is theoretically possible that such a state of hostility might exist between the bankrupt and the person elected as to make him an improper person to act as trustee (*In re McGlynn*, 2 Low. 127, 16 Fed. Cas. 122) it should be at least clear that this bias was not through the bankrupt's own fault. Under the statute (section 45), incompetency for the performance of their duties, and nonresidence, are the only grounds of disapproval; and with these, mere bias or hostility to the bankrupt, except in extreme cases, can have little to do. The choice of creditors ought not to be interfered with on slight grounds. *Robs. Bankr.* 395; *Coll. Bankr.* 247. In the case of *In re Funkenstein*, 9 Fed. Cas. 1004, Hoffman, J., says:

"Until the court has before it clear and positive evidence that the parties nominated are commercially dishonest or disreputable in the commercial community, it seems to me it would be my duty to recommend their approval."

In the case of *In re Barrett*, 2 N. B. R. 533, 2 Fed. Cas. 909, Jackson, J., observes:

"What then is cause sufficient to justify the judge in withholding his assent? Manifestly it must be for want of capacity or integrity in the party selected."

To the same effect are *In re Grant*, 2 N. B. R. 106, 10 Fed. Cas. 973; *In re Clairmont*, 1 N. B. R. 276, 5 Fed. Cas. 810.

The cases cited as to the desirableness of amicable relations (Mc-

Pherson v. Cox, 96 U. S. 404, 24 L. Ed. 746; May v. May, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179) refer to the relations between the trustee and his beneficiaries. In bankruptcy, however, the beneficiaries are not the bankrupt, but the creditors. For that reason the law gives to them alone the choice of trustee; the bankrupt has no part in it, because presumably he has no interest in it; and it is scarcely consistent with that situation, that the bankrupt who has no voice in the election and whose business dealings may have been most reprehensible, should be allowed to defeat the creditors' unanimous choice on the ground that the trustee elected was unfriendly to himself—an objection which would naturally be strongest when the bankrupt's own demerits were greatest.

The trustee's duties are administrative, not judicial. It is not his special duty "to hold an even hand or an unbiased mind" towards the bankrupt, but to make the most possible out of the assets; and in the performance of this duty, mere bias or unfriendliness towards the bankrupt must be rarely, if ever, material. Considering the number and frequency of fraudulent bankruptcies in the past, a zealous watch and scrutiny of an insolvent's transactions, cannot be looked upon as a demerit, or as indicative of a lack of "competency" in a trustee. And unfounded suspicions and prejudices even, may be met by the honest merchant without fear.

If objections of the kind here presented were to be readily entertained, and investigations were to be entered into by referees as might be necessary in order to ascertain the degree, or the cause, or the justification of the alleged bias, it is manifest that great embarrassment and prejudicial delays in the choice of a trustee might often be created at the mere option of the bankrupt, such as the law could never have contemplated; and at the same time, by the adoption of false tests, the most competent and effective trustee might be ruled out.

From the papers presented, Mr. Bacon appears to be a man of high character and mercantile standing, and specially competent for the office of trustee. The unanimous choice of creditors imports this. No question is made in these regards; and when such a man is unanimously elected, charges by the bankrupt of bias, interest or animosity ought not, I think, to be entertained, except upon specifications, which, if true, are so reprehensible as to amount to an impeachment of character. The charges here made, even if they were fairly imputable to Mr. Bacon, are not of that kind. I do not see the least reason to suppose that the bankrupt, with Mr. Bacon as trustee, would find any embarrassment in the performance of his duty to disclose assets, or to reveal all improper claims upon the estate; or that Mr. Bacon would not freely and properly receive such information and make the most of it. The choice of the creditors should, therefore, be approved.

In what has been said above it is not intended to qualify previous rulings as respects the authority and duty of the court or referee to disapprove the choice of creditors when the person selected by them is lacking in substantial character, capacity, independence and good standing, or in any of the other qualities necessary to a faithful and efficient administration of the bankrupt's estate.

In re BARROW.

(District Court, W. D. Virginia. December 16, 1899.)

1. **BANKRUPTCY—ASSETS—GROWING CROPS.**

Where a bankrupt is tenant of a farm under a contract reserving to the landlord, as rent, one-fourth of the crops raised on the land, the bankrupt's interest in growing crops, though they are immature and unsevered at the time of filing his petition in bankruptcy, is property which he might have transferred at that date, within the meaning of Bankr. Act 1898, § 70a, subd. 5, and therefore vests in his trustee as assets of his estate in bankruptcy; and after the crops have been severed the bankrupt must surrender the same to his trustee, or account for the proceeds.

2. **SAME—CROPS GATHERED AFTER ADJUDICATION—COMPENSATION OF BANKRUPT.**

Where a bankrupt who has an interest in growing crops omits to list the same in his schedule of assets, not from any fraudulent design, but because he was advised that they would not pass to his trustee, and completes their cultivation and harvesting after his adjudication in bankruptcy, and is then ordered to surrender the crops, or the proceeds of their sale, to the trustee, he will be allowed a reasonable compensation for work and care bestowed on them from the date of the adjudication.

In Bankruptcy. On review of decision of referee in bankruptcy.

Chas. B. Bryant, for bankrupt.

John W. Carter, for creditors.

PAUL, District Judge. The certificate of the referee in this matter, giving a summary of the evidence, as required by rule 27, General Orders in Bankruptcy, shows the following material facts:

"The bankrupt filed his petition September 1, 1899, and was adjudicated a bankrupt September 2d. The first meeting of creditors was held September 30, and was adjourned to October 10, 1899. At the adjourned meeting, at the instance of certain creditors, the bankrupt was examined as to the property owned by him at the time of filing his petition. From this examination it appeared that he was a tenant farmer on leased premises, under a contract with rent reserved, of one-fourth of the crops produced; that at the time of filing his petition he had growing crops of corn and tobacco, which he omitted from his schedules of property; that the omission was not with intent to defraud his creditors, or to conceal his true financial condition, but because he was advised that the bankrupt act did not require the listing of crops growing, immature, and unsevered at the time of filing his petition"; that subsequent to his adjudication he had gathered these crops, and had them in possession, except part of the corn crop, which he had sold.

A trustee was appointed, and the referee required the bankrupt, under section 39, subsecs. 2, 6, to amend his schedule so as to include these crops.

On the question whether a bankrupt's growing crops, immature and unsevered at the time of filing his petition, are to be surrendered by him, and administered by the trustee as part of the bankrupt estate, the referee held they are not. The contention of the creditors that these crops passed to the trustee must be determined by the provisions of section 70a, Bankr. Act 1898. It provides:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt,

except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him; * * * (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

These six subdivisions embrace every species of property and interests in property of which we can well conceive a man invested with ownership. The provision under subsection 5 ("property which prior to the filing of the petition he could by any means have transferred") determines this question. It only remains to inquire whether a tenant farmer, having by his contract with his landlord a three-fourths interest in a crop of any kind, whether growing or matured, severed or unsevered, can by any means transfer his interest therein. The ownership of property, whether the title be legal or equitable, carries with it the right of the owner to transfer his interest to another. The court does not concur in the view presented by counsel for the bankrupt, that an interest in a growing crop is an exception to this rule; that, by reason of the landlord having an interest of one-fourth in the crops, the tenant could not before the severance of the crops have transferred his interest of three-fourths therein. The contention cannot be sustained on principle, and, so far as the court is informed, it is without the sanction of precedent. It is by no means unusual in this state for a tenant to sell, pledge, or mortgage his interest in growing crops, and his right to do so is as unquestionable as his right to dispose of any other property of which he is the owner. "Transfer" is a very comprehensive word in the common law. It embraces every transaction which passes over or conveys property to another. The bankrupt act of 1898 (section 1, subsec. 25) provides that "transfer" shall include the sale and every other and different mode of disposition of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security." The bankrupt's interest in the crops being such that he could have transferred it before filing his petition, the title to such interest vested in the trustee as of the date of the adjudication. The trustee is entitled to immediate possession of the property, and the bankrupt must account for such part as he has disposed of.

It appearing that the bankrupt did not omit these crops from his schedule with a fraudulent intent, he will be allowed by the trustee a reasonable compensation for the work and care bestowed on them from the date of his adjudication. The finding of the referee is reversed.

In re CRONIN.

(District Court, D. Massachusetts. December 30, 1899.)

No. 1,535.

BANKRUPTCY—DISMISSAL OF PROCEEDINGS—CONSENT OF CREDITORS.

If one of the creditors joining in a petition in involuntary bankruptcy insists upon an adjudication being made, the court cannot dismiss the petition, if the statutory grounds for an adjudication exist, and no fraud, oppression, or mistake is shown, although the other petitioners consent to its dismissal, and although it appears that it would be for the best interests of creditors that the debtor should be allowed to settle with them out of court.

In Bankruptcy. On motion to dismiss petition.

Edgar R. Champlin, for petitioning creditors.

Lund & Welch, for objecting creditor.

Paul R. Blackmer, for certain creditors.

John F. Cronan, for respondent.

LOWELL, District Judge. This was an involuntary petition, which the respondent moved to dismiss. Two of the three petitioning creditors assented to this motion, and I am satisfied that it would be for the best interest of the creditors that the petition should be dismissed, and the respondent permitted to settle with his creditors by way of compromise, which he is prepared to do fairly and equally. The third petitioning creditor objected to the dismissal of the petition, and desired to proceed to an adjudication. It was not shown that any of the parties were acting in bad faith. If a respondent has committed an act of bankruptcy, and the statutory number of his creditors has duly petitioned for his adjudication as a bankrupt, this court must make the adjudication, even though it is satisfied that a compromise offered by the respondent would be for the best interest of the creditors. Bankruptcy is not a remedy like an injunction or the appointment of a receiver, granted in the discretion of a court of equity. The distribution of a debtor's assets is to be made in bankruptcy if he has committed an act of bankruptcy, and the other statutory requisites have been complied with. Fraud, oppression, or even mistake may, in some cases, be sufficient grounds for dismissal of the petition; but none of these grounds exist here. *Lowell, Bankr. p. 39; King v. Henderson* [1898] App. Cas. 720. Is the condition altered by the fact that the majority of the petitioners have come to desire a dismissal of the petition, which dismissal is resisted by the minority? Will the assent of a majority of the petitioners enable the court to act for the interest of the creditors by dismissing the petition, or has the minority the right to insist upon an adjudication, if an act of bankruptcy has been committed? I think that in this case the right of the minority is absolute. After petitioners have joined in a petition, they cannot ordinarily withdraw against the wishes of their fellow petitioners. *Lowell, Bankr. p. 34; In re Heffron*, 10 N. B. R. 213, Fed. Cas. No. 6,321; *In re Sargent*, 13 N. B. R. 144, Fed. Cas. No. 12,361. *In Re Indianapolis, C.*

& L. R. Co., 5 Biss. 287, Fed. Cas. No. 7,023, the court did, indeed, dismiss an involuntary petition, against the objection of two creditors, but only after payment in full had been secured to the objectors; and Judge Drummond said:

"I think that the bankrupt court, as a court of equity, has a full, equitable discretion upon this subject, and can allow a case to be withdrawn from it, provided it is done without prejudice to the interests of any of the parties, debtors or creditors, who are before it. And in this case I think it was competent for the bankrupt court to allow the case to be withdrawn from it, protecting the interests of the different nonassenting creditors."

Motion to dismiss denied.

In re KNOX.

(District Court, N. D. New York. January 2, 1900.)

No. 684.

BANKRUPTCY—PROOF OF DEBTS—EXPUNGING INEQUITABLE CLAIM.

An insolvent debtor made a composition with his creditors of 25 per cent., but secretly promised payment in full to three of them, as a means of inducing them to sign the agreement. The remainder of the claims of these creditors was afterwards paid by the debtor out of property of his wife, which he was managing as her agent, she being ignorant of its use for that purpose. The three creditors, having actual or constructive knowledge of the facts, continued to deal with the wife, and she became indebted to them in sums less than they had respectively received from her property. More than four months after the payment, the wife was adjudged bankrupt, and these creditors proved claims against her estate for the new indebtedness. *Held*, that it would be inequitable to allow them to receive any share of her estate, and their proofs of debt should be expunged.

In Bankruptcy. Upon the petition of the trustee, the referee, after full hearing, expunged the claims of three creditors. Upon the request of these creditors, the referee has certified the questions involved to the court for review.

D. C. Stoddard, for trustee.

Elisha B. Powell, for creditors.

COXE, District Judge. Robert J. Knox, the husband of the bankrupt, became embarrassed in business in the summer of 1897. There was a levy upon his property and a sale was threatened. In these circumstances the creditors signed a composition agreeing to accept 25 per centum of their claims. The creditors whose proofs have been expunged were parties to this agreement, but they consented to sign only after they had negotiated a secret convention with Knox that their claims should be paid in full. Thereafter the property of Knox was sold at public auction to his wife who managed the business with her husband as agent until on or about February 23, 1899, when she was adjudicated a bankrupt upon her own petition. During the time Knox was carrying on the business as agent he paid these creditors in full, using his principal's money for that purpose. After the transfer of the business to the bankrupt these creditors continued to deal with her and at the time of her bank-

ruptcy she was indebted to them in the sums for which they have proved their claims. In each instance the sum proved is less than the amount which the creditor has received from the bankrupt's estate. It is the theory and contention of the trustee that the bankrupt and her other creditors are entitled to have the money thus illegally taken from the bankrupt applied towards the payment of her debts.

The referee has written no opinion and has made no special findings of fact, but he could hardly have reached the general conclusion expunging the proofs without finding the following facts: First. That Robert J. Knox made a secret and unlawful agreement to pay these creditors in full, his other creditors receiving but twenty-five cents on a dollar. Second. That the creditors whose claims were expunged received full payment of their claims against Robert J. Knox, the bankrupt's property being converted without her knowledge for that purpose. Third. That these creditors had actual or constructive knowledge of the facts at the time the present indebtedness was contracted. The evidence warrants these findings. As an abstract proposition it would seem inequitable that these creditors should receive 100 per cent. where the other creditors of Robert J. Knox received but 25, the additional 75 per cent. being paid out of the property of this bankrupt and that in addition they should receive the same dividend as her other creditors. Subdivision "c" of section 60 is as follows:

"If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

This paragraph is inapplicable to the case at bar in several particulars and is quoted only for the purpose of showing that it was evidently the intention of the lawmakers that such controversies may be settled upon the principle of set-off in this informal manner without subjecting the parties to the expense and delay of a lawsuit. Such a disposition is, of course, much more favorable to the creditor than one requiring him to pay back the preference in full and receive only his *pro rata* share of the bankrupt's estate. In the present case the trustee, who represents the interests of all the creditors, seeks to have the debts which these creditors owe the estate of Mary G. Knox set off against the debt which Mary G. Knox owes these creditors. Her other creditors will have a right to complain if her property is used for any other purpose than the payment of her debts.

It is argued for the creditors that as the payments to them as creditors of Robert J. Knox were made more than four months prior to the filing of the petition herein subdivision "b" of section 60 is applicable and the payments cannot be attacked in bankruptcy. As the court understands the position of the trustee it is not founded upon the theory that the bankrupt has given a fraudulent preference to these creditors, but upon the radically different theory that they have taken from the bankrupt without her knowledge or consent

\$3,400 which belongs to her general creditors. The right to compel the creditors to account for this money does not depend upon the bankruptcy act but upon well-known principles of the common law. Where an agent with the knowledge of his creditor pays his own debt with the property of his principal the latter, on discovering the fraud, may recover the property so transferred. Story, Ag. (9th Ed.) §§ 225-231; Van Amringe v. Peabody, 1 Mason, 440, Fed. Cas. No. 16,825. The court is of the opinion that the referee was right in holding that it will be inequitable to permit these creditors to draw additional sums from the bankrupt's estate. Affirmed.

In re BOSTON.

(District Court, D. Nebraska. July 13, 1899.)

BANKRUPTCY—EXEMPTIONS—FRAUDULENT CONVERSION OF PROPERTY.

Where a debtor, shortly before filing his voluntary petition in bankruptcy, and in contemplation thereof, sold property which was not exempt from execution, and applied the proceeds in part payment of a debt secured by a mortgage on property claimed to be exempt as a homestead, *held*, that the transaction was in fraud of the bankruptcy law, and that the trustee in bankruptcy, for the benefit of the creditors, should be subrogated to the rights of the mortgagee to the extent of the money so paid.

In Bankruptcy. On review of decision of referee in bankruptcy. The referee certified the case for review, as follows:

"Now on this 31st day of June, A. D. 1899, at Beatrice, in said district, before Fulton Jack, one of the referees of the above court, this cause coming on to be heard under the order of the above-entitled court for the purpose of taking evidence as to the amount of mortgage indebtedness upon the real estate claimed by the above-named bankrupt as exempt to him for a homestead, and upon the issues joined by the trustee by his answer filed in regard to such matters, the trustee appeared at the time and place, of which notice had been duly given to all parties in interest, and the bankrupt also appeared. And the referee having heard the evidence of the parties, and being duly advised in the premises, finds that the mortgage indebtedness upon said premises claimed as a homestead is the sum of \$1,091.33, bearing interest at the rate of 8 per cent. per annum. And the referee, being advised in the premises, finds that during the month of December, A. D. 1898, and in contemplation of proceedings in bankruptcy, the said Joel V. Boston, bankrupt, made and executed a chattel mortgage to the owner and holder of the said real-estate mortgage covering certain property, to wit, about 400 bushels of corn, which he did not list in any schedule filed by him; and that the said bankrupt afterwards personally sold said corn, obtained the proceeds thereof, and applied the same upon the said real-estate mortgage, and that the proceeds of said corn was the sum of \$120; that \$30 of said amount was paid within a few days of the filing of said petition in bankruptcy, and that the remaining \$90 thereof was paid thereon more than two months after the filing of said petition in bankruptcy; and the referee finds that the bankrupt has obtained the benefit of the proceeds of said property in the reduction of the mortgage indebtedness upon his homestead, and that the bankruptcy estate is entitled to be subrogated to the rights of Annabel M. Evans, the owner of said mortgage, to the said amount of \$120. It is therefore considered, ordered, and adjudged by the referee that the amount of the mortgage indebtedness upon the real estate claimed by Joel V. Boston, bankrupt, as exempt, to wit, the south half of the southeast quarter of section four (4), township six (6), range eight (8) east, in Gage county, Nebraska, in the sum of \$1,091.33; and it is further decreed that the estate in bankruptcy of the said Joel V. Boston

have a lien upon said real estate for the benefit of the creditors of said Joel V. Boston to the amount of \$120, and that the trustee at once set off to the bankrupt, as his homestead, all of said real estate, subject to the mortgage indebtedness due said Annabel M. Evans, and subject to said lien of \$120; and it is further ordered and directed that if the said Joel V. Boston fail for 20 days to pay said sum of \$120 to O. M. Enlow, the trustee in bankruptcy of said estate, that, in that event, the trustee proceed to sell at public auction, for cash, said lien of \$120 upon said real estate. To the order decreeing said lien of \$120 upon said real estate, and directing the sale of the same by the trustee, the bankrupt excepts. Fulton Jack, Referee in Bankruptcy."

"District of Nebraska—ss.: The bankrupt having taken exceptions to the above order of the referee as indicated therein, the question above cited is hereby certified to the Hon. W. H. Munger, judge of the above court, for his opinion thereon. Fulton Jack, Referee in Bankruptcy."

F. M. Davis, for petitioner.

S. D. Killen, for defendants Wolford Bros., J. H. Spellman, and Evert Van Engen.

MUNGER, District Judge. This matter is heard on an appeal from the decision of Referee Jack, finding that the bankrupt, a few days before filing his voluntary petition, disposed of property not exempt, and applied the same in partial payment of an incumbrance upon property which was exempt; that such transaction upon the part of the bankrupt was in fraud of the bankruptcy law; and that by reason thereof the creditors are entitled to be subrogated as mortgage creditors upon the homestead to the extent of such payment, to wit, \$120. This decision of the referee is affirmed.

In re ALDERSON.

(District Court, D. West Virginia. December 29, 1899.)

BANKRUPTCY—PROVABLE DEBTS—JUDGMENT FOR FINE.

Under Bankr. Act 1898, § 63a, providing that debts of a bankrupt may be proved and allowed against his estate which are "a fixed liability, as evidenced by a judgment, absolutely owing at the time of the filing of the petition," a judgment recovered by the state, in one of its courts, in a criminal prosecution for a misdemeanor, imposing a fine on the defendant together with the costs, is provable as a debt against his estate in bankruptcy, but is not entitled to priority of payment, and will be released by his discharge.

In Bankruptcy. On question certified by referee in bankruptcy.

A. G. Patton, for Monroe county.

Miller & Reed, for bankrupt and certain creditors.

JACKSON, District Judge. The referee in bankruptcy has requested the instruction and ruling of the court as to whether transcripts from the records of the circuit court of Monroe county, showing a number of judgments against a bankrupt for fines upon indictments for unlawful retailing, together with the costs of each case, are provable debts, and, if so, whether the bankrupt is released from them by obtaining his discharge in bankruptcy. Section 63 of the bankrupt act of 1898 provides that:

"(a) Debts of the bankrupt may be proved and allowed against his estate, which are a fixed liability, as evidenced by a judgment or an instrument in

writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

It does not clearly appear whether these judgments were obtained before or since the filing of the petition in bankruptcy, but I infer from the nature of the statement sent to me by the referee that these were judgments that were obtained by the state against the bankrupt before he filed his petition in bankruptcy.

The question that is presented is whether or not a judgment obtained by a state upon a criminal prosecution is a "provable debt," and, if so, whether or not the state has a prior lien upon the estate of the bankrupt. There can be no question that a judgment of a state court against the bankrupt is a provable debt. Section 63 of the bankrupt act of 1898, as quoted, expressly declares that, where a liability is evidenced by a judgment, it is a provable debt.

There is no qualification of the language employed in the statute which would tend to show that congress intended to make a distinction in regard to judgments obtained against the bankrupt, either in favor of the United States or of a state. The construction that I give to this statute does not confine the proof of debts to the citizens of the country, but permits judgments obtained in either the courts of the United States or of a state against the petitioning creditor to be proved. That congress evidently intended that this should be the proper construction of section 63, it provided in section 17 of the bankrupt act of 1898 that a discharge shall release a bankrupt from all of his provable debts, except those that "are due as a tax levied by the United States, state, county, district, or municipality in which he resides." This provision is the only one that refers to any demands or claims that a state may urge against a bankrupt, and it is specific in its language. It says "that a discharge in bankruptcy shall release a bankrupt from all of his provable debts." This section provides for the only limitation that would prevent a bankrupt from obtaining a full discharge from all of his debts. For the reason assigned, I am of the opinion that the judgments filed in the case "are provable debts," and are not entitled to precedence in the distribution of the bankrupt's assets.

In re WAXELBAUM.

(District Court, S. D. New York. December 18, 1899.)

1. BANKRUPTCY—VOLUNTARY PETITION—INQUIRY AS TO JURISDICTION.

Upon the filing of a voluntary petition in bankruptcy, and before an adjudication thereon, creditors may move to set the petition aside or dismiss it, on the ground that the court has no jurisdiction, the residence or domicile of the debtor being in another district; and thereupon the court may inquire into the facts of jurisdiction, and make the adjudication or dismiss the petition, according to the result.

2. SAME—PETITIONS IN DIFFERENT DISTRICTS—JURISDICTION.

After the filing of a petition in involuntary bankruptcy in one district and the service of process thereon, but before adjudication, the debtor filed his voluntary petition in another district. The place of his actual

residence or domicile being disputed, there was doubt as to the court which would have jurisdiction. *Held*, by the court of bankruptcy in the second district, that the mere pendency of the involuntary petition was not sufficient ground for dismissing the voluntary petition, but that action thereon would be stayed to await the determination of the court in the first district on the question of its jurisdiction over the petition before it and the adjudication of the debtor thereon.

3. SAME—VOLUNTARY AND INVOLUNTARY PETITIONS.

The provisions of Bankr. Act 1898, § 32, and of General Order No. 6 (32 C. C. A. viii., 89 Fed. v.), regulating the practice in case petitions in bankruptcy are filed "against" the same debtor in different courts of bankruptcy, each of which has jurisdiction, and directing that the first hearing shall be had in the district where the debtor has his domicile, but that the case may be transferred to that court where it can proceed "for the greatest convenience of the parties in interest," apply not only to the case of two or more involuntary petitions being so filed, but also to a case where an involuntary petition is presented in one district, and the debtor's own voluntary petition in another.

4. SAME—TRANSFER OF CAUSES.

Where a petition in involuntary bankruptcy against a debtor was filed in Georgia, and, pending a hearing thereon, he filed his voluntary petition in New York, alleging that he was a resident of the latter state, but it appeared that he had formerly been engaged in business in Georgia, that the debts to be affected were all contracted there, that his present business was as an agent or employé of the corporation which succeeded his former firm, that he was accustomed to spend a part of his time in Georgia, and that his creditors desired that the bankruptcy proceedings should be conducted in the latter state, *held*, that it would be "for the greatest convenience of the parties in interest" that the court in Georgia should proceed with the case, if it determined in favor of its jurisdiction and made the adjudication.

In Bankruptcy. On motion to dismiss petition.

Joseph Fried, for the motion.

Arthur Furber, for bankrupt, opposed.

BROWN, District Judge. In August, 1899, a petition was filed by the creditors of the above-named bankrupt, as surviving member of the firm of S. Waxelbaum & Son, at Macon, in the Southern district of Georgia, to have him adjudicated a bankrupt, alleging that he resided and had his domicile and principal place of business within that district. The bankrupt not being found there, an order for service by publication, issued November 21st, was personally served on the bankrupt in the city of New York on November 28th, requiring him to answer the petition by January 3, 1900. On amendment of the petition, a further order of publication was made, returnable January 15, 1900, which was personally served on the bankrupt in this district on December 5th. On December 7th, the bankrupt filed his own petition in this district stating that he had had his residence and principal place of business for the greater part of the six months previous in this district and asking to be adjudged a bankrupt here. On the next day, before any adjudication thereon, an order was granted by this court to show cause why the last-named petition should not be set aside, or for other relief, upon affidavits presented by creditors, stating the pendency of the involuntary proceedings in the Southern district of Georgia, that he was domiciled there and that a prior voluntary petition filed by the bankrupt

within this district on April 14, 1899, had been dismissed on November 21, 1899, for want of jurisdiction, it being found after full investigation that the bankrupt had not resided or had a place of business within this district for the requisite period. (D. C.) 97 Fed. 562.

The pendency of an involuntary petition before adjudication, does not necessarily invalidate a subsequent voluntary petition filed in the same district or in another district. The former petition may be invalid for lack of jurisdiction, when the facts appear; and other considerations also may sometimes justify, or even make desirable, a subsequent voluntary petition. *In re Canfield*, Fed. Cas. No. 2,380. Here the question of jurisdiction will arise on each petition; and neither is necessarily exclusive of the other, since a possible change of domicile or residence from Macon to New York in July, 1899, might give jurisdiction in either district. Section 2.

The decisions on this subject under the act of 1867, are not precisely applicable to the present case, since the question of jurisdiction was not involved in any of them, and the double petitions were in the same court. *In re Stewart*, 3 N. B. R. 109, Fed. Cas. No. 13,419; *In re Wielarski*, 4 N. B. R. 390, Fed. Cas. No. 17,619; *In re Canfield*, supra; *In re Flanagan*, 5 Sawy. 312, 18 N. B. R. 439, Fed. Cas. No. 4,850.

Under the present act, not only in partnership, but also in individual bankruptcies, a petition may often be properly filed in either of two districts. As respects different petitions in partnership cases. General Order 6 (32 C. C. A. viii., 89 Fed. v.) provides fully; it also further provides, "that if two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile," although the case may be transferred by one court to the other, "if that is for the greatest convenience of the parties in interest."

Section 32 of the act also provides that:

"In the event petitions are filed against the same persons in different courts of bankruptcy, each of which has jurisdiction, the case shall be transferred to the court which can proceed for the greatest convenience of parties in interest."

The above provision, read in connection with section 1 (1), "that a person against whom a petition has been filed, shall include a person who has filed a voluntary petition" (*In re Vaughan* [D. C.] 97 Fed. 560), would require the present case to be heard in the district of the bankrupt's domicile, or else transferred to that of his residence or place of business, if that would be for "the greatest convenience of the parties in interest."

Both the provisions above referred to, however, contemplate a case in which each court has jurisdiction of the cause, and that question when raised must be first determined.

Section 18g provides that upon the filing of a voluntary petition, the judge "shall make the adjudication, or dismiss the petition." No express provision is made in the act or in the rules as to when or how an inquiry into the truth of the jurisdictional facts alleged in a voluntary petition is to be made; but considering the complica-

tion which would often arise, it seems evident that the jurisdiction when challenged, should be inquired into as early as possible, so that the proceedings, if invalid, may be arrested in limine; and the alternative of adjudication or dismissal given by section 18g implies that the court should make such inquiry into the facts as may be necessary to determine whether to adjudicate, or to dismiss.

From the facts appearing in the case dismissed on November 21st for want of jurisdiction, a part of which had to be obtained by a commission to Macon, I am satisfied that the greatest convenience of the parties in interest, both as respects the residence, domicile and principal place of business of the bankrupt, as well as respects all other matters pertaining to the proceedings in bankruptcy, in whichever district the adjudication may be had, will be best subserved by a hearing of the whole case at Macon, should jurisdiction there be established. The debts were all contracted while he was in business there; his present business is in connection with the corporation which succeeded his former firm; he is in its employ, acting under a power of attorney; the creditors desire the investigation to be had there, and there I think the investigation will be most convenient and effective.

The proceedings on the bankrupt's new petition filed in this district on December 7th should, therefore, be suspended and stayed until the question of his adjudication at Macon is determined. If jurisdiction there is sustained, the further proceedings should for the convenience of parties be had in that district; if not sustained, the petition there will be dismissed and adjudication here will follow.

In re FALLS CITY SHIRT MFG. CO. et al.

(District Court, D. Kentucky. October 2, 1899.)

1. BANKRUPTCY—PRIORITIES—RANK OF LIENS.

Bankr. Act 1898, § 64b, cl. 5, giving priority of payment out of bankrupts' estates to "debts owing to any person who by the laws of the states or the United States is entitled to priority," does not operate to place all preferred debts of this class upon a plane of equality; but liens created by the laws of the state will attach to the property of a bankrupt in the hands of his trustee in the same relative rank and order in which they are fixed by the state statutes.

2. SAME—RIGHTS OF LIEN CREDITOR—PRACTICE.

An adjudication of bankruptcy brings the bankrupt's assets into the custody of the court of bankruptcy for administration; and a creditor of the bankrupt, having a lien on such property at that time, is not bound to follow the course of procedure prescribed by the state statute under which the lien arises, requiring certain action to be taken within a limited time for its preservation, but only to prove his claim as the bankruptcy law directs.

3. SAME.

Where a state statute (Ky. St. §§ 2487-2491) provides that, when the property of a manufacturing company shall come to the hands of a trustee or assignee for distribution to creditors, there shall be a lien thereon in favor of those who have furnished materials or supplies for carrying on the business, and directs that a claim therefor must be filed or suit brought to enforce the lien within 60 days, but does not expressly make the lien depend upon such action being taken, the lien will attach to the property of a bank-

rupt corporation upon the appointment and qualification of its trustee; and no proceeding to enforce the lien is necessary in the bankruptcy court, other than its proof as a secured debt, which may be done at any time within one year after the adjudication.

4. SAME—PROOF OF DEBT—AMENDMENT.

A lien creditor of a bankrupt, who inadvertently or by mistake proves his claim as an unsecured debt, may be permitted to amend his proof so as to save the benefit of his lien.

In Bankruptcy. On review of ruling of referee in bankruptcy.

George L. Everback, for John Glock, a creditor.

Strather & Gordon, for J. M. Robinson, Norton & Co., and other creditors.

EVANS, District Judge. The court is asked to review and reverse the ruling of the referee in this case upon two points, the first of which may be stated as follows: The adjudication was made on June 17, 1899, while the bankrupt was occupying the premises of John Glock at a monthly rental of \$160. A claim for something over six months' rent was presented and allowed, and for \$640 of it, covering the four months immediately preceding the adjudication, Glock, under section 2317 of the Kentucky Statutes, was allowed a priority, upon the ground that his lien to that extent was superior to liens claimed by certain material men under sections 2487 et seq. Those sections provide that when the property or effects of any manufacturing establishment, whether incorporated or not, shall come to the hands of any trustee or assignee for the benefit of creditors, or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, the persons who shall have furnished materials or supplies for the carrying on of such business shall have a lien upon such of the property, etc., as shall have been involved in such business, and all the accessories thereto, etc. It is also provided that such lien shall be superior to the lien of any mortgage or other incumbrance thereon "thereafter created." It is clear that the landlord's lien in this case was not created after, but was created before, the property of the bankrupts came into the hands of the trustee in bankruptcy. The landlord's lien was in existence June 17, 1899, at and before the adjudication; but the property of the bankrupts certainly did not come into the hands of the trustee until after that time, and probably not until July 3, 1899, when the trustee was appointed and qualified. Not until that event did the lien of the material men arise or exist. It is manifest, therefore, that the ruling of the referee upon this point was correct, unless, under clause 5, § 64, of the bankrupt act, all liens arising under the laws of the state are placed upon an even footing, regardless of priorities existing by virtue of the state laws. It is contended on behalf of the material men that such should be the construction of the bankrupt act, but the court is of a different opinion. Section 64 of that act, among other things, provides that debts shall have priority, and that the assets of the bankrupt shall be paid out in a certain order; the fifth in point of preference thereby fixed being "debts owing to any person who, by the laws of the states or the United States, are en-

titled to priority." The effect of the contention of the material men here would be that though all the creditors had liens created under the laws of the state, and though by those laws some of these liens had priority over others, still a proper interpretation of the bankrupt act would require a general leveling of these liens to a common plane, elevating some and depressing others, so as to destroy all advantage and all distinction given by the state laws. It cannot be admitted that such contention is sound. It seems to the court that it was obviously the intention of congress to recognize all liens created under the laws of the state, and to leave them precisely as it found them. There does not seem to be any evidence or plausible grounds of contention that congress meant to do anything so unjust or so unjustifiable as a contrary decision would involve. The plain intention of congress was to recognize liens and priorities thereunder precisely as the state laws had fixed them. In no other way could the priorities given by the state laws be made effective. In no other way could the debts "entitled to priority" under the state laws be preferred in the distribution of the bankrupt's assets. It results, therefore, that the ruling of the referee upon the claim of Glock, and by which he was given a priority in payment to the extent of \$640, was correct. He was entitled to it under the laws of the state.

The second question is more difficult, and has received the careful consideration of the court. As already indicated, sections 2487 and 2488 give a lien to the material men only when the property goes into the hands of the trustee in bankruptcy, and ipso facto that event. In this case that occurred on July 3, 1899. This lien then became at once absolute and fixed. Under the laws of Kentucky it was then entitled to the priority also given to it by section 64 of the bankrupt act. On July 25, 1899, W. E. Thorn, executor of W. T. Garner, proved his claim as an unsecured debt; but on September 14th he amended his proof of debt, and stated the facts necessary to show that he stood on the footing of the other material men, and thereupon the referee admitted him to share the priority equally with them. It is contended that this was erroneous. Many decisions under the bankrupt act of 1867 permitted amendments of this character. Loveland, Bankr. § 138, and cases cited. This court recently took the same view of the question in *Re Smith*, at Covington. But counsel insists that under section 2491 of the Kentucky Statutes this creditor would have been bound, in order to retain his lien, to bring his action within 60 days, if there had been an assignment under the state laws, and that there must be something done in this court equivalent to that, such as making proof of the debt as a secured claim within the 60 days; and counsel insists that this view is established by the authorities, and cites the case of *In re Brunquest*, 4 Fed. Cas. 482 (No. 2,055). Under section 2316 of the Kentucky Statutes a lien is given a landlord for one year's rent, as against other liens, under the circumstances named in the section, "provided the same is sued on in 120 days from the time the rent is due." There the landlord's lien is expressly made to depend upon the proviso, namely, the bringing of the suit for the

rent within the time limited; but, in cases where the tenant had assigned for the benefit of the creditors before such suit was brought, the court of appeals, in actions where the assignee had sued to settle the estate, held that, as the property was thenceforward in the custody of the court, the landlord did not lose his lien by not suing within that time. *Loth v. Carty*, 85 Ky. 595, 4 S. W. 314; *Petry v. Randolph*, 85 Ky. 351, 3 S. W. 420. It will be seen that the case under consideration by no means calls for as strong a ruling as those last cited, and yet the court of appeals there overruled a contention similar to the one made in this case. It may therefore be assumed that they would construe in a similar way the sections of the statute giving liens to material men, and providing for their enforcement. The lien in this case is not given "provided" a suit is brought within 60 days, but by sections 2487 and 2488 it is given unconditionally, if the facts exist, as confessedly they do in this case.

In section 2491 is found this language:

"Suit must be filed to enforce the lien given by this article within sixty days from the date of the assignment or from the date when the property shall go into the hands of a receiver or trustee, or from the date when the business shall be stopped or suspended or the property is sold, or claims for which a lien is asserted must be filed within said time with the persons authorized to receive and report claims."

Precisely what result would follow a failure is not apparent, as it is nowhere provided that such failure shall defeat the claim, nor is it expressly made a condition of the continuance of the lien; nor, if it were, could it be determined precisely when the 60 days begun,—whether from the date of the assignment, or from the date when the business shall be stopped, or from the date when there should be a sale of the property,—though these alternative propositions may have reference to something much more clearly in the minds of the members of the legislature than they are in that of the court. But the obscurity of the statutory provision just quoted is by no means cleared up when we read in section 2495 that the liens created under this article of the statutes shall be enforced by proper proceedings within one year. By this section one year is expressly made the limitation of suits on all liens created under the article. Possibly some measure of this confusion may result from faults in compiling several acts, but it seems to the court that it cannot be erroneous, in cases like this, to liberally construe section 2491 in favor of the lien given by the statute, which, by fair implication, provides that suit may be brought within 60 days after any of the different events named in the section. Why should the shortest term be given, instead of the longest? There would seem to be injustice in not allowing the 60 days to run from that event which in order of time takes place last. In this case the last event to occur was the sale of the property, which is shown by the record to have been made on July 22, 1899, and which was less than 60 days before the amended proof of debt by Garner's executor was filed, on September 14th. So that if this be the true construction the amended proof was in time. But, going further, it may be proper to say that, notwithstanding the views expressed by Judge Dyer

in the Case of Brunquest, it seems to me that the correct rule is different. When the adjudication in bankruptcy is made the case is in this court. Unless as litigation already pending may affect the question, the bankrupt's assets are in the custody of this court, and are to be administered here. Rules of state law or practice which require things to be done there within a specified time yield to the rules here. This is especially so in this case, where the lien is not expressly destroyed by statute for failure to sue in 60 days, nor expressly made to depend upon that action. I think the true rule is that a lien of this sort, if it exist at the outset, can be asserted in this court precisely as long as proof of debt may be filed, viz. within one year, and with the same results, should there be delay until after the first dividend. When the case comes here the time for asserting claims is the time given, not by the state laws, but by the bankrupt law. The state laws give the lien *eo instante* the property comes to the hands of the trustee. The trustee takes the property subject to this lien, but the manner of enforcing that lien through the bankrupt proceedings is entirely different from, and independent of, the state laws. There is nothing in the bankrupt act to the contrary, though there is a clause giving effect to the existence of liens under the state laws. Especially is this true in a case like the present. Here there is not only doubt as to what is really the statutory period of limitation, but the existence of the lien is not by any express terms made dependent on the bringing of an action at all. The state undertakes to bar the remedy in her courts either within 60 days or 1 year,—it is difficult to say which,—but that is all. She cannot prescribe a rule for barring the remedy in the bankrupt court, when congress expressly or by inference has fixed another. This case may, indeed, be distinguished from the Brunquest Case upon several grounds, among them being: First, that the lien claimants in that case were not creditors of the bankrupt, but only of his subcontractors; and, second, that the Wisconsin statutes are very different from ours. But, even if the case could not be distinguished, I have heretofore, in the Smith Case, ruled the other way; and upon a reconsideration I am entirely satisfied with the former judgment, and especially upon the peculiar statute of Kentucky now under consideration. The ruling of the referee is approved and affirmed.

KOSCHERAK et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 42.

1. CUSTOMS DUTIES—CLASSIFICATION—DECORATED GLASS BOTTLES.

To bring glass bottles within paragraph 90 of the tariff act of 1894 which provides for such bottles "when cut, engraved, painted, colored, printed, stained, etched or otherwise ornamented or decorated," the cutting, engraving, etching, etc., thereon must be substantial and sufficient to amount to an ornament or decoration; otherwise, they are dutiable as plain glass bottles under paragraph 88.

2. SAME.

Glass siphon bottles, intended for holding gas-charged waters, having etched thereon merely a name and address, with the words, "This siphon not to be sold," all inclosed in rectangular lines, are not dutiable under paragraph 90 of the tariff act of 1894, as ornamented or decorated bottles, but as plain glass bottles, under paragraph 88; but similar bottles having etched thereon a trade-mark design composed of the outlines of the figure of a woman, inclosed in an oval panel resting upon a scrolled base, are ornamented or decorated, and dutiable under paragraph 90.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers which affirmed a decision of the collector of the port of New York touching the classification of certain empty glass bottles.

Albert Comstock, for appellants.

Henry C. Platt, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The merchandise was imported under the tariff act of August 27, 1894. The relevant paragraphs of the act are:

"Par. 88. Flint and lime glass bottles holding more than one pint * * * whether filled or unfilled and whether their contents be dutiable or free, and other molded or pressed green and colored and flint or lime bottle glassware, not specially provided for," etc. "Par. 90. All glass bottles, decanters, or other vessels, or articles of glass when cut, engraved, painted, colored, printed, stained, etched, or otherwise ornamented or decorated except such as have ground necks and stoppers only, not specially provided for in this act, including porcelain or opal glassware, forty per centum ad valorem; provided that if such articles shall be imported filled the same shall pay duty in addition to any duty chargeable upon the contents as if not filled, unless otherwise specially provided for in this act."

The collector assessed the articles for duty under paragraph 90. The importers contend that they are dutiable under paragraph 88. They are siphon bottles intended for holding gas-charged waters. The frank concession of appellants' counsel leaves but a single question for discussion. His brief contains this statement:

"If the siphon bottles in suit are ornamented or decorated, in the sense in which those words are used in paragraph 90, then the decisions below were correct, and should be affirmed. If paragraph 90 provides for all bottles which are etched, whether so decorated or ornamented or not, then, also, the decisions below must be affirmed."

The samples are before us, and the following excerpt from the findings of the board most fully and accurately describes them:

"Upon some of these bottles, occupying a space of 3 by 2 inches, inclosed within rectangular lines, are the words: 'Otto Brandt, Newark, N. J. This siphon not to be sold.' The lines and words are etched upon the clear glass. Upon the other bottles the lines of the figure of a woman, and the general outline of the design, as well as the inscription, appear in the clear glass upon an etched background, occupying a space of about 3 by 5 inches. Within an oval panel containing the figure are the words, 'Hygeia,' on one side, and 'Trade-Mark,' on the other. This panel rests upon a scrolled base containing the

words, 'Hygela Sparkling Distilled Water Company, 351 and 353 West 12th Street, New York, Copyrighted by F. T. King, 1883,'—the whole design being artistic and decorative in its effect."

The board reached the conclusion that, because congress expressly excepted from the enumeration of paragraph 90 such bottles as have ground necks or stoppers only,—a measure of grinding which would not amount to an ornament or decoration,—it must be understood to have intended that any bottles which were cut, engraved, etched, etc., to however limited an extent, were to be included in the enumeration. To give such a construction to the paragraph, it is, of course, necessary to dispose in some way of the pregnant word "otherwise"; and accordingly we find in the opinion of the board the statement that the exception of the bottles having ground necks and stoppers only "implies that the words 'otherwise ornamented or decorated' do not qualify the character of the cutting, engraving, or etching before provided for, but that the scope of the paragraph is enlarged to include any ornamentation or decoration applied to the glass article by other means than those recited. If this was not the intention of congress, why this exception?" There is force to this argument, but its acceptance would necessitate a most strained construction of the language used in the enumeration. It would lead to results which we can hardly believe congress intended, in view of the long-continued distinction between plain and decorated glassware,—such, for instance, as classifying an ordinary beer bottle having the brewer's name printed on it in the same category with a cut-glass decanter. Congress reconstructed this particular paragraph from provisions of the prior act, possibly to eliminate any question of commercial designation by making the language more distinctly descriptive, and certainly with the effect of making it read more smoothly, and at the same time including in the enumeration a reference to additional processes for ornamenting and decorating not specified in earlier acts. A reference to these earlier acts will be found helpful:

Tariff of 1883: "Par. 135. Articles of glass, cut, engraved, painted, colored, printed, stained, silvered or gilded, not including plate glass silvered, or looking glass plates, forty-five per centum ad valorem. Par. 136. All glass bottles and decanters, and other like vessels of glass, shall, if filled, pay the same rates of duty, in addition to any duty chargeable on the contents, as if not filled, except as in this act otherwise specially provided for."

Tariff of 1890: "Par. 106. All articles of glass cut, engraved, painted, colored, printed, stained, decorated, silvered, or gilded, not including plate glass silvered, or looking-glass plates, sixty per centum ad valorem." "Par. 111. All cut, engraved, printed or otherwise ornamented or decorated glass bottles, decanters or other vessels of glass shall, if filled, pay duty in addition to any duty chargeable on the contents, as if not filled, unless otherwise specially provided for in this act."

Under these acts it was uniformly held that, to make an article liable to the higher rate of duty, the process enumerated, whether cutting, painting, or what not, must be sufficiently substantial to remove the article from the group of plain to the group of decorated and ornamented glassware. The use in the new section of the phrase "or otherwise ornamented or decorated," after an enumeration of several processes by which an article may be ornamented or decorated, not only implies, but indicates, an understanding that this

result of the enumerated processes is to be an ornament or decoration, in order to bring the article within the terms of the paragraph. Under any other construction it must be held that congress, while using a form of words well recognized as conveying one meaning, intended that they should be given a different meaning, and should thus be destructive of a distinction between plain and decorated glassware which had been recognized for many years. There appears to have been some dispute from time to time as to the meaning of the words "cut" and "ground" glass. Question was also raised under the act of 1890 as to whether glass vials, not otherwise cut than with ground necks and stoppers, were dutiable as cut glass or as plain glass; and the board of general appraisers held that they were dutiable as plain. S. 14,931, G. A. 2560. From abundant caution, congress has expressly declared in the body of this paragraph that such bottles are not dutiable at the higher rate, but we are not prepared to assent to the proposition that thereby they intended to declare that the main sentence in the paragraph should be given any other than its ordinary well-settled and natural meaning. True, the provision as to the ground necks and stoppers was wholly unnecessary. Bottles cut only to this extent were not within the purview of the paragraph. But there is nothing surprising in the fact that congress has injected superfluous words, accomplishing no result, into a tariff act. Examples of overcarefulness producing carelessness in the use of words are abundant in every such statute. Indeed, we need not go beyond this very paragraph 90 for an illustration. It provides that all articles of glass, when cut, engraved, painted, colored, printed, and stained, not specially provided for, shall pay a duty of 40 per cent. ad valorem,—words wholly superfluous, for the next preceding paragraph (89) had already provided that all articles of glass, cut, engraved, painted, colored, printed, and stained, should pay 40 per cent. ad valorem. We are therefore of the opinion that the cutting, engraving, etching, etc., which will bring a glass bottle within the terms of this paragraph, must be substantial, and sufficient to amount to an ornament or decoration.

The question remains whether the etching in this case has progressed to such extent; in other words, whether the articles may be fairly said to be ornamented or decorated. The testimony as to the understanding of the trade is not helpful. Indeed, it is extremely doubtful whether trade usage, if well settled, would control in a case where congress has used language so distinctively descriptive. We have here not the phrase "cut bottles, engraved bottles, etched bottles * * * ornamented or decorated bottles," but "all glass bottles, when cut, engraved," etc. What is to be determined is whether, in the ordinary acceptance of the term, the bottle is in fact ornamented or decorated. With what intent the maker etched it would seem to be immaterial. Each case must be tested by the result accomplished. As to the first bottle, where there is nothing etched except the name and address of the owner, with the words, "This siphon not to be sold," inclosed within rectangular lines, we are clearly of the opinion that the bottle is not decorated or ornamented. On the other bottle, however, where the figure of the woman, combined with

scrollwork and background, at once challenges attention, there is undoubtedly an ornamental design, correctly described by the board as "artistic and decorative in its effect"; and it is none the less an ornamental design because it happens to be used as a trade-mark. The decision of the circuit court is affirmed as to the "Hygeia" bottle, and reversed as to the "Brandt" bottle.

UNITED STATES v. ESCHWEGE et al.

ESCHWEGE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

Nos. 39, 40.

1. CUSTOMS DUTIES—CONSTRUCTION OF TARIFF ACTS—CLASSIFICATION.

In construing tariff acts based on the fundamental idea of protection to domestic manufacturers, and in which the duties are uniformly increased to correspond with the advanced state of manufacture of the article, where a material used in making manufactured articles has been subjected to further treatment than that of a class specifically enumerated, it should be classified with a higher, rather than a lower, class.

2. SAME—CLASSIFICATION—CELLULOID IN POLISHED SHEETS.

Sheets of celluloid, polished on both sides, are dutiable under the third clause of paragraph 17 of the tariff act of 1897, as "finished or partly finished articles," and not under the second clause, which covers celluloid "rolled or in sheets, unpolished."

Appeal from the Circuit Court of the United States for the Southern District of New York.

J. E. Hindon Hyde, for the United States.

Edward Hartley, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The question in this case is as to the classification, under the tariff act of 1897, of sheets of celluloid polished on both sides. Celluloid is one of the compounds of pyroxyline, and in the processes of manufacture is advanced from the crude article into progressive forms: (1) Into rolled slabs, the material being in a rough and porous condition; (2) into unpolished sheets, by planing the rough slabs; (3) into polished sheets, by subjecting the unpolished sheets to hydraulic pressure between polishing surfaces; and (4) into finished and partly finished articles by cutting up the polished or unpolished sheets, and further manipulation. Both the unpolished and polished sheets are an article of commerce, are imported in sheets of different thicknesses, and are sold to be cut up, and the pieces made into numberless small articles. The rolled slabs are not imported or dealt in commercially, but rolled celluloid in the form of rods is.

Paragraph 17 of the tariff act of 1897, subjecting celluloid to duty, is as follows:

"(17) Collodion and all compounds of pyroxyline whether known as celluloid or by any other name, fifty cents per pound; rolled or in sheets, unpolished, and not made up into articles, sixty cents per pound; if in finished or partly finished

articles, and articles of which collodion or any compound of pyroxyline is the component material of chief value, sixty-five cents per pound, and twenty-five per cent. ad valorem."

It was insisted by the importers that the sheets in controversy should have been classified for duty as a compound of pyroxyline, and were dutiable, under the first clause of the paragraph, at 50 cents per pound; or (2) as a compound of pyroxyline "rolled or in sheets, unpolished, and not made up into articles," under the second clause of the paragraph, and dutiable at 60 cents per pound; or (3) as a non-enumerated manufactured article, under section 6 of the tariff act, and subject to duty at 20 per cent. ad valorem.

The board of general appraisers were of the opinion that the proper classification of the importations was under the third clause of paragraph 17, and that they were "finished or partly finished articles," and dutiable at 65 cents per pound and 25 per cent. ad valorem. The circuit court, upon the appeal from the decision of the board, was of the opinion that the proper classification of the importations was under the second clause of paragraph 17. and for that reason reversed the decision of the board.

The phraseology of paragraph 17 is not happily chosen, but, reading it by the aid of pre-existing legislation upon the same subject, and applying settled rules of interpretation, we think the meaning of congress to be reasonably plain. The tariff acts of 1883, 1890, and 1894, in imposing duty upon compounds of pyroxyline, are identical in terms of enumeration, and differ only in rates of duty.

Paragraph 15 of the act of 1894 reads as follows:

"(15) Collodion and all compounds of pyroxyline, by whatever name known, forty cents per pound; rolled or in sheets, but not made up into articles, fifty cents per pound; if in finished or partly finished articles, forty-five per cent. ad valorem."

These acts, as well as the present act, evince a consistent purpose by congress to classify celluloid for duty with reference to the several stages of advancement which the material undergoes in the process of manufacture, subjecting the crude article to the lower rate, and progressively increasing the rate as the material is advanced by additional labor. It will be observed that the second clause of the paragraph in these acts does not, apparently, embrace in its enumeration all kinds of celluloid "rolled or in sheets," but only those "not made up into articles." The exception was unnecessary, because of the language of the third clause, unless congress regarded some kinds of sheet and rolled celluloid as made up into articles. Whether, under the earlier acts, importations like the present would have been dutiable under the second clause of the paragraph, we need not consider. Polished and unpolished sheets were dutiable at the same rate as rolled (or rod) celluloid, unless the polished sheets, being an article further advanced, were excluded from that clause, and relegated to the third clause. However this may be, and whether congress intended to discriminate between the different kinds of celluloid in sheet or not, some effect must be given to the change in the paragraph introduced by the act of 1897. That change demonstrates beyond controversy the intention of congress to discriminate between pol-

ished and unpolished sheets, and, while imposing the same duty upon unpolished sheets as upon rolled celluloid, to exclude polished from the same dutiable category.

Did congress intend to prescribe a lower rate of duty on polished sheets than on rolled celluloid and unpolished sheets of celluloid? If it did not, is the language of the succeeding clause of the paragraph apt, and sufficient to describe the polished sheets?

As was said in *Arnold v. U. S.*, 147 U. S. 497, 13 Sup. Ct. 408, 37 L. Ed. 253, of the tariff act of 1890, the idea which runs through this tariff act "is well known to be that of protection to our manufactures." Such protection is not usually given in tariff acts by subjecting to the higher duty those articles of a given class of products or manufactures which represent the least outlay of skill and labor, or to the lower duty those which represent the greater. The present act throughout, as well as in paragraph 17, endeavors to give it by laying a higher duty on the more advanced articles of the general class. It does not necessarily follow that congress did not intend to make an exception in the case of celluloid sheets, but such an intention ought not to be inferred in the absence of language signifying it. There is no such language in the celluloid paragraph, and that paragraph was obviously framed to cover every product, crude and manufactured, of which any compound of pyroxyline is the component material of chief value.

Celluloid sheets are an "article." *Junge v. Hedden*, 146 U. S. 233, 13 Sup. Ct. 88, 36 L. Ed. 953. If they are such within the meaning of paragraph 17, they are included in the enumeration of the last clause. The term of that clause, "finished or partly finished articles," is a comprehensive term, and was doubtless employed to embrace a large class of articles, many of which are further advanced than the polished sheets of celluloid; but it is also appropriate to describe the polished sheets, and to embrace all the members of the general class. The clause does not enumerate any specific articles, and the general term is not, therefore, to be narrowed to embrace only those ejusdem generis. The polished sheets must find a place somewhere in the enumeration of that paragraph, and that clause, it seems to us, supplies the only place where they can be properly located for duty purposes.

The decision of the circuit court is therefore reversed, and that of the board of general appraisers is affirmed.

UNITED STATES v. WING WO CHONG.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 54.

CUSTOMS DUTIES—CLASSIFICATION—DRIED FRUITS—LYCHEE.

Dried lychee, which is Chinese fruit having, when dry, a thin shell inclosing an edible pulp, is dutiable under paragraph 262 of the tariff act of 1897, as an "edible fruit, dried," and not entitled to free entry under paragraph 559, as a fruit not specially provided for.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers, which affirmed a decision of the collector of the port of New York. 91 Fed. 637.

Henry C. Platt, for the United States.

Howard T. Walden, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The merchandise comprised 10 cases of what the protest of the importer calls "dried lychee," imported from China. The lychee, or lichi, is a Chinese fruit; and the sample discloses an outer shell, about the thickness and consistency of that of a paper-shell almond, inclosing an inner edible portion about the consistency of a prune or raisin, with a pit about the size of a cherry stone.

The tariff act of July 24, 1897, under which the articles were imported, contains the following paragraphs:

"Par. 262. Apples, peaches, quinces, cherries, plums and pears, green or ripe, twenty-five cents per bushel; apples, peaches, pears and other edible fruits, including berries, when dried, dessicated, evaporated or prepared in any manner, not specially provided for in this act, two cents per pound; berries, edible, in their natural condition, one cent per quart; cranberries, twenty-five per centum ad valorem."

"Par. 20. Drugs, such as barks, beans, berries, balsams, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums and gum resin, herbs, leaves, lichens, mosses, nuts, nut-galls, roots, stems, spices, vegetables, seeds (aromatic, not garden seeds), seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing which are drugs and not edible, but which are advanced in value or condition by refining, grinding, or other process, and not specially provided for in this act, one-fourth of one cent per pound, and in addition thereto ten per centum ad valorem."

"Par. 272. Nuts of all kinds, shelled or unshelled, not specially provided for in this act, one cent per pound."

"Par. 559. Fruits or berries, green, ripe or dried, and fruits in brine, not specially provided for in this act [free]."

"Par. 548. Drugs, such as barks, beans, berries, balsams, buds, bulbs, and bulbous roots, excrescences, fruits, flowers, dried fibers, and dried insects, grains, gums, and gum resin, herbs, leaves, lichens, mosses, nuts, nut-galls, roots, and stems, spices, vegetables, seeds aromatic, and seeds of morbid growth, weeds, and woods used expressly for dyeing; any of the foregoing which are drugs and not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process, and not specially provided for in this act [free]."

There is no claim that the lychee are nuts, so paragraph 272 may be disregarded. It will be observed that paragraph 20 covers only such fruits as are nonedible, and are also drugs, advanced in value or condition by refining, etc. Paragraph 548 gathers into the free list only such not otherwise enumerated fruits as are nonedible and are also drugs. Paragraph 559 is a comprehensive one, gathering into the free list all dried fruits not specially provided for, whether edible or not. It covers nonedible dried fruits, which are not drugs, and so not covered by paragraph 548. Inasmuch as paragraph 559 covers both edible and nonedible dried fruits, while paragraph 262 covers

only such as are edible, the latter is the more specific. It does not call for any particular method of drying,—whether by exposure to the sun or to artificial heat. The opinion of the board states that the merchandise is similar to the “lichi” described in S. S. 3162, May 23, 1877, as follows:

“A fruit which grows in clusters on a small bush, the skin or outer covering of which is of a light red color, soft and pliable when ripe: on being sun-dried for exportation, the skin becomes hard and brittle, somewhat resembling the shell of a nut.”

The witness (a Chinaman) called by the importers before the board testified that the lychee grew on the tree in just the same condition as the sample. With the invoices and the samples before it, however, the board found that it was an edible fruit, dried; and we are not disposed to disturb such finding, nor to separate the covering of the fruit from its contents for duty purposes, as did the circuit court. In the condition in which it was imported, the article seems to be a dried fruit, although the interior is not as dry as the exterior. The decision of the circuit court is reversed.

GRANBY MERCANTILE CO. v. WEBSTER.

(Circuit Court, D. South Carolina. December 27, 1899.)

1. INTERNAL REVENUE—INSTRUMENTS REQUIRING STAMPS—ORDERS FOR PAYMENT OF MONEY.

A mercantile company, by an arrangement with a cotton-mill company, sold goods to employes of the latter, which paid the accounts therefor, on presentation, from wages due the employes. The mercantile company required each purchaser to sign an order on the mill company for the amount of his purchase, which orders, however, were not presented, but were filed and kept as vouchers by the mercantile company, which guaranteed the correctness of the accounts it presented. *Held*, that such orders were “orders for the payment of money,” within the terms of section 6 of the war revenue act of 1898, and required revenue stamps affixed thereto, and that, under the provisions of such section, requiring payment of the tax by the person or party who shall make, sign, or issue such orders, “or for whose use or benefit the same shall be made, signed, or issued,” the mercantile company, as well as the signers, was liable to the government for the tax on the orders which were unstamped.

2. SAME—EVIDENCE ALIUNDE TO SHOW CHARACTER OF INSTRUMENT.

Where a written instrument is on its face one which requires an internal revenue stamp under the law, the purpose for which it was taken or used cannot be inquired into to affect its liability to the duty.

This was a suit brought under the provisions of Rev. St. § 3226, to recover back the amount of a tax exacted under the internal revenue law.

Wm. H. Lyles, for plaintiff.

Abial Lathrop, U. S. Atty., for defendant.

SIMONTON, Circuit Judge. The question presented in this case, lying, as it does, in a very narrow compass, is nevertheless important. The Granby Mercantile Company had an understanding with the Granby Mills,—whether put into formal contract or not does not ap-

pear. Under this contract or understanding the mercantile company sold goods to the operatives of the mills on credit. When the accounts for such sales were presented to the treasurer of the mills, they were paid out of the moneys due to the operatives making them for wages in the mills, the mercantile company guarantying the mills company the correctness of the several accounts. To protect itself, and as vouchers for each transaction, the Mercantile Company at each sale took from the purchaser an order in this form:

Columbia, S. C., _____.

Granby Cotton Mills: Pay to the Granby Mercantile Company _____ dollars
_____ cents, for my account.

Witness:
_____.

The Granby Mercantile Company never presented these orders to the mills, but filed them away as vouchers, probably to be presented in case the maker disputed the account. The collector of internal revenue, discovering this mode of dealing, called upon the Granby Mercantile Company to affix the two-cent revenue stamp upon each of these orders. He insisted upon this demand, and the commissioner of internal revenue, upon an appeal to him, sustained the decision of the collector. The mercantile company paid the demand, 2 cents upon 15,847 orders, in all \$316.94, and now brings suit for its repayment. Section 3226, Rev. St. U. S.

The collector proceeded under section 6 of the act of congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," passed in 2d session of 55th congress. The section is in these words:

"That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use and benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

Schedule A, referred to in this section, requires a stamp of two cents on "bank check, draft, or certificate of deposit not drawing interest, or order for the payment of any sum of money drawn upon or issued by any bank, trust company, or any person or persons, companies or corporations, at sight or on demand." The collector requires a stamp upon instruments referred to in the case at bar because they are orders for the payment of money. There can be no doubt that they are orders for the payment of money, and nothing else. The language used can have no other interpretation. The plaintiff, however, says that, whatever may be their form, they were not intended for presentation, were never in fact presented, but were taken, kept, and filed by the mercantile company as vouchers for each sale. The case of *U. S. v. Isham*, 17 Wall. 496, 21 L. Ed. 728, says:

"The liability of an instrument to a stamp, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of facts outside the instrument itself."

And this rule commends itself. Were it necessary to inquire into all the circumstances attending the execution of an order for the payment of money, before it can be ascertained whether it be liable to the stamp tax, endless delay would be occasioned. The purpose of the tax—the prompt relief of the treasury—would be defeated.

The important question, however, is this: Who is liable for the stamp? The drawer of the order unquestionably is. He comes within the words of the act, being the person "who makes, signs, or issues" the order. But, besides this, the payment must be made by the maker, or by the party "for whose use or benefit the order shall be made, signed, or issued." In the case at bar, "for whose use or benefit" were these orders made or signed or issued? The transaction is this: The operative makes the purchase. He cannot or does not desire to pay cash. But the mercantile company is unwilling, or at least does not intend, to rely on the personal credit of the operative. It takes from him an order on the mills company, payable out of the account of the operative with the mill company. That is the security which the mercantile company takes, and it is taken for its benefit. Whether it be presented then, or is kept for presentation at some time in the future, if needed, or whether it be retained simply as a voucher,—a verification of the account,—it is taken for the use of the mercantile company. So that company comes within the words of the statute. It cannot be said that these words; "or for whose use or benefit the same shall be made, signed, or issued," apply to the drawer of the order. If this were so, the words quoted would be entirely superfluous, mere surplusage; nor would the disjunctive "or" have been used to connect these words with the words preceding. This seems conclusive of the question. Let an order be taken dismissing the complaint.

In re NORTON.

(District Court, N. D. California. December 23, 1899.)

No. 11,980.

NAVY—ENLISTMENT OF MINORS—NECESSITY OF PARENTS' CONSENT.

Under Rev. St. §§ 1418, 1419, 1624, relating to enlistments in the navy, which prohibit the enlistment of boys under the age of 16, but permit the enlistment of boys between the ages of 16 and 18, until they shall arrive at the age of 21, with the consent of their parents or guardian, and provide for the enlistment of "other persons" for terms not exceeding five years, the consent of the parents or guardian of a minor over the age of 18 is not essential to his valid enlistment, and he cannot be discharged from such enlistment by a court on a writ of habeas corpus, at suit of his parents or guardian.

This was a proceeding by habeas corpus to secure the discharge of Eugene L. Norton from an enlistment in the navy of the United States.

Bert Schlesinger, for petitioner.
Frank L. Coombs, U. S. Atty.

DE HAVEN, District Judge. The facts of this case are not in dispute. Eugene L. Norton, a minor of the age of 19 years, enlisted in the United States navy on July 25, 1899, without the consent of his parents. The mother seeks by this proceeding to secure his discharge from such enlistment, and for a judgment that he be returned to her custody and control.

Congress is given power, by section 8 of article 1 of the constitution, "to provide and maintain a navy." Under this grant of power, that body has the right to declare what class of persons shall be permitted to enlist in the navy, and may provide by law for the enlistment of minors therein, without the consent of parents or guardians. *U. S. v. Bainbridge*, 1 Mason, 71, Fed. Cas. No. 14,497; *U. S. v. Stewart*, Crabbe, 265, Fed. Cas. No. 16,400; *Com. v. Downes*, 24 Pick. 227. The present inquiry must therefore be confined to a consideration of the question whether the enlistment in the navy of a minor of the age of 19 years, without the consent of his parents or guardian, is a valid enlistment, under the laws of the United States. If the enlistment of a minor of that age is not in violation of some law of the United States, it is clear the court cannot declare that compulsory service in the navy in pursuance thereof is an unlawful restraint of the liberty of such minor. The particular sections of the Revised Statutes of the United States applicable to the case are as follows:

"Sec. 1418. Boys between the ages of sixteen and eighteen years may be enlisted to serve in the navy until they shall arrive at the age of twenty-one years; other persons may be enlisted to serve for a period not exceeding five years, unless sooner discharged by direction of the president.

"Sec. 1419. Minors between the age of sixteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians."

"Sec. 1624. Any officer who knowingly enlists into the naval service any deserter from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of sixteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of sixteen years, shall be dishonorably dismissed from the service of the United States."

The obvious construction of these sections is that minors over the age of 18 years may lawfully enlist in the United States navy without the consent of their parents or guardians. The express provisions that minors between the ages of 16 and 18 years shall not be enlisted in the naval service without the consent of their parents or guardians, and that "other persons" may be enlisted, and the further provision making it an offense in any officer of the navy to knowingly enlist a minor between the ages of 16 and 18 years without such consent, is sufficient to show that the consent of his parent or guardian is not essential to the valid enlistment of a minor over the age of 18 years. This conclusion is in accordance with the maxim of interpretation that, when a statute expressly provides a rule for one particular class of persons or cases, the rule is not to be applied to any other class of persons or things which might have been, but were not, expressly included therein.

In the enactment of the sections above quoted, congress evidently intended that minors between the ages of 16 and 18 years should

constitute a distinct class, who cannot be lawfully enlisted in the navy without the consent of their parents or guardians, but that other infants, who have reached years of reasonable discretion,—and this would include minors between the ages of 18 and 21,—may be enlisted without such consent. This view is opposed to the cases of *In re McNulty*, 2 Low. 270, Fed. Cas. No. 8,917; *In re McLave*, 8 Blatchf. 67, Fed. Cas. No. 8,876; and *In re Hayes*, Fed. Cas. No. 6,261a,—but is fully sustained by the following: *In re Doyle* (D. C.) 18 Fed. 369; *U. S. v. Watson*, 2 Hayw. & H. 226, Fed. Cas. No. 16,650a; *U. S. v. Bainbridge*, 1 Mason, 71, Fed. Cas. No. 14,497. See, also, *Gormley's Case*, 12 Op. Attys. Gen. U. S. 258; *Id.*, 21 Op. Attys. Gen. U. S. 327.

It is ordered that the writ be discharged, and the minor remanded to the custody whence he was taken.

BLEISTEIN et al. v. DONALDSON LITHOGRAPHING CO.

(Circuit Court, D. Kentucky. December 13, 1899.)

COPYRIGHTS—SCOPE OF STATUTE—ENGRAVINGS.

Engravings representing ballet dancers or fancy bicycle riding, designed for use as show bills, or advertisements of a circus, are not entitled to the privilege of copyright, either under the constitutional provision giving to congress power "to promote the progress of science and useful arts" by copyrights, or under Rev. St. § 4952, as amended by Act June 18, 1874, § 3 (18 Stat. 79), which provides that in the construction of such section the "words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts," whether or not such provision be construed to require the "pictorial illustrations" to be connected with the fine arts.

This was an action to recover the penalty fixed by statute for infringement of certain copyrighted engravings. On motion by defendant for direction of a verdict.

Wilcox & Miner and C. J. & W. W. Helm, for plaintiffs.

E. W. Kittridge and Cobb & Howard, for defendant.

EVANS, District Judge. This is an action to recover \$12,000 for the alleged infringement by the defendant of certain copyrights, being at the rate of \$1 each for all the copies of the things copyrighted which were found in the possession of the defendant. The claim to this sum of money is based upon section 4965 of the Revised Statutes of the United States, which, as amended, reads as follows:

"Sec. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article, as

aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale: provided, however, that in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars: and provided, further, that in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts, or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States."

The three subjects of copyright described in the plaintiffs' petition are: First, an engraving called "Spectacular Ballet Design," which is made up of a line of a dozen or more figures of females in ballet costumes of the most flashy style; second, an engraving called the "Stirk Family Design," which is a series of representations of fancy or trick bicycle riding; and, third, an engraving called the "Statuary Act Design," which is made up of pictures of certain statuary. Each of the engravings was designed and engraved at Buffalo, N. Y., and at least one of them by an employé of the plaintiff the Courier Company, and all were designed for use as show bills, and as advertisements for the Wallace Circus. The proof does not appear to warrant a claim (and which, indeed, is not made) that there was any infringement of a copyright of a photograph made from an object not of the fine arts, which would be a case that would limit the recovery to any sum between \$100 and \$5,000, as fixed in the proviso of the section just copied. The broad claim made in the plaintiffs' petition is that they are entitled to recover under the clauses of the section which fix the sum to which they are entitled at \$1 per sheet. The court, however, is strongly inclined to the opinion that, if the plaintiffs are entitled to recover at all, the limits for such recovery are between \$250 and \$10,000, as fixed in the last clause of the section above copied, as, if there is any infringement, it may be of the copyright of a "print." In any event, there is raised a very important question, and one which, in this case, and in one which came before me at the last term, has received my most careful consideration. Clause 8 of section 8 of article 1 of the constitution of the United States, among other things, gives to congress power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." In attempting to exercise that power, congress has made statutory provisions relating to the subject of copyrights. Among those provisions are sections 4952, 4956, 4957, 4962, and 4965 of the Revised Statutes. The first two of these, as amended, and so far as applicable to this case, read as follows:

"Sec. 4952. The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying

with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same. * * * In the construction of this act the words 'engraving,' 'cut,' and 'print,' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office."

"Sec. 4956. No person shall be entitled to a copyright unless he shall, on or before the day of publication, in this or any foreign country, deliver at the office of the librarian of congress, or deposit in the mail within the United States, addressed to the librarian of congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary, or a model or design, for a work of the fine arts, for which he desires a copyright; nor unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the librarian of congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same: provided, that in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom."

It will be seen that the prime question is whether the things copyrighted here are pictorial illustrations connected with the fine arts, or are such as are intended to be perfected as works of the fine arts. That this must necessarily be the question in this connection seems to be apparent from the language of that part of section 4952 in regard to the construction of the words "engraving," "cut," and "print," as used in the statute. The statute provides that those words "shall be applied only to pictorial illustrations or works connected with the fine arts." If the words "pictorial illustrations" are to be taken independently of the words which follow, then it must be determined whether the things copyrighted here, or any of them, are "pictorial illustrations," within the intent of the legislation. I think that no one of them is. On the contrary, I think that congress meant by those words a pictorial representation placed in a book or other publication to elucidate the text. In defining the word "illustration" the Century Dictionary uses substantially that language. If, however, disregarding this view, we are to construe the words "pictorial illustrations" in connection with the words "or works connected with the fine arts," then the plaintiffs' claim has quite as little support, inasmuch as works which are connected with a "cut" or "engraving" or "print" must necessarily be "pictorial illustrations" in a certain sense. If all parts of the language are to be construed as having reference to the fine arts, then, in order to bring out the real meaning, we may disregard the words "or works," and correctly read the clause as though it read that in construing the words "engraving," "cut," and "print" they shall be held to apply only to "pictorial illustrations connected with the fine arts." But, whether this is correct or not, the things copyrighted in this case, in my judgment, are neither "pictorial illustrations" nor "works connected with the fine arts," within the meaning

of the law. That there is a distinction between the useful arts and the fine arts is a fact which we must assume to exist, not only as matter of common knowledge, but from cases like *Almy v. Jones*, 17 R. I. 266, 21 Atl. 616, 12 L. R. A. 414, and from the definitions found in the dictionaries. For example, the fine arts are defined to be "those which seek expression through beautiful modes." It may be altogether undesirable to undertake to fix or describe in any set phrase the line of difference between the two. It may, indeed, be quite as difficult as it is undesirable to do so; but that there is a difference will be assumed by the court.

Inasmuch as the constitutional provision above referred to only authorizes congress to promote the "useful arts," the curious might moot the question of the power to promote any but the useful arts, and consequently the lack of power to legislate to give exclusive privileges respecting the fine arts, unless in cases where they are also useful arts; but the court is limited to a consideration of the intention of congress in the legislation regarding the fine arts which is thought to authorize this action, and the recovery of the enormous penalties demanded for the printing of the cheap show bills upon which the claim is based. The court, in considering this case, is limited to that, because, in its judgment, that is the only question to be decided on the pending motion, though it involves, of course, the question of the validity of each of the copyrights mentioned. If the things copyrighted in this case do not come within the statute, there is no occasion to go further. That the pictures offered in evidence in this case are such as are connected with the fine arts, I do not for a moment agree, nor does the evidence leave any question upon the subject which the court thinks it necessary to submit to the jury. That the picture which represents a dozen or more figures of women in tights, with bare arms, and with much of the shoulders displayed, and by means of which it is designed to lure men to a circus, is in any sense a work of the fine arts, or a pictorial illustration in the sense of the statute, I do not believe. The court does not think that it was in any wise intended by congress that such a picture should be the subject of the exclusive advantages given by the privilege of copyrighting. Instead of being either useful art or fine art, it is something to be regarded as merely frivolous, and to some extent immoral in tendency, though the court by no means intends to intimate that the nude is not perfectly admissible in the fine arts. The same conclusion, but upon somewhat different reasons, might apply to the picture called the "Stirk Family Design," which, as we have seen, is only an illustration of trick or fancy bicycle riding. As to the other picture, that known as the "Statuary Act Design," the same conclusions might generally be applied, but the proof appears to be that the copyright of this one is void upon another ground, viz. that it was printed, and a number of copies of it shipped to the circus agent as many as four days before the copies were either mailed or delivered to the librarian of congress in compliance with the provisions of section 4956, and, instead of being entitled to recover as to this particular picture, the plaintiffs, having, before it was granted, marked

upon it a statement that it was copyrighted, may have brought themselves within the penalty for that offense provided in section 4963. And, if the court were to submit the case to the jury at all, it would also be its duty to comment upon that portion of the evidence of the plaintiffs which seemed to indicate a possible publication of the two other pictures before the time of application for the copyright. The court, indeed, might have grave doubts whether the Courier Lithographing Company, which is a mere trade-name of a certain department of the business of the unincorporated association known under the laws of New York as the Courier Company, is or can be the author, inventor, designer, or proprietor of any of the things copyrighted, within the meaning of section 4952. The Courier Lithographing Company is a legal nonentity; that is to say, it is not a natural or legal person with any power to be a proprietor. It is certainly not the author, inventor, or designer of the things copyrighted, and how it, under the circumstances, can be the proprietor of it, is not clear to the court. Nor has any title in it been shown, unless it be that a title would result from the fact that a designer in the employ of the Courier Company designed one, or possibly two, of the pictures, though plaintiffs do not make it at all clear who designed any but the statuary act design. Certainly it is not made clear that they, or any employé of theirs, designed either of the others.

Of course, the librarian of congress does not inquire into the matter of right when granting a copyright. He only states who claims the title, and leaves the courts to pass upon its validity. And, notwithstanding the cases of *Colliery Engine Co. v. United Correspondence Schools Co.* (C. C.) 94 Fed. 153, and *Werckmeister v. Pierce & Bushnell Mfg. Co.* (C. C.) 63 Fed. 445, and *Scribner v. Clark* (C. C.) 50 Fed. 473, and *Lawrence v. Dana*, 15 Fed. Cas. 26, and *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547, which discuss a general proposition, I would be in much doubt about the right of the Courier Lithographing Company to two of these copyrights, in view of the evident design of the constitutional and statutory provision to which I have referred to give the inventor or author the exclusive right, although, if the six other plaintiffs had obtained the copyrights in their own individual names, or in that of the unincorporated association recognized by the laws of New York, it might be that the court should not hold that the actual inventor might not have previously transferred his rights by acts in pais, or by such as should be construed to be an equitable assignment of those rights. The trouble in this case is that there was never any sort of transfer, equitable or otherwise, to the Courier Lithographing Company, and that no right, therefore, existed in that unreal concern. It had no legal right to own or be the proprietor of anything. These remarks do not apply to the statuary act design, because in that case the copyright was granted to the Courier Company. However, the court does not feel called upon to pass definitely upon this question, as, in its opinion, the case must turn upon the others, and especially upon the general proposition that the things copyrighted in this case were by no

means such as either the constitution or the legislation of congress intended to protect by the privilege of copyrights. The court cannot bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection of not only the exclusive right to print them, but the additional protection of a penalty of a dollar each for reprints from them. As previously stated, they are neither "pictorial illustrations" nor "works connected with the fine arts," within the meaning of section 4952. Not being so, there was no authority to grant the copyrights, whether the constitution authorizes congress to promote the fine arts or not. The judgment of the court is that the plaintiffs, on their own showing, are not entitled to recover, and for that reason the motion of defendant will be granted, and I will instruct the jury to find a verdict for it.

WELSBACH LIGHT CO. v. AMERICAN INCANDESCENT LAMP CO. et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 95.

1. PATENTS—ANTICIPATION—PRIOR KNOWLEDGE AND USE.

The provision of Rev. St. U. S. § 4886, which denies to an inventor the right to a patent where the thing invented was known and used by others in this country before his invention thereof is applicable to both domestic and foreign inventors, and in either case, to defeat a patent, such knowledge and use must have been before the date of the patentee's actual invention; and, as against an infringer, the patentee in a United States patent for an invention previously made by him, and patented in a foreign country, may, to avoid alleged use in this country by an infringer before the date of the foreign patent, show the date of the application for such patent, for the purpose of showing the actual date of his invention.

2. SAME—INCANDESCENT MANTLES.

The Rawson patent, No. 407,963, for an improvement in the production of incandescent mantles, is not void on the ground of prior knowledge and use in this country by Welsbach before the date of the English patent, as, if such knowledge and use existed, it was subsequent to the application for such patent, and hence to the date of the actual invention by the patentees.

Appeal from the Circuit Court of the United States for the Southern District of New York.

R. D. Kenyon and Wm. H. Kenyon, for appellants.
John R. Bennett, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from an interlocutory order of the circuit court for the Southern district of New York which granted an injunction pendente lite against the infringement of claim 1 of letters patent No. 407,963, applied for August 21, 1888, dated July 30, 1889, and issued to Frederick L. and William S. Rawson for an improvement in the production of incandescent mantles. The patent had been sustained by Judge

Townsend at final hearing in *Welsbach Light Co. v. Sunlight Incandescent Gaslight Co.* (C. C.) 87 Fed. 221, and from his decree no appeal was taken. Upon the subsequent application of the complainant for an injunction against the Rex Incandescent Light Company (C. C.; 94 Fed. 1006), Judge Lacombe went over the record in the Sunlight Case and the briefs of counsel therein, with the result of an absolute concurrence in Judge Townsend's conclusions. The Rawson invention was designed to give to the Welsbach mantle commercial utility and value, and was of a remarkable and meritorious character. It is described by Judge Townsend as follows:

"In 1885 Dr. Carl Auer von Welsbach discovered or invented the mantle of the incandescent light which bears his name. Prior to that date it was known that certain rare earths, when heated to incandescence, were possessed of great luminosity. Dr. Auer von Welsbach, or, as he will hereafter be called, Welsbach, was the first to discover that by immersing a textile fabric in a solution of the salts of said rare earths, and afterwards applying heat and consuming the fabric, the earthy salts would be left in a coherent condition exactly reproducing the fabric consumed, and capable of emitting the intense white Welsbach incandescent light. Great as was this scientific discovery, it was commercially valueless. The resultant product was so light and fragile that although, as stated by the inventor, 'it would remain effective as an illuminant for hundreds of hours,' it would crumble to ashes if handled, or even touched by a hard body. In their specification the patentees, after speaking of the difficulty previously found in transporting these mantles without breakage, say: 'This difficulty our invention is designed to overcome by dipping the mantles, after they have been given their proper shape, into a liquid which will thoroughly penetrate the pores of the material, and will afterwards set to such a degree of hardness as to protect the material from danger of breakage in packing or handling, and which can afterwards be removed without mechanical injury to the mantles, or without leaving any objectionable residue.'"

The main defense rests upon the alleged facts that Welsbach and Ludwig Heitingger jointly, or one of them severally, invented the Rawson improvement in Vienna in 1886, and that Welsbach introduced it into this country in 1887, and made on March 3, 1888, a joint application for letters patent for it. They did make a joint application for two inventions, one of which was Welsbach's for a reinforcement of his mantle by reimmersion in the original Welsbach solution, and the other for the Rawson invention. The patent office rejected the claims for the latter upon the Rawson English patent, published July 23, 1887, the specification of which was filed September 1, 1886. Thereupon Welsbach and Heitingger filed an abandonment of their application, and Welsbach filed a new application for the other invention, and received a patent therefor. The position of the defendant, based upon the alleged invention by Welsbach or Heitingger of the Rawson improvement in Vienna in 1886, is that Rawson, who subsequently received letters patent of the United States, cannot place the date of his foreign invention prior to the date of his English patent, viz. prior to July 23, 1887, and consequently that Welsbach or Heitingger was, or both of them were, entitled to a patent when it was rejected. The alleged fact of the invention by Welsbach or Heitingger is not supported by testimony in the record. The affidavit of A. Ernest Nienstadt proves nothing in regard to this invention. Welsbach filed on October 20, 1886, an application supplementary to an application of April

28, 1886, upon which his German patent, No. 41,945, was issued on December 17, 1887; but while, in his supplementary application, he stated an improvement of the Rawson character, he did not claim it as his own. The Welsbach Light Company, established in 1887 or 1888, knew of the great commercial importance of this invention, and of the importance of obtaining an exclusive right to use it; but, as appears by the testimony of Mr. Randal Morgan, its vice president, it learned at the time of the abandonment of the application in this country that Welsbach made no claim that he, either separately or jointly with Heitingen, invented the improvement. No subsequent application was ever made by Heitingen. What foundation, if any, he had for an assertion of original invention, does not appear in the record, which also fails to show how Welsbach's title to originality ever existed. The distinction between his inventions for the strengthening of his mantle, as shown in his French patent of 1886 (No. 172,064), his English patent of April 24, 1886 (No. 15,255), and his German patent (No. 41,945), mentioned *supra*, and the Rawson invention, is pointed out by Judge Lacombe in *Welsbach Light Co. v. Rex Incandescent Light Co.*, *supra*. This is not the case of an interference in the patent office, or of a contest in the courts between two original inventors for priority of invention, in which it is the established rule, under section 4923, Rev. St. U. S., that an original inventor, who applies for letters patent of the United States, cannot be deprived of his right to a patent by the fact that an inventor had made in a foreign country, at a prior date, the same original invention, but which had not been described at a prior date in a patent or in a printed publication. *Ireson v. Pierce* (C. C.) 39 Fed. 797; *Roemer v. Simon*, 95 U. S. 214, 24 L. Ed. 384; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000. The subject of the practice in the patent office upon two applications by two original inventors in a foreign country of the same invention is stated in *Lander v. Crowell*, 16 O. G. 405. Neither the practice under, nor the established construction of, section 4923, has a bearing upon this case, because Welsbach is not shown to have been in any country an inventor of the Rawson improvement; but if it was used in this country, either before or after the date of the Rawson United States patent, by a person not claiming under the Rawsons, it was used by an infringer. This question then arises: Can an infringer defeat letters patent of the United States to an original inventor in a foreign country by proof that a few days before the date of a prior foreign patent to the same inventor, but not before the date of the application for such patent, and less than two years before the date of the application for a United States patent, the invention was used in this country by a person who did not invent it?

It is contended by the defendant that, under section 4886 of the Revised Statutes, the Rawson patent was void, on the ground that the improvement was known and used in this country before the invention thereof, because the actual inventor is not permitted to show that the date of his invention was prior to the date of his foreign patent. The section is as follows:

"Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known and used by others in this country and not patented or described in any printed publication in this or any foreign country before the invention or discovery thereof, or not in public use or sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

The section gives to an inventor, foreign or domestic, the right to a patent, unless certain conditions existed, neither of which in fact existed in this case. The Rawson invention had not been patented or described in any country before the patentees invented it, had not been in public use or on sale for more than two years prior to their application, had not been abandoned, and had not been known or used in this country by any one before the date of the invention. If no other disabilities prevent, an inventor may obtain a patent of the United States for an invention made and previously patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application (section 4887), which is, in substance, the qualification which exists in section 4886, as applicable to any invention; and it is not necessary that the introduction shall have been made with the consent of the inventor. *Andrews v. Hovey*, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 557; *Id.*, 124 U. S. 694, 8 Sup. Ct. 676, 31 L. Ed. 557. It is, however, said that the section requires that the invention must not have been known or used in this country before the date of the invention, and that the date of the publication of the foreign Rawson patent is the date *de jure*. The section applies to all inventions, irrespective of the place of their origin, and the term "date of invention" is used without discrimination between classes of inventions. The theory of the defendant is that, as to the domestic inventor, knowledge in this country must precede the actual date of the invention, but that, as to a foreign inventor, knowledge in this country need only precede the date of the publication of his foreign patent. We are of opinion that the language of the section refers to the actual, and not an artificial, date, and that, where there is no contest between inventors, if knowledge in this country did not precede the actual date of the invention, unless it had been used in this country for two years before the application, the inventor was entitled to a patent. This question was before Judge Dallas in *Hanifan v. Godshalk Co.* (C. C.) 78 Fed. 811, and before Judge Townsend in *Hanifan v. Price* (C. C.) 96 Fed. 435, whose opinions are in conformity with those herein expressed. Our conclusion is that, as against an infringer, the patentee in a United States patent for an invention previously made by him and patented in a foreign country may, to avoid alleged use in this country by an infringer before the date of the foreign patent, show the date of the application for the foreign patent, for the purpose of showing the actual date of his invention in a foreign country.

Upon the facts shown in the record, it is not, in our opinion, certain that the Rawson improvement was introduced into this country before July 23, 1887. It is true that Welsbach came to New York

on April 24, 1887, for the purpose of organizing a corporation and manufacturing mantles, and opened an office at No. 10 Wall street, and paid rent for the months of June and July of that year. A sufficient number of witnesses testify that they worked in the office for a part of the month of June, and, after an intermission of three or four weeks, in Warren street in July, and used a process like the Rawson process. There are a variety of circumstances which throw doubt upon the credibility of the fact of the use of the improvement at that early period, although undoubtedly it was subsequently used. It is, however, unnecessary to recite the circumstances of this part of the case, or to make a finding thereon.

The defendants also make the point that the English Rawson patent was confined by its terms to a hot process; that a cold process was a new invention, and therefore was known in this country before Rawson made it. The conclusion that a cold process was a new invention made after the date of the English patent does not seem to us to rest upon sufficient evidence.

The effort which was made to show that William S. Rawson was the sole inventor of the invention of the Rawson patent fails to convince the mind, and was not persuasive. The order of the circuit court is affirmed, with costs.

CARY MFG. CO. v. NEAL et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 19.

1. DESIGN PATENTS—VALIDITY—INVENTION.

Originality and the exercise of the inventive faculty are as essential to the validity of a design patent as a mechanical patent.

2. SAME—INVENTION—BOX FASTENERS.

The Cary design patent, No. 28,142, for a box fastener, consisting of a metal strap, which differs in construction from the one described in a prior mechanical patent to the same patentee only in omitting a corrugation along the edges, making the strap plain, does not disclose invention, and is void.

Appeal from the Circuit Court of the United States for the Southern District of New York.

A. G. N. Vermilya, for appellant.

Robert Stewart, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the circuit court of the United States for the Southern district of New York, which dismissed a bill in equity for the infringement of letters patent No. 28,142, applied for on October 15, 1894, and issued on January 11, 1898, to Spencer C. Cary, for a design for a box fastener. 90 Fed. 725. On April 21, 1891, the same Cary obtained letters patent No. 450,753 for a box fastener as an article of manufacture. The invention was a very narrow one, and was described in the claim as follows:

"As an article of manufacture, a box strap composed of a metal plate or strip, the end edges of which are curved in outline, and having a corrugation

which is continuous at, along, and upon the side edges, and said end edges, and tongues at or near the strap ends cut from the strap body within the line of said edge corrugation, and bent at an angle to the face of the strap which is opposite to the corrugated face thereof, substantially as and for the purpose set forth."

The limited character of his invention is apparent from the following excerpt from the specification of the patent:

"I am aware that box straps have been heretofore formed with tongues cut from the strap body, and bent at an angle to the face thereof, and hence I make no claim thereto, broadly, herein. I am also aware that box straps have been formed with their end edges curved in outline, and therefore I make no claim to such form of the said edges, broadly, herein; and I am also aware that box straps have been corrugated along and upon their side edges and have been given corrugations extending laterally of the strap; but in such latter case the lateral corrugations have not been at and upon the said end edges."

His design patent consisted "in a box fastener having ends bounded by curved lines and upwardly or downwardly extending prongs, with openings in the material, the main surface of which is plain, and the essential features are a plain, flat body bounded at the sides by substantially straight lines and at each end by a curved line, having near each end openings in the face, and prongs extending from the sides of the openings at substantially right angles to the surface of the main body of the fastener." The invention of the mechanical patent had a continuous corrugated edge, which extended along and upon the edges of the fastener. The design patent has a plain, flat body. This is the only difference between them as disclosed in the specification of either patent, and the question in the case is whether the omission of the corrugated edge is patentable.

Section 4929 of the Revised Statutes provides that any person who, by his own industry, genius, efforts, and expense, has invented and produced any new and useful original shape or configuration of any article of manufacture, may obtain a patent therefor. It has been clearly stated that, to entitle an inventor to the benefit of the section in regard to design patents, "there must be originality, and the exercise of the inventive faculty." "Mere mechanical skill is insufficient. There must be something akin to genius,—an effort of the brain, as well as the hand." *Smith v. Saddle Co.*, 148 U. S. 674, 679, 13 Sup. Ct. 770, 37 L. Ed. 606. In this case the patentee had simply omitted from his own box strap the corrugation along the edges, and made a plain strap. We can see nothing of an inventive character, nothing akin to genius, in this change. It was simply the work of the mechanic, without an apparent effort of the brain, for the purpose of increasing the simplicity, and therefore the utility, of the strap. There was a pre-existing flat box strap, but it is not necessary to analyze the differences between it and the device shown in the patent in suit, for the line of distinction between the old and the new, at the date of the patented improvement, is shown upon the face of the two Cary patents. The decree of the circuit court is affirmed, with costs.

SINGLE-TRACK OVERHEAD RY. MFG. CO. v. RODEN.

(Circuit Court, D. New Jersey. January 31, 1895.)

No. 53.

PATENTS—INFRINGEMENT—ELEVATED RAILROADS.

The Curtis & Cook patent, No. 285,116, for an improvement in portable elevated railroads, considered, and *held* void for anticipation as to claims 1, 2, and 3, and valid and infringed as to claim 4.

Suit in Equity for Infringement of a Patent. On final hearing.

Francis D. Pastorius, for complainant.

Frederick W. Rex, for defendant.

ACHESON, Circuit Judge. This suit is upon letters patent No. 285,116, granted to Benjamin S. Curtis and John A. Cook, September 18, 1883, for an improvement in portable elevated railroads. The proofs are rather meager. On the part of the defense, Joseph H. Haynes, the constructor of the alleged infringing overhead railway of the defendant, testifies that as early as the year 1866 he saw in use at the Camden Iron Works, at Camden, N. J., a single-track overhead railway, which, in construction and mode of operation, was substantially the same as the defendant's railway. This evidence is not contradicted. I discover no reason for doubting the truth of what this witness here states. I am of the opinion that, as to the first, second, and third claims of the patent, the plaintiff's case fails. The fourth claim is as follows:

"(4) A main elevated or overhead track, in combination with branch tracks, a switch, and a traveler adapted to run upon said track, substantially as and for the purpose set forth."

Mr. Haynes admits that one of the switches in the defendant's track is similar in construction to that of the patent in suit. Having further stated that he had no knowledge, previous to September, 1883, of an elevated or overhead track in combination with a branch track or tracks, a switch, and a traveler adapted to run thereon, he testified as follows:

"Q. Do I understand you to say that you have no knowledge of any such construction previous to September 18, 1883? A. I have no knowledge. Q. Is not the elevated or overhead track which you built for David W. Roden, the respondent in this case, composed of an elevated track in combination with a branch track or tracks, a switch, and traveler adapted to run on said elevated track or tracks? A. It is."

This testimony, taken in connection with that of the plaintiff's witnesses, justifies a finding that the fourth claim of the patent is infringed by the defendant's structure.

I am not prepared to hold that the presumption of the patentability of this combination, arising from the grant of the patent, has been rebutted. The defendant has contented himself with taking the mere opinion of Mr. Haynes that the principle of the switch of the patent is the same as that of the switch of an ordinary railroad built on the ground. Upon the point of patentability, as the rec-

ord stands, I feel that I ought to stand by the action of the patent office. A decree may be drawn in favor of the plaintiff with respect to the fourth claim.

OVERHEAD RAILWAY & SWITCH CO. v. HILLER.

(Circuit Court, E. D. Pennsylvania. December 1, 1899.)

No. 15.

PATENTS—VALIDITY—ELEVATED RAILROADS.

The Curtis & Cook patent, No. 285,116, for an improvement in portable elevated railroads, considered on a motion for preliminary injunction, and its validity held too doubtful on the showing to warrant the granting of an injunction.

This is a suit in equity for the infringement of letters patent No. 285,116, granted to Curtis & Cook, September 18, 1883, for an improvement in portable elevated railroads. On an application for a preliminary injunction.

James Ryon, for complainant.

Ernest Howard Hunter, for respondent.

DALLAS, Circuit Judge. The plaintiff's application for a preliminary injunction has not been adequately supported. It is necessary only to read the opinion in the case of Manufacturing Co. v. Roden (C. C.) 98 Fed. 619, to perceive that its decision ought not to be regarded as conclusive. The question respecting the validity of the patent, as it is now presented, is at least a serious one, and the force of the evidence of anticipation which has been presented is not substantially opposed by anything to be found in the moving papers. Neither has infringement been satisfactorily shown. The motion for a preliminary injunction is denied.

BROWN SADDLE CO. v. TROXEL (two cases).

(Circuit Court, N. D. Ohio, E. D. December 23, 1899.)

Nos. 5,860, 5,861.

PATENTS—SUIT FOR INFRINGEMENT—DEFENSES.

The fact that a corporation is a member of an illegal combination or trust constitutes no defense to a suit by such corporation for the infringement of a patent of which it is owner, and an averment of such fact in the answer in such suit is irrelevant and impertinent.

In Equity. On exceptions to answers.

Thurston & Bates, for complainant.

Kline, Carr, Tolles & Goff and Osgood & Davis, for defendant.

TAFT, Circuit Judge. These cases come before the court on exceptions to the answers of the defendant. The bills are filed to enjoin the infringement of two patents. As to one of the patents,

the averments of the bill show that the complainant obtained title by assignment of the legal title from the defendant. In the other case the bill makes such averments as to show that the defendant was part owner, in equity, of the title, at one time, and thence it passed to the complainant. The bill also avers that the defendant was a director of the corporation of Colorado from whom the title to the patents was assigned to the complainant, and was an active participant in that assignment. The exceptions are directed to parts of the answer which, in effect, set out that the defendant, though a director in the complainant corporation, has now no voice in its management, by reason of the combination of the majority interests to prevent his having a proper voice therein. The exceptions are further directed to an averment that the complainant is a constituent of a combination or trust, alleged to be in violation of the so-called federal anti-trust law, and void under common-law rules.

The exceptions must be sustained, and the matter objected to eliminated from the answer. The averments of the answer with reference to the defendant's connection with the corporation do not tend in any way to show that he did not, by his conduct as a stockholder and director in corporations through whom the title to the patents sued on passed, estop himself from denying the validity of the patent, or the title of the complainant thereto. I do not mean to say that his relation, as developed in the bill, necessarily estops him, but it is certain that the averments of the answer are impertinent and irrelevant upon that issue.

Secondly, the averment that the complainant is part of a combination or trust is irrelevant and impertinent, for the reason that it is no ground for denying relief for continued trespasses by a third person upon the property of the complainant. The fact that a corporation is part of an illegal combination or trust cannot justify the spoliation of the property which belongs to it by third persons. It is merely seeking by its bill to preserve its rights in its own property. What it may do with that property, or is doing with that property, cannot deprive it of its right to invoke the protection of the court against trespass and infringement. The exceptions are sustained.

DICKERSON v. SHELDON.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 1,181.

PATENTS—LIABILITY FOR INFRINGEMENT—PURCHASER OF ARTICLE FROM UNITED STATES.

The fact that an article which infringes a patent has been seized, condemned, and sold by officers of the United States in proceedings for violation of the customs laws does not vest the purchaser, who buys with knowledge that the article infringes the patent, with any right to vend it, as against the owner of the patent, nor in any way affect his liability for the infringement in case he does.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

George H. Petitt, U. S. Atty., for appellant.
Anthony Gref, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The complainant is the owner of United States letters patent No. 400,086, issued March 26, 1889, for the chemical compound or drug known as "Phenacetine." Defendant is the owner of several packages of the same compound, made in Germany, and which it is not disputed infringe complainant's patent. These he has offered for sale, insisting that he is entitled to sell them, in entire disregard of complainant's patent. The person or persons who brought these packages to this country undertook to smuggle them in without payment of the customs duty. They were detected, and the goods were seized, condemned, and sold, in conformity to the statutes of the United States. The defendant bought at such sale, knowing at the time that the goods infringed the patent.

The defendant's main contention appears to be that, by passing through the hands of the federal government, the infringing Phenacetine has been in some way freed from the operation of the letters patent; that the rights of the patentee, so far as they relate to this particular Phenacetine, have been abrogated by the action of the taxing officers. This proposition is wholly without support in any case cited on the brief. The citations enunciate merely the proposition, which no one here disputes, that all property rights are subject to the taxing power. The law as to patents infringed by government is thus stated by the supreme court:

"In England the grant of a patent for an invention is considered as simply an exercise of the royal prerogative, and not to be construed as precluding the crown from using the invention at its pleasure. * * * But in this country letters patent for inventions are not granted in the exercise of prerogative, or as a matter of favor, but under article 1, §.8, of the constitution, which gives congress power to 'promote the progress of science and useful arts, by securing, for limited terms, to authors and inventors, the exclusive right to their respective writings and discoveries.' The patent act provides that every patent shall contain a grant to the patentee, his heirs and assigns, for a certain term of years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States. Rev. St. § 4884. And this court has repeatedly and uniformly declared that the United States have no more right than any private person to use a patented invention without license of the patentee or making compensation to him." *Belknap v. Schild*, 161 U. S. 15, 16 Sup. Ct. 444, 40 L. Ed. 591, citing *U. S. v. Burns*, 12 Wall. 252, 20 L. Ed. 388; *Cammeyer v. Newton*, 94 U. S. 235, 24 L. Ed. 72; *James v. Campbell*, 104 U. S. 358, 26 L. Ed. 786; *Hollister v. Manufacturing Co.*, 113 U. S. 67, 5 Sup. Ct. 717, 28 L. Ed. 901; *U. S. v. Palmer*, 128 U. S. 270, 9 Sup. Ct. 104, 32 L. Ed. 442.

The same court has held, in the same case, that the United States have not consented to be liable to suits, founded in tort, for wrongs done by their officers, though in the discharge of their official duties, and are therefore not liable to a suit for infringement of a patent; also that officers or agents of the United States, although acting under order of the United States, are personally liable to be sued for their own infringement of the patent; but that injunction should

not be granted, even in a suit against them, when the United States holds both the title and possession of the article, and is actually using it through such officers and agents; it being further intimated that, for such use of a patent,—practically an exercise of the right of eminent domain,—the proper forum in which to seek redress is the court of claims. *James v. Campbell*, 104 U. S. 358, 26 L. Ed. 786. But none of these propositions touch the case at bar. Complainant is not suing the United States; nor have the United States either title or possession of the “thing made in infringement of the patent”; nor are they using it in any way; nor has any officer or agent of the United States been sued or enjoined; nor is any claim made against the United States for any infringement of the patent, by reason of its having, without license of the complainant, sold Phenacetine which infringed the patent. There is nothing even for the court of claims to consider. Nor is there any conflict, as defendant contends, between the patent laws and the revenue laws. The customs officers have made no effort to tax, condemn, or sell the complainant’s property in the incorporeal franchise which he holds from the United States; nor is the patentee seeking, nor has he sought, to prevent the customs officers from taxing, condemning, or selling the corporeal property upon which the tariff act imposed duty as a chemical compound.

The defendant further contends that, by the condemnation proceedings, the statutory notice having been given, the absolute title to the property sold passed to the purchaser, freed from any lien, interest, incumbrance, or reservation. This is correct as to the property sold. All persons having title to it, or lien upon it, or interest in it, are cut off. But the owner of the patent is in none of these categories. He has no title to, or lien on, or legal or equitable interest in, the infringing property. “The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself.” *Patterson v. Kentucky*, 97 U. S. 506, 24 L. Ed. 1115. “Title in the thing manufactured does not give the right to use the patented invention. No more does the patent right in the invention give title in the thing made in violation of the patent.” *Belknap v. Schild*, 161 U. S. 24, 16 Sup. Ct. 448, 40 L. Ed. 591.

The suggestion in defendant’s brief that complainant in some way participated in attempt to smuggle the packages is wholly without any evidence to support it. The order of the circuit court is affirmed.

DODGE v. PORTER et al.

(Circuit Court, D. Massachusetts. November 14, 1899.)

No. 764.

1. PATENTS—INVENTION—APPLICATION OF OLD DEVICES TO DIFFERENT ART.

The application of old and well-known devices to a different art, in which they perform a new function, may constitute invention where the advantages to be gained by their use for such purpose were not obvious; and the fact that the art to which they were so applied was not new, and that they had never before been used therein, tends to support the claim of invention.

2. SAME—ANTICIPATION—PNEUMATIC TIRES.

The Tillinghast patent, No. 497,971, for a pneumatic tire, which consists of a single-tube tire composed of an interior rubber air tube, an outer rubber cover, and an intervening fabric, all united by vulcanization, the purpose being to prevent chafing between the interior and exterior tubes, which resulted in such tires as previously made, was not anticipated by anything in the prior pneumatic tire art, nor is the construction shown devoid of invention because sheets of rubber with a fabric between, similarly united, were previously used in the making of rubber hose and rubber gaskets.

This was a suit in equity for infringement of a patent. On final hearing.

Fish, Richardson & Storrow, William A. Redding, and Wilmarth H. Thurston, for complainant.

E. S. Mansfield, for defendants.

COLT, Circuit Judge. This suit relates to patent No. 497,971, granted May 23, 1893, to Pardon W. Tillinghast, for a pneumatic tire. The patent describes a single-tube pneumatic tire composed of two annular rubber tubes with intervening fabric all vulcanized together, and forming a complete integral tire having all of its component parts securely united. Previous to the Tillinghast tire the double-tube pneumatic tire was in common use. It was to overcome what the patentee regarded as defects in the double-tube structure that he invented his single-tube tire. In defining the invention, Tillinghast says in his patent:

"Heretofore pneumatic tires have been constructed with an interior air tube of vulcanized rubber, provided with a covering of canvas, and a separately vulcanized outer rubber covering having all its joints and parts cemented together after vulcanization. Tires so constructed, however, are liable to be rendered useless, owing to the chafing and wear of the parts in contact with each other, and the cemented joints are liable to separation under the strain caused by the constant flexing of the tire at the tread. It is the object of my invention to provide a tire which will be free from internal chafing, and that will have no joints or parts cemented or otherwise connected after vulcanization, to become separated by use, and that can also be more readily attached to the rim of the wheel, and be easily repaired. My invention consists in the combination of an annular inner rubber air tube, an outer rubber covering, and an intervening layer of braided or woven fabric, the several parts being joined to form a complete annular tire while the rubber is in an unvulcanized condition, and then all vulcanized together, so that the textile layer will become attached by the process of vulcanization to both the inner rubber tube and the outer rubber covering; and when a loosely-woven or braided fabric is employed the air tube and the outer rubber covering will also be united to each other

through the interstices of the fabric, the textile covering of the air tube serving to prevent the bursting of the said tube when subjected to pressure, and at the same time allowing the side walls of the tire to yield freely when passing over an uneven surface."

The claims in controversy are as follows:

"(1) A pneumatic tire, consisting of a rubber air tube and outer covering, substantially as specified, with the ends of the air tube and other component parts securely united by vulcanization, substantially as described, thereby constituting an integral complete tire. (2) A pneumatic tire, composed of a rubber tube, an intermediate layer of fabric, and an outer covering of rubber, substantially as described, having all its rubber joints and component parts simultaneously vulcanized together, forming an integral annular tire."

The evidence shows that Tillinghast invented his single-tube pneumatic tire, and disclosed it to others, as early as the summer of 1890, and that, consequently, his invention antedates the Boothroyd article in the *Cyclist*, describing a single-tube pneumatic tire, which was published in England in December, 1890. In the summer of 1890, Tillinghast was engaged in perfecting several other improvements in bicycle tires, which he thought at the time would yield him a more immediate pecuniary return than his single-tube pneumatic tire. These improvements related to a puncture-proof tread and an automatic pump; and between April, 1891, and July, 1892, he was granted five patents covering these inventions. He first applied for a patent for his single-tube pneumatic tire November 20, 1891. This application was several times rejected, and several times amended. On September 2, 1892, he withdrew his first application, and filed a new application, with a request that it be substituted for the old one. This request was granted, and the patent was finally issued on May 23, 1893. Under these circumstances there is no ground for holding that the patentee is chargeable with any such laches in taking out his patent as to render it void. *Hubel v. Dick* (C. C.) 28 Fed. 132, 140; *National Cash-Register Co. v. Lamson Consol. Store-Service Co.* (C. C.) 60 Fed. 603.

The principal defense in this case is that the Tillinghast patent, in view of the prior art, is void for want of invention. In considering the prior art as bearing on the validity of this patent, the evidence discloses several things which should be borne in mind. Although the rubber-tire art goes back to 1847, Tillinghast was the first to produce a practical and efficient single-tube pneumatic tire. His invention was not a mere improvement upon prior structures of the same type. The device has proved of great utility, and marks a distinct advance in the art. The Tillinghast tire to a large extent has supplanted in this country all other kinds of tires used on bicycles. The history of the rubber-tire art exhibits several distinct types, known, respectively, as the "solid tire," the "cushion tire," and the "pneumatic tire." The advantages derived from the solid and cushion tires are due to the resiliency of the rubber. The pneumatic tire does not depend upon the resiliency of the rubber, but upon the resiliency of the air with which it is inflated. The highly compressed air furnishes the highest degree of resiliency, and the elasticity of the rubber is only incidentally made available. Previous to the Tillinghast invention, the only practical pneumatic tire known was the Dunlop tire. This

tire consisted of two tubes. It was constructed of a vulcanized inner rubber air tube and a separately vulcanized outer cover, the air tube and the cover being separate from each other. The Dunlop tire was defective, owing to the chafing and wear of the parts in contact with each other, due to having the inner rubber air tube separate from the outer rubber cover. It was to overcome the objections to this form of tire that Tillinghast invented his single-tube tire, composed of an inner rubber air tube, an outer rubber covering, and an intervening fabric, inseparably united by vulcanization. There is nothing in the rubber-tire art which can be seriously considered as an anticipation of the Tillinghast structure. The solid rubber tire and the cushion rubber tire were not adapted to be inflated, and are manifestly different in construction and function. The only prior structures which bear directly on the question of anticipation relate to pneumatic tires. This branch of the art, as revealed in the present record, comprises four patents for pneumatic tires, and the Dunlop tire already commented upon. The earliest pneumatic tire is described in the Thomson patent of May 8, 1847. In this tire the air tube, composed of "sulphurized caoutchouc or gutta percha," is inclosed in an outer casing made of segments of leather riveted together. This casing also serves to attach the tire to the wheel rim. It is apparent that this structure is not an anticipation of the Tillinghast tire. Reference is also made to the three Thomas patents, dated March 12, 1889. In these patents the principal feature of novelty consisted in having the tread portion thicker or tougher than the other parts of the tire. These patents do not describe a single-tube pneumatic tire having the structural characteristics of the Tillinghast tire. They do not disclose a single-tube tire composed of an inner rubber air tube, an outer rubber cover, and an intervening fabric all vulcanized together. The only other tire in the prior art at the date of the Tillinghast invention was the Dunlop tire. This tire, as we have already said, was a double-tube tire, and it manifestly is not an anticipation of the Tillinghast device. In the construction of a pneumatic tire, Thomson, in his patent of 1847, considered an outer cover necessary for the protection of the inner rubber air tube, but did not conceive the idea of making the inner rubber air tube an integral part of the outer cover. In the Thomas 1889 patents it was thought that a pneumatic tire could be made out of a single annular rubber tube without any intervening fabric. The Dunlop conception embodied a vulcanized inner rubber air tube and a vulcanized outer rubber cover, which were separate from each other. This was the condition of the art at the time Tillinghast made his invention. He was the first to conceive the idea of making the inner rubber air tube and the intervening fabric an integral part of the outer rubber cover, and so prevent the inner rubber air tube from creeping or chafing against the interior surface of the outer rubber cover. It is clear that the Tillinghast patent is not void for want of invention by reason of anything which is found in the prior rubber-tire art.

Nor, in my opinion, is the Tillinghast patent void for lack of invention by reason of anything which is found in the prior rubber-hose art, or in the prior rubber-gasket art. It appears from several American

and British patents that it was the common practice, previous to 1890, to manufacture rubber hose composed of an inner rubber tube and an outer rubber covering, with intervening fabric, all vulcanized together. As this is not disputed, it is unnecessary to refer specifically to any of these patents. But, notwithstanding this fact, it still remains true that a pneumatic tire is quite a different thing from a rubber hose, and that each belongs to a distinct art. A rubber hose is a tubing of indefinite length, open at both ends. It is not an annular pneumatic tube forming a tire. There is nothing in the structure of rubber-hose tubing, nor in the various modes of producing such tubing, nor in the uses to which such tubing is put, which affords any suggestion leading to the production of a pneumatic tire. Nor does a rubber hose suggest that a tire having the structural characteristics of the Tillinghast patent would possess any special utility or advantages over other pneumatic tires. Rubber gaskets were constructed substantially the same as the Tillinghast tire. They were used for making tight joints in a vessel for treating sugar cane and bagasse. They are shown in the Duval patent of 1887. The Duval structure comprises a large vertical chamber to hold the crushed cane. The chamber is closed at its lower end by a removable bottom, which may be opened to permit the refuse solid matter to be discharged after treatment. The bottom must close against the lower end of the chamber with a tight joint, and to secure this result the joint is provided with a rubber gasket or packing ring. The specification of the patent says:

"The said jacket has formed in its lower edge a circular groove, in which is received a tube, G, of India rubber, filled with water under pressure, the said tube forming a packing to make a tight joint between the said jacket and a movable trap, which serves to close the bottom of said jacket, and that of the vessel A."

What has been said with respect to rubber hose may be repeated as to the rubber gasket, namely, that there is nothing in its structure, or in the mode of its production, or in the use to which it is put, that affords any suggestion that a pneumatic tire having such structural characteristics would be of any special utility, or would solve the problem of a practical and efficient pneumatic tire. In determining the question of anticipation of the Tillinghast patent based upon what was old in the rubber-hose art and in the rubber-gasket art it is well to bear in mind the language of Mr. Justice Brown, speaking for the supreme court, in *Topliff v. Topliff*, 145 U. S. 156, 161, 12 Sup. Ct. 825, 828, 36 L. Ed. 658:

"It is not sufficient to constitute an anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used, for the performance of such functions."

The inventive thought of Tillinghast was in the pneumatic tire itself, and not in the method of uniting two annular rubber tubes and an intervening fabric, which method may previously have been adopted for various purposes. The mere fact that it was old to vulcanize together an inner rubber tube, an intervening fabric, and an outer rubber cover in the rubber-hose art and in the rubber-gasket art, does

not prove that there was no invention in the application of such a method of construction, which such modifications as must be made, to a pneumatic tire. Although hose pipe and gaskets had been manufactured for years prior to the Tillinghast invention, it did not occur to any skilled mechanic that their method of construction could be successfully applied to the production of a pneumatic tire.

From the best consideration I am able to give the question, I am of the opinion that there is nothing found in the prior art which anticipates the Tillinghast patent, and that, admitting the method of inseparably uniting by vulcanization an inner rubber tube, an intermediate fabric, and an outer rubber cover was old in rubber hose and rubber gaskets, the conception that such a form of construction would produce a practical and efficient pneumatic tire constituted invention within the meaning of the patent laws of the United States. The pneumatic rubber-tire art dates back half a century. This record does not show that either the Thomson patent of 1847 or the later Thomas patents of 1889 describe practical tires. The Dunlop double-tube tire undoubtedly went into general use, but it was defective by reason of its duplex structure. Tillinghast, by uniting the different parts into an integral whole, overcame the defects in the Dunlop tire, and produced a really efficient and practical pneumatic tire. The Tillinghast invention may seem simple now that it has been disclosed. This is often true of very important inventions. Upon this point it is well to remember the language of the supreme court in the case of *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177. In that case, Mr. Justice Bradley, speaking for the court, said:

"It is further argued, however, that, supposing the devices to be sufficiently described, they do not show any invention, and that the combination set forth in the fifth claim is a mere aggregation of old devices already well known, and therefore it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed,—one which would occur to any mechanic skilled in the art. But it is plain from the evidence, and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes; they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. * * * At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit."

Let a decree be entered for an injunction and account in accordance with the prayer of the bill.

JANDREAU v. WITHERBEE et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 30.

WHARVES—INJURY TO VESSEL IN LOADING.

Where the loading of libelant's canal boat, of which he was captain, with iron ore, at defendant's dock, is shown to have been under his own direction, the lever man who controlled the flow of ore through the chute into the boat being at a distance, and governed by libelant's orders as to when he should start and stop, as the boat was moved along, defendant cannot be held liable for the wrecking of the boat by the running of too much ore in one place during libelant's temporary absence from the chute, it not being shown that defendant's superintendent or the lever man was chargeable with knowledge that libelant had left the chute unattended to either by himself or a deputy.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal from a decree of the district court, Southern district of New York, in favor of libelant for \$265.51. The facts sufficiently appear in the opinion.

C. C. Van Kirk, for appellants.

Le Roy S. Gove, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Libelant was the captain and owner of the canal boat Lyman Hall, which on June 24, 1896, was being loaded with iron ore at defendants' wharf, on the west shore of Lake Champlain, at Port Henry, N. Y. The loading began about 7 a. m., and, according to the usual custom, the first part of the load was brought aboard in wheelbarrows, and, when dumped, was trimmed by libelant's men. It was trimmed even on the boat, from bow to stern, the whole length of the boat, about one foot deep. The ore brought on in wheelbarrows amounted to about 105 tons. They then began, about 2:30 p. m., to load some 35 tons more through a chute. There were five cars loaded with ore, holding 6 or 7 tons each. These cars ran upon a trestle, which followed the line of the wharf, about 12 or 15 feet back from its front. The trestle was about 20 feet high, and from it there ran a chute so arranged as to catch the ore as it was discharged from the bottom of a car, and conduct it down to drop beyond the edge of the wharf into the boat. The mouth of the chute was 4 or 5 feet above the deck of the boat, the distance varying with the amount of load in the boat and the height of the water in the lake. The chute was arranged with a lever, which opened and shut a gate, thus admitting or preventing the running of the ore. The lever was worked by a man known as the "lever man," from a platform nearly on a level with the trestle. Inasmuch as the chute was stationary, the method of loading practiced that day (as usual) was to move the boat along the dock, so that different parts of the deck came, in succession, under the mouth of the chute. The boat was moved by men standing on it, and pushing it along. On the day in question the bow of the boat was first placed under the chute. When

enough ore had been deposited there from the chute, the lever man was instructed to cut off the flow, and thereupon the boat was moved a little further along, and, being stopped when the chute was somewhat further aft, the lever man was instructed to allow the ore to flow again. Sometimes the ore continued to flow while the boat was pushed along. This operation was repeated until the boat had been pushed so far along that the mouth of the chute was about amidships, the captain up to that time having directed the operation, calling out instructions to the lever man, and regulating the movements of the men who pushed the boat along. Having brought the boat up till the chute was amidships, the captain determined to go forward to measure the draft of the boat, in order to ascertain how much more load to take on. When he started forward, he said to one of the pushers, "Now, you be careful not to put on too much ore; I am going to measure my boat to the bow." This pusher was one of the men employed by defendants to wheel the ore on the boat. It took the captain, as he says, probably four or five minutes to measure the draught, the boat meanwhile being pushed along, and the ore flowing in, and, when the stern reached the chute, the boat was stopped, and a pile accumulated there about four feet high. Having finished at the bow, the captain started for the stern to measure there, when he saw that the boat was pitching by the stern; whereupon he called out to stop the flow, which was done as soon as possible after his call. Nevertheless the load was too much for the boat, and she sprung a leak at the stern, was pulled on the beach, where she grounded on hard bottom, and broke in two.

The district judge, in a brief memorandum, found the libelant to blame for not stopping the chute while he went forward, and that the defendants are not chargeable for the neglect of the "pusher" to attend to the chute properly, the libelant having left that matter in his care. From these findings no appeal has been taken. He further found "that the superintendent and lever man were to blame for sending down ore in such quantities when the captain was forward necessarily, and could be seen there; they must have known such quantities of ore in one place were dangerous." We are unable to concur in this conclusion. The method of loading at that wharf was well known to everybody. To the captain of each boat, himself familiar with its strength or weakness, with its capacity, and with the draught required for his future navigation, it was left to regulate the quantity of ore to be taken in from the chute, and the place where it was to be dumped. Libelant's own testimony on this point is most positive. He said: "When they drop the ore [from the chute], it is for the captain of the boat to say 'Stop,' you see." "When we began on the bow, I told him to let it come easy. He let it go until I told him to stop. Whether it fills the boat or not, I suppose they would wait for me to give orders." The way they "know when to let the ore run and when to stop it [is that] we let him know from down below. We tell him to stop; we tell him to go ahead. * * * [They] take orders from me when to start and stop." The superintendent of the dock, having general charge of all that was going on there, had a right to rely upon the libelant attending to the matter

which he had in particular charge; and the duty of the lever man was undoubtedly to wait for and obey the orders called up to him from the boat, especially as, from the relative positions of the boat, the mouth of the chute, and the platform where the lever man stood, the latter presumably could not see how high the ore was piled at particular localities on the boat. Indeed, the libelant himself admitted that it was a difficult matter to tell from the chute whether or not too much ore was being put on. It would be laying an unfair burden upon these two employes of the defendants to require them to anticipate that the captain would wholly neglect his duty, and to regulate the flow, irrespective of his orders, by their own ideas of what was a sufficient quantity for the boat to take. Unless, therefore, the testimony in the case is such as fairly to charge them with knowledge that the captain was not himself attending to the incoming ore, either personally or by deputy, and that the pile, in one place or another, was increasing to an extent greater than the boat would stand, there is no ground for holding the defendant liable. The statement of libelant that he "supposed" the superintendent saw him go forward is hardly sufficient, even although he might have been seen there if the superintendent's attention had been attracted to him; and we find nothing in the record to charge the lever man with knowledge that there was a dangerous accumulation of ore at the stern. The decree of the district court is reversed, with costs of this appeal, and the cause remanded to the district court, with instructions to dismiss the libel, with costs.

THE CLEVELAND.

(District Court, D. Washington, N. D. December 23, 1899.)

MARITIME LIENS—RELEASE OF VESSEL ON BOND—DISCHARGE OF LIEN.

A vessel which, after being seized upon a libel, is released, on giving a bond to secure the demand of the libelant, cannot be arrested a second time for the same cause of action, unless her discharge was obtained through fraud or mistake, even where the libel is dismissed without prejudice.

In Admiralty.

A libel in rem against the same vessel, by the same libelants, for the same causes of action, and by others for similar causes of action, having been heretofore dismissed, after the vessel had been taken into custody by the marshal, and released upon the giving of a bond pursuant to section 941, Rev. St., conditioned to satisfy any decree which might be rendered in favor of the libelants, the claimant moved to dismiss the present suit, on the ground that the release of the vessel in the former suit freed her from any lien for the same causes of action. Motion granted.

Brady & Gay, for libelants.

White, Munday & Fulton, for claimant.

HANFORD, District Judge. This is a second suit in rem against the steamship *Cleveland*, by the libelants, to recover damages for the same cause of complaint. Upon a showing by affidavits, the court made an order allowing the libelants and others to sue in forma pauperis, and afterwards, upon evidence taken and submitted,

the court determined that the affidavits alleging the poverty of the libelants, and their inability to pay costs or give security for costs, was untrue, and, considering that there had been an abuse of the process of court without any reasonable excuse, made an order dismissing the case, without prejudice to the rights of the libelants to commence other suits for the same causes. The order of dismissal was made after the vessel had been released from custody upon a bond given pursuant to section 941, conditioned that the obligors should abide by and answer the decree of the court in the cause.

In the case of *The Union*, Fed. Cas. No. 14,346, it was decided by Mr. Justice Nelson that a vessel, after being discharged from arrest under admiralty process, upon the giving of a bond or stipulation, returns into the hands of her owner, subject to all previously existing liens or charges, the same as before the seizure, except as respects that on account of which the seizure was made; and this decision has been frequently cited as an authority supporting the proposition that a vessel discharged from arrest under admiralty process, upon giving a bond or stipulation for her value, or for the payment of the amount claimed in the libel, returns to her owner freed forever from the liens upon which she was arrested, and can never be seized again for the same cause of action, even by the consent of parties. *The White Squall*, Fed. Cas. No. 17,570; *The Old Concord*, Fed. Cas. No. 10,482; *The William F. McRae* (D. C.) 23 Fed. 557; *The Mutual* (D. C.) 78 Fed. 144. The supreme court of the United States has several times in its decisions cited the opinion of Justice Nelson in the case of *The Union* with apparent approval, and recognized the rule contended for by the claimant in this case, by deciding that a bond or stipulation given for the release of a vessel arrested under admiralty process is, in admiralty practice, a substitute for the vessel released; that a libelant may proceed in a second suit in rem, in another jurisdiction, upon a separate and distinct cause of action; and by dicta approving decisions holding that a court of admiralty may order a vessel to be again taken into custody, where her release has been obtained by fraud or mistake. See *The Palmyra*, 12 Wheat. 1, 6 L. Ed. 531; *The Haytian Republic*, 154 U. S. 118, 38 L. Ed. 930; *U. S. v. Ames*, 99 U. S. 35, 25 L. Ed. 295. The care taken in these decisions to set forth the particular facts upon which they are grounded argues that, in the opinion of the court, the general rule does not permit a vessel to be arrested a second time, for the same cause of action, after she has been released upon a bond given to secure the demand of the libelant.

This case does not come within any recognized exception to the general rule. The release of the steamer *Cleveland* was not obtained by means of fraud on the part of the claimant, nor was the decision of the court in the former case founded upon a mistake or misunderstanding of the facts. The court has not passed an order in this case directing that the vessel be again taken into custody, but the libelants are endeavoring to proceed as if the former suit had never been commenced, and as if it were permissible for them

to ignore the fact that in the former suit a bond to answer their several demands was received as a substitute for the security which they obtained by attaching the vessel. Upon the authority of the decisions above referred to, and other cases to which they refer, I am obliged to hold that the release of the steamship *Cleveland* in the former suit against her, by these libelants, discharged her absolutely from liability to answer the demands of the libelants in this case, and that the proviso in the order dismissing the former suit that the same was made without prejudice can have no other effect, as a saving clause, than to prevent the decree of dismissal from being set up in bar of subsequent suits in personam against the master or owners of the vessel. Motion to dismiss granted.

TRACY v. BALTIMORE & O. R. CO. et al.¹

(District Court, E. D. Pennsylvania. December 7, 1899.)

No. 36.

1. NEGLIGENCE—MAINTENANCE OF JETTY—INSUFFICIENT MARKING.

Where a jetty, which was built to protect a dock from mud that would be carried in by the tide, was suffered to be pressed out of line by the mud deposited against it, and was not visible at high tide, nor marked in any way except by a group of piles at the extreme end, the dock owners were held liable for an injury to a tug which struck the submerged and projecting portion of the jetty while attempting to back out of the dock.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Although the master of the tug had often used the dock before, and knew its condition, *held*, that he was not required to know the exact line of the jetty; and a swerving of a few feet, sufficient to strike it, would not charge him with contributory negligence.

3. SAME—EVIDENCE.

A photograph of the jetty, taken three months after the accident, is competent to show its condition.

In Admiralty. This was a libel in personam by the master of the tug *Fidget* for an injury caused to the tug by the defective condition of a jetty maintained by the defendants to protect their dock, which the vessel was lawfully using. The facts are stated in the opinion.

Willard M. Harris, L. Levering Jones, and Hampton L. Carson, for libellant.

William H. Addicks, for respondents.

McPHERSON, District Judge. In 1895 the Baltimore & Ohio Railroad built a dock extending into the stream from the west bank of the Delaware river. A wharf was constructed for the reception and loading of freight, and a jetty of timber was erected parallel with the wharf, and south of it about 75 feet; the object of the jetty being to prevent mud and refuse from being carried into the dock by the tide. At first the jetty was straight, but it was soon pressed out of line by the increasing quantity of mud that was deposited against its

¹ Reported by Arthur G. Dickson, Esq., of the Philadelphia bar.

south side. In March, 1899, the deviation was 7 or 8 feet at some points, as is shown by a photograph that was taken in June, but represents with substantial accuracy. I have no doubt, the condition that existed three months before. At its eastern end the jetty terminated in a group of piles that was always several feet above the surface of the river, even at high tide. But between these piles and the shore the main body of the structure was so much less in height as to be several feet under water when the tide was high. At such stage of the water nothing indicated the northern line of the jetty, except the group of piles at the eastern end. No posts or other marks pointed out where the northern line had been pushed into the dock, and where, therefore, it had become a danger to navigation.

In March, 1899, the tug Fidget, in charge of Isaac Tracy, master and part owner, towed a schooner to the wharf, and, having discharged this duty, tried to back out of the dock between the schooner and the north line of the jetty. It was daylight. There was no wind. The master was in the pilot house, directing the movement of the vessel, and the attempt was slowly and cautiously made. But the tide was at flood, the main body of the jetty was submerged and invisible, and one result of the effort was that the tug's propeller struck the submerged portion of the jetty, breaking the shaft; this being the injury complained of. During the previous three years the master had often towed vessels into the dock, although not since the middle of December, 1898, and knew its condition.

Upon this state of facts, the court is asked to hold the respondent liable for negligently maintaining a structure that was dangerous to navigation. The complaint is directed against the defective condition of the jetty, "which, at the place where this collision occurred, projects, by reason of imperfect construction, out into the dock to such an extent as to seriously impede and affect the navigation thereof"; it being further averred "that this deviation is neither apparent, nor is there any effort made on the part of the defendant company to warn mariners of its dangerous character." The libellant may have intended to charge defect in the original construction, as well as negligence in maintaining; but, if such intention existed, the charge was not proved. Negligence in maintaining, however, is, I think, sufficiently established. It would have been easy to mark the northern line of the jetty by bolting on pieces of timber long enough to project above the water at all times, especially at the points of greatest deviation; and, in my opinion, some such marking was a duty that the respondent owed to the vessels that were invited to use the dock, and were thus assured that it was in a reasonably safe condition. No doubt, the master of the tug knew the condition of the jetty, and was therefore chargeable with exercising such caution as was reasonable in view of such knowledge; but I do not find anything in the testimony to convict him of contributory negligence. An error of a few feet was enough to cause the injury, and he could not fairly be asked to carry in his mind so accurate a picture of the winding line of the jetty, that he could know to a yard or two just where it was bulging under the water, and where it was retreating. As long as the line was straight, the piling at the end may, perhaps, have been a

sufficient guide, but I do not think it was sufficient after the line had become as crooked as the testimony discloses.

It may be desirable to add that I have given no weight to Capt. Lambert's testimony concerning a similar accident to his boat, the conditions being in some respects materially different.

There must be a decree for the libelant, but not for the full amount of the claim. The bills for repairs will be allowed, but I think the item of demurrage has not been fully proved. The wages of the crew are proper to be taken into account, but there is no evidence to support the claim of \$66.15 for the boat's loss of time. Even the libelant did not give the court any facts upon this point. All he said was, "Well, we are supposed to have something for the boat;" and there is no further testimony on the subject. The court cannot be expected to guess at the value of a tugboat's service by the day.

A decree may be drawn for \$172.52, with interest from March 6, 1899, and costs.

THE QUEVILLY.

(Circuit Court of Appeals, Third Circuit. December 18, 1899.)

No. 21.

1. TOWAGE—SUIT TO RECOVER—CONSTRUCTION OF LIBEL.

In a suit to recover a balance claimed to be due for towage services, an allegation in the libel that the charge for towage was made in accordance with a printed schedule of rates based on the tonnage of the vessel, which was shown to the captain of the vessel, and agreed to by him; that settlement was made on the basis of the tonnage as stated by the captain, but a corrected rate was afterwards agreed to, based upon the tonnage of the vessel required by the customs officers of the United States,—cannot be construed to mean that the schedule of rates was based exclusively on the tonnage as fixed by the customs officers, but that it was based on the actual tonnage, which was, in the case in question, correctly ascertained by such officials.

2. SAME—CONSTRUCTION OF CONTRACT.

Under an agreement for towage in accordance with a schedule of rates based upon the tonnage of the vessel, the amount of the charge is to be determined by the actual tonnage, as to which the statement of the Lloyd's register, while, no doubt, generally correct, is not conclusive.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 95 Fed. 182.

Horace L. Cheyney, for appellant.

Curtis Tilton, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. We do not think that the appellant's criticism of the libel is well founded, or that his view of the effect of the evidence adduced in its support is correct. It is not alleged in the libel "that the tonnage of the bark, ascertained by the customs officials of the United States for the port of Philadelphia, is the basis of the rates of the Towboat Association." What is alleged is "that the

said tariff is a printed schedule of rates, which was shown to the captain of said bark, and charges are made according to the tonnage of the vessel; that the tonnage of said bark was at first misrepresented by the said captain of said bark, so that the towage rate was only \$144, but that the corrected rate, as finally accepted by said captain, based upon the tonnage required for said bark by the customs officials of the United States for the port of Philadelphia, made the towage rate \$220 for said service, which the master of the bark agreed to, but her agent refused, and still refuses, to pay." This cannot be construed to mean that the tariff of the association had for its basis the ascertainment of tonnage exclusively by the Philadelphia customs officials. Its plain meaning is that the towage charges were to be made according to actual tonnage, however ascertained, and that in this instance the actual tonnage had, in fact, been correctly determined by those officials. No part of the evidence was inconsistent with this allegation. No doubt, tonnage is, in general, assumed to be rightly stated in the Lloyd's books, but there was no testimony which would have justified a finding that those books must, in all cases, be regarded as conclusive. The court below was of opinion that the real question was as to the true net tonnage of the *Quevilly*, and this question it decided in accordance with the action of the customs authorities. This, we think, was clearly right; and, as the opinion which was filed by the learned judge sufficiently presents our own views upon the whole case, further discussion of it is unnecessary. The decree is affirmed.

FARR & BAILEY MFG. CO. v. INTERNATIONAL NAV. CO.

(Circuit Court of Appeals, Third Circuit. November 28, 1899.)

No. 13.

SHIPPING—DAMAGE TO CARGO—SEAWORTHINESS.

To constitute a ship seaworthy when she enters on a voyage, she must be fit, in design, structure, condition, and equipment; and she cannot be said to be fit, as to condition, when both the iron and glass coverings of a port, which it is the usual custom to close and fasten before sailing, though structurally fit, are, through inadvertence, insecurely fastened, so that, although the vessel does not encounter bad weather or rough seas, such covers become open, and admit sea water, which damages the cargo. In such case the damage must be held to result from the unseaworthiness of the ship, and not from any fault or error in navigation, or in the management of the vessel, for which the owners are exempted from liability by section 3 of the Harter act, as the master was justified in supposing that the port had been securely closed before sailing, in accordance with the usual custom, and was not chargeable with fault in failing to cause it to be thereafter examined, although the cargo was so stored that it was accessible.

Gray, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 94 Fed. 675.

Horace L. Cheyney, for appellant.

J. Rodman Paul, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. By the libel filed in the court below damages were claimed for injury done by sea water to several bales of burlap which were received on board the steamship Indiana at the port of Liverpool, consigned to the libellant, in Philadelphia. These goods were stowed in a compartment on the lower steerage deck in such manner as to admit of free access being had to the port through which the water subsequently entered. This port, and others similarly situated, were inspected on the day before the vessel sailed, and they were believed to be closed and properly fastened; but, after the Indiana had proceeded for four or five days upon her voyage, water made its appearance in the compartment, and a day or two later investigation disclosed that both the glass cover and the iron dummy of the port in question were open, and that through this opening the water was admitted. There had been no severe weather, no accident was known to have happened, and the port, its covers, fastenings, and surroundings, did not appear to have been in any way broken or impaired.

The bearing upon the case thus presented of the act of congress of February 13, 1893, known as the "Harter Act," is now for consideration. The third section of that act provides that:

"If the owner of any vessel transporting merchandise to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owners, agents or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

This act has not modified the obligation of owners to furnish a seaworthy ship. The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771; The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; The Silvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. Did the damage in question result from unseaworthiness? Respecting its immediate cause there can be no doubt. It was the condition of the port. Was this condition chargeable to unseaworthiness, or should it be ascribed to lack of due care, skill, or judgment on the part of those engaged in navigating and managing the vessel? The definition of "seaworthiness" which the learned counsel for the appellee has supplied from Carver on Carriers by Sea (section 18, p. 20) is, so far as it is here material, that "the ship must be fit in design, structure, condition, and equipment"; and, although the Indiana seems to have been structurally fit, her "condition," as respects the port in question, was, we think, palpably unfit. The learned judge of the court below found as a fact that it "was either not fastened at all, or was insecurely fastened," and this finding is quite consistent with the contention of the appellee's counsel that it was not open at the time of sailing. The impression made upon us by the evidence is that it was probably closed, but, be this as it may, certain it is that it was not securely fastened; and we are of opinion that by reason of this fact the vessel was unseaworthy, for the conclusion is inevitable that a ship with a hole in her side, which those in charge

of her navigation suppose, and have a right to assume, is tightly closed, but which in fact had been so inadequately fastened as to admit of its being opened by ordinary pressure of the sea, and so permit the water to flow in upon the cargo, does not "have that degree of fitness which an ordinary careful and prudent owner will require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it"; and "to that extent * * * the shipowner undertakes absolutely that she is fit, and ignorance is no excuse." *Carv. Carr. by Sea, supra*. It has, however, been contended that the master of the *Indiana* had no right to assume that the covers of this port had been properly secured, but should himself have made timely discovery that they had not been, and therefore that his omission to have them made fast during the voyage, and before the damage had been done, was a fault in navigation or in management, for which the vessel is not liable. We cannot sustain this contention. The record shows that the custom was to close and securely fasten all such ports before sailing, and that in this instance this practice, except as to this one port, was effectually pursued. The master was, of course, not responsible for the vessel's general fitness of condition; and, this being so, we are at a loss to conceive upon what ground neglect could be imputed to him by reason of his not having seen to the condition of this particular part of the ship at a time when its unfit condition had not become known to him. This case was twice argued in the court below. Upon the first occasion the learned judge directed a decree to be entered for the libellant, but upon reargument he dismissed the libel. In all that he said in support of the conclusion which he first announced, we fully concur; but we are unable to acquiesce in the result which he finally reached, because we cannot agree that it was rendered necessary by the decision in the case of *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. The facts of that case and of this one, though similar, are not precisely the same; and the differences between them, though seemingly slight, are, when considered with reference to the reasoning upon which the judgment in the *Silvia* Case was founded, of controlling importance. It was there said that "the test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport"; and, applying this test, it was held that the *Silvia* was not, under the circumstances there presented, to be regarded as being unseaworthy, merely because at the time of sailing, when the weather was fair, and with the glass covers tightly closed, the iron covers of some of her ports were left open to light the compartment. There was in that case, as in this one, no structural defect or omission of appliances, and the question there, as here, was only as to fitness of condition. The compartment involved contained no cargo, but only spare sails and ropes and a small quantity of stores. The ports were in a place where the iron shutters would usually be left open for the admission of light, and there was nothing to prevent or embarrass access to them in case a change of weather should make it necessary or proper to close them. In the afternoon of the day of sailing rough weather was encountered, the glass cover of one of the ports was broken, and

the water came in through the port and damaged the cargo; and this damage, it was held, was occasioned, not by unseaworthiness, but by fault or error in the navigation or in the management of the ship, because the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas is included in navigation and management, and consequently the neglect to close the iron covers of the ports was in that case ascribed to those in charge of the navigation and management, and not to those responsible for seaworthiness. But in the present case the port in question was not designedly left open, and its shutters ought not to have been left unfastened. They would not "usually be left open for the admission of light," or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary, and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived. If, as in the *Silvia* Case, the compartment in question had contained only tackle and stores, and if, as in that case, the glass cover had been closed, but the iron cover left open to admit light, it would unquestionably have been the duty of the master, upon encountering rough weather, to have had the iron cover closed; but he cannot be justly said to have committed either a fault or an error in omitting to remedy a defect of which he had no knowledge, and for the existence of which he was in no way responsible. The fact that in the *Silvia* Case, as in this one, the cargo was not so stored as to prevent access to the port, does not make the judgment in that case decisive of this one. There it was said that, if the cargo had been so stored as to require much time and labor to shift or remove it in order to get at the ports, the fact that the iron shutters were left open at the beginning of the voyage might have rendered the ship unseaworthy; but it was not decided that, under all circumstances, freedom of access to the ports of a vessel imposes upon those engaged in her navigation and management a duty to inspect them. On the contrary, it seems to us that what the court said about this matter accords with our present conclusion; for, if a ship be "unseaworthy at the time of sailing, by reason of the cargo having been so stowed against the open port that the port could not be closed without removing a considerable part of the cargo," it would seem that there must likewise be unseaworthiness wherever, for any cause, it would be unreasonable to expect the master to investigate a port which had not been fastened at the time of sailing; and that such expectation would not have been reasonable, and in fact was not entertained, in this case, has already been shown. The decree of the district court is reversed, and the case will be remanded to that court, with direction to enter a decree adjudging the respondent to be liable for the damage complained of by the libellant, and referring the case to a commissioner to determine the extent of the loss.

GRAY, Circuit Judge. I cannot agree with the majority of the court in the conclusion reached by them in this case. Entirely aside from the question of the applicability of the decision of the supreme court of the United States in the case of *The Silvia*, I think the owners of the *Indiana*, on the facts disclosed in the record, are within the exemption provided for in the third section of the act of congress known as the "Harter Act." If the ship, when she left port, was not defective in structure or equipment, she was, within every reasonable definition of the term, seaworthy. There is no suggestion that her equipment in the matter of ports or deadlights was defective. If properly equipped with hatch coverings and tarpaulins, it does not render a ship unseaworthy, if they are left open or insecurely fastened. If they are, it is a fault of the navigation or management. So, if a ship is properly equipped with anchors, and the requisite tackle for stowing them, it does not render her unseaworthy, if on leaving port the anchors are allowed to swing from the catheads, whereby there is danger of knocking a hole in the bows when the ship encounters head seas. It is a fault of the management and navigation to so leave them. In the case of *Hedley v. Steamship Co.* [1894] App. Cas. 222, a ship sailed with stanchions and rails on board, but not set up as they ought to have been. A storm coming on, a seaman engaged in performing his duty fell overboard in consequence of the neglect to ship the stanchions and rails, and was drowned. The house of lords held that this was a neglect of duty, but did not render the ship unseaworthy. Lord Herschell said:

"After she left port, her hull and equipment remained precisely what they were at the time of her departure. She was in all respects efficiently equipped. The fault was in not making use of the equipment with which she had been furnished. * * * The failure to properly secure many parts of the ship which are in ordinary practice open, from time to time, would no doubt diminish the safety of those serving on board her, and be a source of danger to them; but I do not think it could be reasonably said that because, in such a case, a bolt was not securely fixed, the vessel therefore became unseaworthy."

The reasoning in the case of *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241, however, seems to me on every point applicable to the present case, and to be of binding authority on this court, as it was considered to be by the learned judge of the court below. The facts in that case were precisely like those in the present case; the only difference being that in the *Silvia* the iron cover over the port was left open, while in the *Indiana* the glass cover was left open or insecurely fastened. I think the decree of the court below should be affirmed.

KING et al. v. CITY OF ST. LOUIS et al.

JOY v. SAME.

(Circuit Court, E. D. Missouri, E. D. December 15, 1899.)

Nos. 4,217, 4,225.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—RIPARIAN RIGHTS.

An action involving the right to accretions along the river front by the owners of lands whose title is derived through a patent, issued pursuant to the provisions of an act of congress, in which the lands are described as "lying on the west bank of the Mississippi river," presents a case for the construction of the grant, and is a question arising under a law of the United States, of which a federal court has jurisdiction.¹

2. SAME.

The general doctrine that local laws must determine the riparian rights of owners of real estate bounded on navigable rivers is subject, in all cases, to a consideration of the primary right of the United States in navigable waters for the purposes of commerce; and, in construing a grant by the United States bounded on such a river, a consideration of other matters besides the local law may become necessary in determining the intent and scope of the grant.

On Demurrer to Petition in Each Case.

E. P. Johnson, for plaintiffs.

B. Schnurmacher and Chas. Claflin Allen, for defendants.

ADAMS, District Judge. These two cases in ejectment are now before the court on demurrers to the petitions. The demurrers present the question whether a federal question is involved, so as to confer upon this court jurisdiction to hear and determine the cases. The averments of the petitions show that the plaintiffs claim title to the land described in the petitions under and by virtue of a patent issued to Louis Le Baume, or his legal representatives, pursuant to the provisions of an act of congress approved March 3, 1807, granting to them land "lying on the west bank of the Mississippi river," between the northern and southern boundaries of survey No. 3,333. As a result it is claimed that the plaintiffs are constituted riparian owners, invested with the title to all accretions along that front since the date of the grant. It is claimed by the plaintiffs that their title depends upon the proper construction of the letters patent to Le Baume, and that the true construction of the letters patent is the controlling question in the cases. It is further alleged in the petitions that a controversy has arisen between the plaintiffs and the defendants as to the proper construction of the letters patent, in this: That the plaintiffs claim that Le Baume, or his legal representatives, by the descriptions and necessary intendments of their grant, were vested with the title to and ownership of all land thereafter to be formed by accretions or gradual deposits from the river along the eastern boundary. It is further alleged in the petitions that the plaintiffs' claim is disputed by the defendants. Plaintiffs further allege that

¹ For federal question as ground of jurisdiction, see note to Robbins v. Ellenbogen, 18 C. C. A. 86, and, supplementary thereto, note to Mecke v. Mineral Co., 35 C. C. A. 155.

defendants claim under and by virtue of a certain act of congress approved June 12, 1866 (14 Stat. 62), whereby the right, title, and interest of the United States in and to the wharfs, streets, lanes, etc., within the corporate limits of the city of St. Louis were granted in fee simple absolute to the city of St. Louis. The contention in the case is whether the plaintiffs took, by their patent, title to any and all possible accretions along the west shore of the Mississippi river opposite their fronts, or whether the same remained in the United States, and subject to its subsequent disposition, and whether this contention presents a federal question within the meaning of the judiciary acts. It is contended by the city of St. Louis that the only question in the case is one of boundaries, resulting finally in the question of riparian ownership, which is dependent upon local law for its determination; and the defendants cite and rely in support of their proposition that no federal question is involved upon the case of *Hamblin v. Land Co.*, 147 U. S. 531, 13 Sup. Ct. 353, 37 L. Ed. 267, and several other cases, mainly from the circuit courts. Plaintiffs, on the contrary, rely upon the case of *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, and several other cases, including the case of *Railroad Co. v. Schurmeir*, 7 Wall. 272, 19 L. Ed. 74, which is cited with approval in *Shively v. Bowlby*, *supra*. In *Shively v. Bowlby* it appears that Shively was the owner of a donation land claim as laid out and recorded by him under the provisions of the act of congress of September 27, 1850 (9 Stat. 496); that afterwards the United States issued a patent to him for his claim, bounding the same on one side by the Columbia river. Bowlby afterwards secured a conveyance from the state of Oregon to all lands lying between high-water and low-water mark along the front of Shively's grant on Columbia river. A controversy arose between Shively and Bowlby concerning their respective rights. Shively claimed, by virtue of his grant from the government, all the tide lands and riparian and wharfing rights in front of his lands. Bowlby claimed the right to the same by virtue of his conveyance from the state. The case, as above stated in very general terms, manifestly is quite like the one now at bar. Mr. Justice Gray, in delivering the opinion of the supreme court of the United States on a motion to dismiss for want of jurisdiction, says:

"The only matter adjudged [by the supreme court of the state of Oregon] was upon the counterclaim. The judgment against its validity proceeded upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the state, in lands below high-water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a federal question within the appellate jurisdiction of this court. Rev. St. § 709. That jurisdiction has been repeatedly exercised, without objection or doubt, in similar cases of writs of error to the state courts. [Here several authorities are cited.] It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants, and upon

this just ground: that, the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant beyond what such grant by necessary and unavoidable construction shall take away.' Many judgments of this court are to the same effect. [Here several cases are cited.] The present case being clearly within our jurisdiction, we proceed to the consideration of its merits."

I regard this last-mentioned case as direct and controlling authority, and strictly applicable to the case now before the court. I have read carefully a large number of cases to which my attention has been called by counsel, and find nothing in them to shake the authoritative character of this last-mentioned case, and, following its teachings, the court must take jurisdiction of the cases now under consideration. I may incidentally add that the general doctrine invoked by defendants that local laws must determine the riparian rights of owners of real estate bounded on navigable rivers is subject in all cases to a consideration of the primary right of the United States in navigable waters for the purposes of commerce. See *Gibson v. U. S.*, 166 U. S. 271, 17 Sup. Ct. 578, 41 L. Ed. 996. In cases where such considerations are permissible,—like that now before the court,—the true construction of the grant may involve a consideration of other matters besides the local laws applicable to riparian rights. The real question in these cases is, what was the intent of the United States in granting the lands in question to Le Baume and his legal representatives? Was it to convey to him and his legal representatives the accretions which might attach to the land by reason of the change in the currents of the river, or was the intent to limit the grant to lands on the western shore or high-water mark of the river as it existed at the day of the grant? This question, in my opinion, in the light of the authorities, must be held to be a federal question. The demurrers are overruled.

JORDAN v. TAYLOR et al.

(Circuit Court, D. Massachusetts. December 29, 1899.)

No. 1,109.

1. FEDERAL COURTS—JURISDICTION IN EQUITY—PROPERTY IN POSSESSION OF STATE COURT.

During the time the estate of a testator is in process of administration in a state probate court, and before the executors have rendered any account, a federal court will not entertain a bill in equity by a cestui que trust under a trust fund comprising the general residuary estate of the testator to set aside a sale of stocks made by the executors, and to take the proceeds out of their possession, which is, in legal effect, the possession of the probate court, and substitute therefor the property sold.

2. EQUITY JURISDICTION—SUITS AGAINST EXECUTORS.

As a general rule, an executor who has not settled his final account in the probate court cannot be charged by a suit in equity by the residuary legatees for property sold by him in violation of his trust, as the rights of such legatees, who are interested only in the residue in the executor's hands after payment of all specific legacies and charges, can be fully protected by the probate court.

In Equity. On demurrer to bill.

Robert M. Morse, J. H. Benton, Jr., and Charles F. Hanlon, for complainant.

Richard Olney, for defendant Taylor.

Solomon Lincoln, and Charles K. Cobb, for defendant executors and trustees.

COLT, Circuit Judge. This is a bill in equity brought by the complainant, one of the residuary legatees under the will of Eben D. Jordan, to set aside a sale of 375 shares of stock of the Globe Newspaper Company, made by the defendant executors Jordan and Nichols to the defendant Taylor, and praying that the defendant Taylor may be ordered to transfer to the executors the said stock upon their payment to him of \$375,000, the amount paid for the stock. Eben D. Jordan, in his lifetime, executed an agreement with Taylor that he might purchase from his estate, within three months after his death, under the conditions named in the agreement, an amount of Globe stock sufficient to make his share equal to one-half of the capital stock of the corporation. In his will Jordan suggested that the executors should retain the Globe stock as a permanent investment, unless, for good reasons, it should become desirable to dispose of it. At the same time he directed that any agreement made in his lifetime with reference to the sale of such stock should "be faithfully carried out." The defendants Jordan, Taylor, and Nichols were appointed executors and trustees under the will. The executors Jordan and Nichols, acting under the agreement, sold to Taylor 375 shares of the stock shortly after the probate of the will, and before he qualified as executor. The bill charges, in substance: First, that the agreement which Jordan made in his lifetime with respect to the sale of the stock to Taylor is void for want of consideration; second, that the conditions contained in the agreement were not complied with; third, that two of the appraisers appointed to fix the price to be paid for the stock under the agreement were not disinterested parties; and, fourth, that, whereas the price at which the stock was sold was \$1,000 a share, its fair market value was \$2,000 a share. The prayer of the bill is as follows:

"And that said sale and transfer of said three hundred and seventy-five (375) shares of the capital stock of the Globe Newspaper Company by the defendants to the defendant Taylor may be declared null and void, and that the defendant Taylor may be ordered and decreed to assign and transfer to the defendants said three hundred and seventy-five (375) shares, and to pay to the defendants the amount of all dividends which he has received thereon, with interest on the amount of said dividends; the defendants at the same time paying to defendant Taylor the sum of three hundred and seventy-five thousand (\$375,000) dollars, and interest thereon from the date of payment by him of his promissory note aforesaid for said amount."

The present hearing was had on demurrer to the bill. The first ground of demurrer to be passed upon is whether the court has jurisdiction in this case. In the consideration of the question of jurisdiction in this class of cases it is important to examine carefully the particular case which is presented. It is undoubtedly true that a federal court, where the requisite diversity of citizenship exists,

has jurisdiction in some cases brought by a legatee against executors or trustees to establish rights under a will, or to set aside a wrongful sale of trust property; but the real question now presented for determination is whether, under the frame of this bill, and the specific relief prayed for, the court has jurisdiction in this particular case. The complainant is a beneficiary in the general residuary estate of Eben D. Jordan, which, under his will, is to be held in trust by the trustees designated in that instrument. The complainant has no right to a transfer of this stock in specie to him, or to the trustees for his benefit. He is merely interested in the general residue of the estate after the payment of debts, specific bequests, and charges of administration. He is only entitled to a beneficial interest in the residue coming into the hands of the trustees after they have ceased to act as executors. He is one of four beneficiaries who are to share in the income from the trust estate, and the bill is brought, not to have the sale declared void as to himself alone, or to make the executors account to the trust estate for the full value of the stock to the extent of his interest in the trust estate, but the bill is so framed as to call upon the court to adjudicate upon the rights of the other beneficiaries, who may have consented to the sale, or over whom, by reason of their being citizens of Massachusetts, this court has no jurisdiction. This circumstance alone, if the question of jurisdiction rests at all in the discretion of the court, should cause it to hesitate to entertain a suit of this character, where it is plain that the state probate court has full jurisdiction over the subject-matter and all the parties in interest. Under these circumstances, and at this stage in the settlement of the estate, this court is asked, in effect, by the present bill, to take \$375,000 out of the possession of the probate court, and to substitute therefor 375 shares of Globe stock. It is asked to disturb the res in the possession of another court. It is called upon to interrupt the administration of the estate by the probate court before the debts or specific legacies have been paid, or the executors have rendered any account, and while the entire estate is in the actual possession of the probate court. Although the determination of the question of jurisdiction in this class of cases, as shown by the authorities, is not always free from difficulty, there is one principle which has been firmly established, and which applies to the present case. Where property is in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process issued out of another court. The possession of the property of a decedent by an administrator appointed by a state court is the possession of the court, and such possession cannot be disturbed by another court.

In *Byers v. McAnley*, 149 U. S. 608, 614, 615, 13 Sup. Ct. 908, 37 L. Ed. 871, the court said:

"It is a rule of general application that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Peck v. Jenness*, 7 How. 612, 625, 12 L. Ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Ellis v. Davis*, 109 U. S. 485, 498, 3 Sup. Ct. 327, 27 L. Ed. 1006; *Krippendorf v. Hyde*, 110 U. S.

276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; *Borer v. Chapman*, 119 U. S. 587, 600, 7 Sup. Ct. 342, 30 L. Ed. 532. Secondly. An administrator appointed by a state court is an officer of that court. His possession of the decedent's property is a possession taken in obedience to the orders of that court. It is the possession of the court, and it is a possession which cannot be disturbed by any other court. Upon this proposition we have direct decisions of this court." *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536; *Williams v. Benedict*, 8 How. 107, 12 L. Ed. 1007; *Vaughn v. Northup*, 15 Pet. 1, 10 L. Ed. 639; *Peale v. Phipps*, 14 How. 367, 14 L. Ed. 459.

It was held in *Byers v. McAuley* that a citizen of another state may proceed in a federal court to establish his right to a share in the estate of a deceased person, or to establish a debt against such estate, but he cannot proceed in any way so as to disturb the actual possession of the property by the state probate court. This is not a suit by a beneficiary against trustees seeking to avoid a sale of specific property held in trust. *Morse v. Hill*, 136 Mass. 60. It is not a suit brought for the possession of real estate devised in trust under a will. *Harrison v. Rowan*, 4 Wash. C. C. 202, Fed. Cas. No. 6,143. It is not a suit by a distributee against the administrator and the sureties on his bond to obtain his distributary share in the estate of a decedent. *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260. It is not a suit by a creditor to establish a debt against the estate. *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536. It is not a suit concerning trust property, brought after the executors have rendered their final account in the probate court, and the residue of the estate has passed to them as trustees. In *Colt v. Colt*, 111 U. S. 566, 581, 4 Sup. Ct. 553, 28 L. Ed. 520, the court said:

"As long as personal property is held by executors as part of the estate of the testator, for the payment of debts or legacies, or as a residuum to be distributed, they hold it by virtue of their office, and are accountable for it as executors. That liability only ceases when it has been taken out of the estate of the testator, and appropriated to and made the property of the cestui que trust."

We have before us in this case the question whether, during the time the estate is in process of administration in the state probate court, and is in the actual possession of that court, and before the executors have rendered any account, a federal court will entertain a bill in equity, brought by a cestui que trust under a trust fund composing the general residuary estate of the testator, to set aside a sale of stock made by the executors, and to take the proceeds of the sale out of the possession of the probate court, and substitute therefor the property sold. We have been referred to no case where a court of equity has taken jurisdiction under such circumstances. The present bill, in our opinion, cannot be sustained either on principle or authority. As a general rule, an executor who has not settled his final account in the probate court is not liable to be charged by suit in equity by the residuary legatees for property sold by him in violation of his trust. This was so held, and, as we think, properly, by the supreme court of Massachusetts in *Morgan v. Rotch*, 97 Mass. 396. In that case the court said:

"We do not perceive that the residuary legatees can require anything more than that the stock shall be charged at its utmost value in the probate settle-

ment of the estate. Full justice will be done to them by such a course. They have no right to a transfer of the stock in specie to them, or in trust for their benefit. All they are entitled to is the residue in the executor's hands after payment of debts, specific bequests, and charges of administration, which is to be ascertained as a pecuniary balance. They are interested merely in the amount of the residue, as to which all their rights can be fully protected in the probate court. A very different case from the present would be presented if the executor's account had been finally settled in ignorance of the improper character of the sale. Then, perhaps, a court of equity, if the remedy in the probate court were lost, might enforce a trust, and order a new sale by the executor, or afford other appropriate relief to enable the parties beneficially interested in the estate to realize the full value of the property."

The demurrer is sustained, and the bill dismissed, with costs.

BROOKS et ux. v. LAURENT.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1899.)

No. 872.

1. JURISDICTION OF FEDERAL COURTS—SUIT AGAINST ASSIGNEE—RIGHT OF REMOVAL.

The provision of the judiciary act of 1887-88, that a circuit court of the United States shall not have cognizance of any suit to recover the contents of a promissory note or other chose in action in favor of any assignee unless such suit might have been maintained in that court if no assignment had been made, does not prevent such court from entertaining jurisdiction, either originally or by removal, of a suit based on a chose in action brought by a party thereto, who is a citizen of a state, against an assignee of the other party, who is an alien, without regard to the citizenship of defendant's assignor; and such a suit, when commenced in a state court, may be removed by the defendant where the requisite amount is involved.

2. SAME—ANCILLARY JURISDICTION—CROSS BILL.

A circuit court of the United States, which has, by removal, acquired jurisdiction of a suit by a lessor, who is a citizen of the state, against an assignee of his lessee, the defendant being an alien, for a cancellation of the lease, has also jurisdiction to entertain a cross bill by defendant to enforce specific performance of the lease, which is merely ancillary to the original suit, although by reason of the fact that defendant's assignor is a citizen of the same state as complainant the cross bill could not have been maintained in that court as an original action.¹

3. MARRIED WOMEN—ESTOPPELS AGAINST.

The enlargement of the property rights of married women by modern legislation and judicial opinions imposes upon them the burdens correlative with such rights, and a married woman who institutes a suit in equity in relation to her property is estopped by the allegations of her pleadings to the same extent as other litigants.

4. EQUITY—ESTOPPEL BY PLEADINGS—INCONSISTENT POSITIONS.

A married woman, who joins with her husband in a bill in equity, which is sworn to by her as well as her husband, for relief based upon a lease of her property, which the bill alleges was made by her husband with her consent, after such allegation and the validity of the lease have been admitted by the answer of the defendant, and the cause has proceeded to a hearing upon the issues joined, cannot take the position on such hearing or on a subsequent appeal that the lease is void because not executed by her as required by statute.

¹ For ancillary jurisdiction of federal courts, see note to *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 36 C. C. A. 195.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

This litigation was begun by an original bill in chancery, filed in the state circuit court of Florida on September 17, 1897. The complainants were William M. Brooks and his wife, Sue G. Brooks, citizens of Florida, and the defendants were Achille Laurent and Leon Laurent and Paul Jumeau, agent of the former, citizens of the republic of France. The bill alleged that on April 10, 1895, William M. Brooks leased in writing to one W. A. Fulton a certain tract of land in Florida for the purpose of mining and shipping phosphate rock; that on April 17, 1895, the said William M. Brooks consented to the transfer of Fulton's interest as lessee to Achille Laurent, which was done by a written instrument of that date; that "on February 14, 1895, the complainant Sue G. Brooks became the owner of this land, and was at the last-mentioned date in possession of it, and assented to its transfer by said Fulton to said Achille Laurent, and she authorized and assented to the making of the lease by the complainant William M. Brooks to said Fulton"; that Achille Laurent and Leon Laurent had knowledge of the ownership and possession of the land, but on March 31, 1897, Achille assigned his interest to Leon without the consent of Brooks and wife; and that Achille Laurent took the lease from Fulton, subject to the terms and conditions of the original lease, for the purpose of mining and shipping phosphate rock. The bill further alleged that under the lease all phosphate rock analyzing 75 per cent. of bone phosphate of lime and less than 3 per cent. of iron and alumina should be mined in a workmanlike manner by the usual approved methods; that Laurent should pay \$1 per ton, and mine not less than 7,000 tons per year, or pay not less than \$7,000 yearly as royalty; that he should settle the claim of the Brooksville State Bank against the land for \$10,000, and advance to the said William M. Brooks \$4,000, and charge the same, with interest at 10 per cent., against the royalties; that mining could be suspended when the price fell below \$4 per ton; that the contract should be forfeited upon a breach of the conditions. The bill alleged that Laurent had failed to mine said land in a workmanlike manner by the usual approved methods; that only a part of the phosphate had been mined; that the gravel rock had been allowed to go to waste; that no machinery was erected until March, 1897, and that for a part of the time mining had been stopped, notwithstanding phosphate rock was worth \$4 per ton at the time; that the complainants had been damaged in the sum of \$10,000, for which they have commenced an action at law. The bill charged Achille Laurent with fraud in procuring the lease from Fulton, by the settlement with the bank, and by the delay in mining in order to prolong the payment by William M. Brooks of the interest, and deprive him of the rents. The bill also alleged that there was plenty of available phosphate to be mined, and that much more should have been mined; that the contract between Laurent and Fulton was a novation, and discharged Brooks from any liability for the bank settlement; that the assignment of Achille to Leon was fraudulent, and forfeited all rights in the lease to Brooks, and made a cloud on the title to the land; that the rent or royalty due to the complainants was unpaid, and that, after a reasonable time, the complainants entered and took possession of the premises; that the defendant Paul Jumeau attempted by force to regain possession, but without success; that complainants feared that said Jumeau would attempt to obtain possession by violence. The bill prayed that the original lease be canceled and surrendered, that the defendants be decreed to pay the rent due by them of \$1,935, and expenses and damages of the suit at law, and for an injunction and process. The bill was sworn to by both William M. Brooks and wife. An injunction was granted on a bond for \$100. The state circuit court having jurisdiction of the cause, on motion of the defendants for a dissolution of the injunction, ordered the same dissolved, unless complainants gave bond for \$5,000 within 10 days. On October 12, 1897, the court, upon proper notice and bond filed, granted the petition of the defendants to remove the said cause to the circuit court of the United States for the Southern district of Florida, and the record of the former proceedings in the state court was filed on October 22, 1897, in said United States court.

On October 27, 1897, the defendants demurred to the bill, and on November

26, 1897, filed their answer to it. The answer admitted the original lease from Brooks to Fulton, and its transfer to Achille Laurent with the assent of Sue G. Brooks, but otherwise pleaded ignorance of the ownership of the land. It admitted the assignment from Achille to Leon Laurent without the consent of the complainants, but alleged that the complainants did not object to the same. It denied that Achille Laurent took lease from Fulton subject to all the conditions of the original lease from Brooks, but alleged that, under the wording of the assignment from Fulton, Achille Laurent had the right to assign the lease to any other person. It denied that the transfer from Achille to Leon was fraudulent, or a breach of the conditions, or worked a forfeiture, or created a cloud on the title. It alleged that the assignment to Leon Laurent was recorded on April 12, 1897, but that previous to the filing of the bill the complainants made no objection to the same, and now objected as a pretext for claiming a cancellation of the lease. It alleged that Achille Laurent anticipated the action of the complainants in procuring the reassignment of the lease from said Leon to him, and he now owns the same. It alleged that the charges in the bill of not running in a workmanlike manner with approved machinery are without merit; that Achille Laurent continued to mine the phosphate with the same machinery formerly used by Brooks, and paid him rent for it, which was cheerfully received without objection; that the lease did not call for any special machinery. It admitted the amount of phosphate alleged in the bill to have been mined, and alleged that a plant was begun in November, 1896, and completed in March, 1897. It admitted that no mining was done between May and November, 1896, but denied that 75 to 100 tons could have been mined, as claimed, and denied that 1,000 tons of gravel were going to waste. The answer further alleged that the plant erected is as good as the best in use, and that 30 tons per day is fair average running. It denied that the complainants have been damaged to the extent of \$10,000, or any other sum, by the facts set out in the bill. It denied that the mining was delayed in order to deprive the complainants of royalties, or to charge up interest in the settlement with the Brooksville State Bank, and alleged that such a course would be unreasonable, because the interest on the plant and the expenses of the same would exceed the interest due by the complainants. It alleged the right to suspend mining when the price of phosphate fell below \$4 per ton. The answer further alleged that the plant was erected at a cost of \$7,000, and that during its erection no complaint was made about not mining, and the expenditure was encouraged; that from March until June 10, 1897, the new plant mined and washed 3,897 tons, but it was then stopped for the repair of broken machinery; that on June 15, 1897, Brooks sued out a distress warrant for \$1,935 for the rent of said lands, and the same was levied on the phosphate mined and on the mining plant erected by the defendant; that defendant traversed affidavit in distress, and said cause stands for trial; that the distress proceedings and levy were a great wrong on the defendant, and the possession of the plant by the sheriff was illegal; that about this time W. A. Fulton began proceedings in chancery, in Citrus county, Fla., to dissolve and wind up the alleged partnership between him and the defendant, asking for a receiver, and obtained an injunction against the sale of phosphate; that, as soon as the defendant effected an amicable settlement with said Fulton, the defendant tendered a sufficient bond to the sheriff, who refused to accept the same until September 18, 1897, after service of the writ of injunction herein; that the sheriff claimed possession of said premises until said date, and refused to deliver the same to said agent, Jumeau, until he had approved said replevin bond, and obtained pay for his deputy from said Jumeau. The answer further alleged that the defendant, Laurent, was entirely willing to go on mining, notwithstanding the price of phosphate, and would have mined in July, and since then, but for the suits at law and in equity; that he instructed his agent, Jumeau, to go to work as soon as possible, and charged that the complainants are alone responsible for the delay in mining. The defendant, Achille Laurent, denied that any royalty is due for the use of said land, but alleged that he advanced \$14,000 on royalties, and that there was due him on such advance about \$8,000 at the time of the institution of distress proceedings; that no demand was made upon him for any rent, or any notice given him of such claim, prior to the beginning of said suit;

that the complainants fraudulently and wrongfully obtained possession of said leased premises, and all charges that said Jumeau attempted to get possession by force and arms are false and absurd; that on September 13, 1897, said Jumeau went by accident upon said land, without any unlawful intent, and was assaulted and beaten by said deputy sheriff, who threatened with a gun to shoot said Jumeau and one Patterson; that the defendant did not know whether said deputy sheriff was then acting for the sheriff or for the complainants, but that said Jumeau, as agent, was charged for the time of said deputy sheriff to September 18, 1897. The defendant, Achille Laurent, denies that he owes \$1,935 as rent, and insists that, as the complainants have already entered suit for that amount, which is pending, they have no right to sue here for said sum, but that said distress proceedings were a waiver of any claim to a forfeiture; and the defendant claimed that the complainants are estopped in equity from any claim of forfeiture after permitting and encouraging the erection of the plant.

On December 8, 1897, the defendant, Achille Laurent, filed his cross bill in this cause, which recited the substance of the original bill and answer, and alleged that the orator is the owner of all rights under the original lease and assignments thereof; that he has done nothing and omitted nothing by which the lease should be forfeited; that he is ready to continue mining, and insists that the complainants should be required by the said circuit court to perform the agreements of said lease. The cross bill alleges affirmatively many facts relating to the litigation between the parties, the substance of which has been stated heretofore. The cross bill prays for a decree of specific performance, for an injunction against interference in the use and enjoyment of the premises, against prosecution of action in distress, against going on the land or removing phosphate or machinery therefrom, and for process.

On January 3, 1898, Brooks and wife filed their answer to the cross bill. The answer refers to many facts alleged in the original bill, denies the truth of most of the allegations in the cross bill, and alleges new facts not material to the assignments of error on this appeal. The record contains no evidence as to the ownership of the real estate described in the lease other than the said statements in the pleadings and contracts. The lease, which was made an exhibit to the original bill, was dated April 10, 1895, and is signed and acknowledged by William M. Brooks and W. A. Fulton. It contains an agreement on the part of Fulton not to transfer it without the assent of Brooks. On the lease is the following indorsement:

"Referring to clause in mining lease between myself and W. A. Fulton, dated April 10, 1895, requiring that W. A. Fulton do not assign or transfer any interest in said lease without my consent in writing, I hereby give my consent that he may assign or transfer any such interest as he may desire to Mr. Achille Laurent, or to the Franco-American Phosphate Co.

"William M. Brooks."

The record contains the assignment by Fulton to Laurent, which is in the form of a contract between them, and refers to the land as belonging to "William M. Brooks and his wife, Sue G. Brooks," and is dated April 16, 1895. There are differences in the terms of the contract of assignment and the original lease, but it is not necessary to state them here.

On the reference to the special master a number of depositions were offered on each side. The master made an elaborate report, in which he found "that the complainants, William M. Brooks and Sue G. Brooks, have failed to sustain the allegations of their bill, and recommends that it be dismissed at the cost of the complainants. The master further finds that the complainant in the cross bill, Achille Laurent, has sustained the material allegations of the cross bill." The complainants filed exceptions to the master's report. The court, the Honorable James W. Locke presiding, rendered a final decree on April 20, 1899, overruling all exceptions to the special master's report, and confirming the report. Relief on the original bill was denied, and relief on the cross bill granted. The lease, as assigned and modified by the agreement of the parties, is declared to be a valid and existing lease between the original complainants and the original defendant, Achille Laurent. The decree enjoins the complainants from disturbing the possession of Laurent, and from obstructing

the mining and shipping of phosphate by Laurent and his agents. It ascertains that there is due by the original complainants, William M. Brooks and his wife, Sue G. Brooks, to Achille Laurent, on the account as stated by the master, \$8,532.35, for advances made by the said defendant on behalf of the complainants, pursuant to the lease. It is decreed that the said sum be credited to Laurent and set off against royalties due, or which may be earned or become due, to the complainants. The title or right to possession of the machinery or mining plant situated on the premises is not passed on. A decree was rendered against the complainants for the costs, including the special master's fee. It contains no direction to issue execution except for the costs. The complainants in the original bill (defendants in the cross bill) appeal to this court. There are 14 errors assigned, but the only ones which are deemed material are those relied on in the brief and oral argument, and relate to the jurisdiction of the United States circuit court and to the validity of the lease.

Herbert L. Anderson, for appellants.

John G. Reardon, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is assigned as error that the United States circuit court had no jurisdiction of the case. The position taken by counsel is that the suit in which relief is granted is one by Achille Laurent, as the assignee of Fulton, to enforce specifically the lease, and that the lease is within the prohibition of the statute providing that the circuit court shall not "have cognizance of any suit * * * to recover the contents of any promissory note or other chose in action in favor of any assignee, * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 24 Stat. 552, as corrected by 25 Stat. 434. *Corbin v. Blackhawk Co.*, 105 U. S. 659, 26 L. Ed. 1136, is cited as sustaining this position, and it is there held that a suit to compel the specific performance of a contract, or to enforce its other stipulations, is a suit to recover the contents of a chose in action, and is not maintainable, under section 629 of the Revised Statutes of the United States, in the circuit court, by an assignee, if it could not have been prosecuted there by the assignor had no assignment been made. This objection would at least require careful consideration, and would, perhaps, prevail if this were an original suit brought by Achille Laurent, as the assignee of Fulton, against Brooks and his wife. In such case it may be conceded that the record, to show jurisdiction of the circuit court, would be required to show that Fulton, the assignor, could have maintained the suit in the circuit court. Whatever relief is sought by Achille Laurent is not, however, by an original bill, but by a cross bill. The original bill is not filed by an assignee of a chose in action. Brooks and his wife, citizens of the state of Florida, filed the original bill in the state court against Achille Laurent, Leon Laurent, and Paul Jumeau, who are citizens of the republic of France. The original bill and the petition for removal show these jurisdictional facts. The circuit court has jurisdiction of controversies between citizens of a state and citizens or subjects of a foreign state. 25 Stat. 434. The original bill, therefore, when filed by Brooks and wife in the state court, could have

been filed by them in the United States circuit court, for, "where the action is between a citizen of a state and the subject of a foreign state, the court has jurisdiction on account of the character of the parties, without reference to which of them is plaintiff or defendant." *Hinckley v. Byrne*, 1 Deady, 224, Fed. Cas. No. 6,510. So it appears that the suit, when instituted, was one of which the United States courts had jurisdiction. It was a controversy between citizens of a state and citizens of a foreign state, and involved the jurisdictional amount. It was not a suit by or in behalf of an assignee. The complainants were the lessors in a lease involved in the litigation, but they were neither the assignors nor the assignees of the lease. The controversy being one, as is shown, of which the circuit court had jurisdiction, it was removable under the second section of the act, providing that "any suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state." Act Aug. 13, 1888 (25 Stat. 434). After the case was regularly removed, under this statute, to the United States court, the defendants first filed a demurrer, and later an answer, to the bill. A motion was also made by the defendants to dissolve the injunction theretofore granted in the case. It was pending this litigation, and as a part of the defense in the controversy, that Achille Laurent filed the cross bill praying for a decree enforcing the specific performance of the contract of lease, which was the subject-matter of the original bill. The jurisdiction invoked by the cross bill was not original, but ancillary. The jurisdiction of the court was established by the existing record. In *Cross v. De Valle*, 1 Wall. 5, 14, 17 L. Ed. 515, the court said that "a cross bill is a mere ancillary suit, and a dependency of the original." The same principle is involved where a bill of revivor is filed. "A bill of revivor is but a continuation of the original suit, and, if the plaintiff was competent to sue the defendant in the circuit court, his administrator, though a citizen of the same state as the defendant, may revive it." *Clarke v. Mathewson*, 12 Pet. 164, 9 L. Ed. 1041. The cross bill being merely ancillary to the original suit, it may be maintained although the court would not have had jurisdiction of the cross bill as an original action. *Railroad Co. v. Chamberlain*, 6 Wall. 748, 18 L. Ed. 859; *Osborne & Co. v. Barge* (C. C.) 30 Fed. 805; *First Nat. Bank of Salem v. Salem Capital Flour-Mills Co.* (C. C.) 31 Fed. 580; *Freeman v. Howe*, 24 How. 450, 460, 16 L. Ed. 749. If the court has jurisdiction of the case made by the original bill, it has jurisdiction of all germane ancillary proceedings, whether by cross bill, bill of revivor, or intervening petitions.

It is contended by the learned counsel for the appellee that there was a novation of the original contract of lease; that the lessee, Fulton, and the lessors agreed to substitute Achille Laurent for Fulton, and that the contract by which the substitution was made so changed the lease as to make a new contract between the lessors

and Achille Laurent. It is claimed that it is not the case of a mere assignment of a chose in action. The contention is that a new contract was made, and that the question as to Laurent's right to sue as assignee is eliminated, and that he is not an assignee. This view finds support in the terms of the lease, which made it nonassignable except by the agreement of the lessors. The material changes, also, made in the lease by the agreement to substitute one lessee for another, give support to this position of counsel. As we decide that the circuit court had jurisdiction, and that the case was removable for the reasons already given, it is unnecessary for us to express an opinion on this contention.

It is claimed by the appellants that the lease was void, and that the court below erred in granting relief on the cross bill. The original bill was filed jointly by William M. Brooks and his wife, Sue G. Brooks. One of its purposes was to obtain the cancellation of a lease. The validity of the lease was not denied in the bill. It was expressly alleged by the complainant Sue G. Brooks that she authorized and assented to the making of the lease by the complainant William M. Brooks. Conceding its validity, and proceeding upon that theory, she sought its cancellation on account of breaches of the lease by the lessee. She complained that the mining was not done in a workmanlike manner, that the lessee did not mine at least 7,000 tons of phosphate per annum, that the royalties were not paid according to agreement, and that the lessee in fact was unable to perform his part of the contract. It is alleged that she became the owner of the land on February 14, 1895. There is no proof of this averment in the record, nor is there any denial of it. A married woman owning real property may sell, convey, or mortgage it as she might do if she were not married, provided her husband joined in the same. Rev. St. Fla. 1892, § 1956. Such sale, conveyance, or mortgage must be acknowledged separately and apart from her husband, before some officer authorized to take such acknowledgment. *Id.* § 1958. The custody and management of the property remain with the husband. *Id.* § 2071. It is further enacted that a married woman shall have the right to bring suits or actions for or concerning her real property without joining her husband or next friend. *Id.* § 2074. These statutes are enacted in conformity to Const. Fla. art. 11. The defendant in the original bill, Achille Laurent, after having answered, filed a cross bill, in which he also proceeds upon the theory advanced by the complainants, that the lease was valid and binding upon the parties thereto. By the cross bill he seeks an accounting and other relief. On this accounting before the master it appeared that the complainants in the original bill were indebted to Achille Laurent on account of the lease. That indebtedness was finally ascertained to be \$8,532.35. While the special master was executing the reference to ascertain the state of the account between the parties, the complainant Sue G. Brooks, by her attorney, for the first time raised the point that the lease was void because it was executed by the husband alone, that the property belonged to the wife, and that the assent of the wife had not been given in the mode provided for by the Florida statutes. No

question of this kind was raised by the pleadings. It is only when the litigation based on theories and facts averred by her and her husband has proved in the result unsatisfactory to her that she seeks through counsel, without a change in the pleadings, to take the position that the lease was not in fact made by her, or with legal authority. Is it not a sufficient answer to this late contention to say that the bill contains the averment of her consent to and acquiescence in the lease, and that the action is an equitable suit based on the lease? The relief to be granted, the decrees to be rendered, must be based on the pleadings and on the evidence consistent with them, and arguments and suggestions of counsel cannot be followed to sustain defenses or to grant relief in conflict with the pleadings. The bill shows that the complainants have received benefits from the lease, and that they seek compensation for breaches of its provisions. We would not, we think, be justified in looking beyond the averments of the pleadings to base a decree on the theory, advanced in the argument after the case is closed and submitted, that the lease was never in fact the valid contract of the complainants. The wife having averred that it was made with her authority, and that averment standing unchanged and undenied in the pleadings when the final decree was rendered, we cannot now, at her instance, assume that this statement was untrue. This would be to accept the argument and briefs of counsel in lieu of the record. A decree fairly based on the averments of the complainants' sworn bill should not, we think, be disturbed at the suggestion of the complainants in argument in conflict with the allegations of the bill. If the court accepts as true the sworn bill of the complainants, they cannot be heard to complain. The wife having joined in the sworn allegation that the lease was her valid contract, we must assume, as against her, that this is true, and that she did everything required by law to make the lease binding. It is contrary to the first principles of justice that a party should be permitted to assert rights under a contract, and obtain advantages, or seek to obtain them, by litigation based on its validity, and in a subsequent proceeding relating to the same contract claim that it was without validity, and not binding on him. It seems well settled by principle and authority that a party to a suit is not permitted to take inconsistent positions to the detriment of his adversary on material questions involved in the litigation. In *Railroad Co. v. Marcott*, 41 Mich. 433, 2 N. W. 795, the court held that counsel, who was shown by the record to have told the jury that in a certain contingency they should find for the plaintiff, could not afterwards take any ground inconsistent with the concession, or claim to be injured by the rulings in accord with it. The court held, in other words, that counsel could not attack the judgment of the court or the ruling of the court which was in accord with his contention. In *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28, the wife procured a divorce and alimony upon a petition which she claimed later did not give the court jurisdiction to render the decree. It was held that, "whether the court had or had not jurisdiction, she cannot now, having accepted the benefits of the decree, be heard to question the jurisdiction of the court to render it." In

Abbot v. Wilbur, 22 La. Ann. 368, the court held that, where parties made an assertion in a plea for their own benefit, and to the injury of the opposite party, they could not afterwards be heard to say, or permitted to prove, that the assertion was false. In *Mills v. Hoffman*, 92 N. Y. 182, 190, the court held that the principal cannot accept the benefits of an unauthorized contract made by an agent, and repudiate its obligations, and that a party cannot enjoy the rights awarded to him by a judgment, and deny its force as an adjudication. In *Sullivan v. Colby*, 18 C. C. A. 193, 71 Fed. 460, it was held by the circuit court of appeals for the Seventh circuit that any confession or admission made in pleading in a court of record, whether express or implied, will preclude the party from afterwards contesting the same fact in a subsequent suit with his adversary, though there is no adjudication upon the point. It was further held in the latter case that where one, in pleading, bases his right to possession of land upon the ground that a lease to him has not yet expired, and his adversary accepts this as an assurance that his possession will not become hostile to the latter's title, the party who so admitted the lease would not be permitted to change his attitude, and claim title by adverse possession. In *Railway Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693, the court held that:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his attack upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

This case is cited approvingly by the supreme court in *Davis v. Wakelee*, 156 U. S. 680, 691, 15 Sup. Ct. 555, 39 L. Ed. 578. In the latter case Davis had in a judicial proceeding asserted the validity of a certain judgment. The judgment was in fact void for want of jurisdiction. The court held that Davis nevertheless was estopped in equity from claiming that it was void. Mr. Justice Brown, delivering the opinion of the court, said that:

"Even if Davis had been mistaken as to his legal rights with respect to this judgment and its subsequent discharge, his assertion that it was still of record, and in full force, is none the less binding upon him in view of Wakelee's acquiescence in the ruling of the court sustaining this contention."

The learned justice added that:

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position taken by him."

This case, in principle, seems directly in point here. Mrs. Brooks and her husband both assumed the position that this lease was a valid and binding contract, and filed a bill upon the theory that the lessee had committed breaches of it. It is true that the bill sought the cancellation of the lease, but that prayer was, in effect, an admission of the lease as an existing contract. The bill also sought to collect moneys alleged to be due from the lessee on account of the lease. It

sought and obtained an injunction, which could only be had upon the theory of the validity of the lease. All this appeared in the initial pleading filed in the case,—in the original bill. The defendant, Achille Laurent, accepted as true the averment that the lease was an existing and valid contract. His cross bill is filed on that theory. The protracted and expensive litigation proceeded on that theory till the parties appeared before the special master to state the account. If the complainants had been successful in their contentions, and if the statement of the account before the special master had shown a balance in their favor, it is not likely that they would have changed their position and asserted the invalidity of the lease. When the result of the litigation fails to meet their expectations, they change their position, and allege that the lease they sued on as valid is in fact void. The law does not permit this change of position. This view seems to be confirmed in *Harkness v. Fraser*, 12 Fla. 336, 347. A married woman, in a suit brought by her, sought to take advantage of the alleged fact that she had not acknowledged a deed. The court said:

"The bill alleges that the deed was executed by the complainants. * * * It is not in issue in this case. It is somewhat anomalous that a party should come into a court of equity, and demand that his deed be set aside because of his own blunder, or his imperfect execution of the instrument."

The question not being raised by the pleadings, the court declined to give any importance to the defect, and said that the matter was mentioned in the opinion only because it "was dwelt upon in the argument with some earnestness."

Pomeroy says that the tendency of modern authority "is strongly towards the enforcement of the estoppel against married women as against persons *sui generis*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right or to maintain a defense." *Pom. Eq. Jur.* 814. The courts that generally decline to apply estoppels to a married woman do not hesitate to apply the doctrine to her "where she is attempting affirmatively to enforce a right inconsistent with her previous conduct upon which the other party has relied." *Id.*, and authorities there cited. This doctrine is applied against the wife where the husband has acted for her as her agent (*McCaa v. Woolf*, 42 Ala. 389), and where she acts jointly with her husband (*Wilder v. Wilder*, 89 Ala. 414, 7 South. 767, 9 L. R. A. 97). The evolution of the law, as shown by constitutions, legislation, and judicial opinions and decisions, is constantly towards yielding to the wife dominion over her property, real and personal, and removing the disabilities of coverture. The statutes which emancipate and confer rights necessarily impose burdens. The statutes that permit her to sue and be sued as a *feme sole* when she appears in court as a party to a suit make her amenable to the well-settled rule denying to parties the right to take advantage of op-

ponents by assuming, to their injury, inconsistent positions. Such statutes are not intended to confer rights inconsistent with the rights of others. The decree of the circuit court is affirmed.

CUNNINGHAM v. CITY OF CLEVELAND.¹

(Circuit Court of Appeals, Sixth Circuit. December 4, 1899.)

No. 693.

1. **EQUITABLE JURISDICTION—SUIT TO WIND UP INSOLVENT CORPORATION—ANCILLARY PROCEEDINGS.**

A court of equity, which has taken possession of the property and assets of an insolvent corporation in a suit to wind up its affairs, may authorize its receiver to bring in, by ancillary bill, a debtor of the corporation, for the purpose of ascertaining and enforcing payment of such indebtedness; and its jurisdiction to determine the questions involved in such ancillary proceeding is conferred by the original bill, and is not affected by the fact that such questions are of a legal nature.²

2. **RES JUDICATA—DECREE DISMISSING BILL WITHOUT PREJUDICE.**

A decree dismissing a bill filed by a corporation without prejudice, and based on the ground that the evidence failed to show that the complainant was authorized to maintain the suit, does not constitute a bar to a second suit on the same cause of action by the corporation or its receiver, when due authority is shown.

3. **MUNICIPAL CORPORATIONS—GRANT OF FRANCHISES—MONOPOLIES.**

An ordinance granting a franchise for the construction and maintenance in a city of water and electric light plants for a term of years, and by which the city contracts to pay rental for a certain number of fire hydrants and lights during the term, is not the grant of an exclusive privilege, and does not prevent the city from granting similar franchises to others or making similar contracts with them.

4. **SAME—POWER TO CONTRACT.**

Under an amendment to the charter of a city authorizing it to provide for lighting the streets, and for supplying itself and its inhabitants with water, by contract or otherwise, and to grant franchises for a term of years to water or lighting companies, the mayor and council may, by an ordinance granting a franchise or entering into a contract, bind the city during the term of such franchise or contract.

5. **SAME—CONTRACT FOR WATER SUPPLY—DEFENSES AGAINST PAYMENT.**

Statutory provisions requiring the consent of a city to authorize the formation of a corporation to exercise a franchise as a water company, and the appointment and report of inspectors concerning the source of the proposed water supply, are for the protection of the city, and when they have been substantially, though not technically, complied with, and the company has been formed, and has proceeded, with the full assent of the city authorities, to erect its plant and furnish the city with water, in accordance with the contract embodied in its franchise, the city is estopped to defend against payment therefor on the ground of informality in compliance with such requirements.

6. **SAME—CONSTRUCTION OF CONTRACT—LIMIT OF INDEBTEDNESS.**

A contract by which a city agrees to pay an annual rental during a term of years for water and electric lights, to be furnished by a company, does not create an indebtedness for the aggregate amount of such rentals, so as to render it invalid, under a statute forbidding the contracting of an indebtedness in such an amount without a vote of the electors.

¹ Rehearing denied February 13, 1900.

² For supplementary and ancillary proceedings and relief, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

7. SAME—ACTION TO RECOVER RENTS—DEFENSES.

A city granted to certain persons franchises for electric light and water purposes for a term of years, and also contracted with them to supply light and water for municipal purposes. Such persons undertook to form a corporation, of which they were sole incorporators, to construct and operate both the light and power plants, and assigned to it the franchises and contracts. The company borrowed money for the purpose, to secure which it mortgaged its plants, franchises, and contracts. The mortgagee subsequently filed a bill for foreclosure, which was also made a creditors' bill, and, a question having arisen as to the legality of the incorporation, it made the individual incorporators defendants, and they answered, admitting the averments of the bill, and disclaiming any interest in the property adverse to that of complainant. A receiver was appointed, who, by leave of court, filed an ancillary bill against the city to recover rentals due under the contracts for light and water. *Held* that, conceding the company to be without corporate existence either de jure or de facto, such fact constituted no defense on behalf of the city, as in that case the contracts remained the property of the original grantees, whose rights therein, under the pleadings in the original cause, were represented by the receiver.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This is an appeal of R. J. Cunningham, receiver of the Cleveland Water & Electric Light Company, from a decree of the circuit court for the Eastern district of Tennessee, dismissing his ancillary bill against the city of Cleveland, Tenn. The litigation was begun in the court below by the National Waterworks & Construction Company, which filed a bill against the Cleveland Water & Electric Light Company and W. W. Cunningham and four other individual defendants, to foreclose a mortgage held by complainant upon all the real property, plant, and franchises of the defendant company, securing an indebtedness of \$47,000. The lien of the mortgage specifically covered two contracts with the city of Cleveland, one conferring upon W. W. Cunningham and his associates the right to construct, maintain, and operate waterworks in the city of Cleveland for 20 years, and to receive rentals therefor, and the other conferring upon the same persons a similar franchise to construct, maintain, and operate an electric light plant. The bill averred that the grantees of these two franchises had organized a corporation, under the laws of Tennessee, known as the Cleveland Water & Electric Light Company, and had assigned the franchises to it; that though the waterworks and electric light plant had been erected by this company, and had been operated, and the city had received the benefit thereof, it had refused to pay its stipulated rentals, on the ground that the company was not duly incorporated; that, however this might be, complainant had dealt with the company as a corporation, and had lent it money as such, with the express understanding that it should receive a mortgage on its property and these municipal contracts; that the loan and the mortgage had been made by the company with the knowledge and assent of W. W. Cunningham and his associates, and that they were made parties in order that the lien upon the contracts might be declared, not only against the company, but also against the original grantees of the municipal contracts, the sole incorporators of the company. The bill averred the insolvency of the defendant company, and represented that unless the works were continuously operated the franchises would be lost. The complainant prayed a foreclosure of the mortgage, and a sale of all the interest of the defendant company and of Cunningham and his associates in the works, plant, and franchises described in the bill. There was a further prayer for the appointment of a receiver who should take charge of and operate the works, collect the rents, and, after paying the expenses of operation, hold the surplus to apply on complainant's indebtedness. Cunningham and his associates filed an answer to the bill, admitting all its averments, and disclaiming any interest in the two municipal contracts. The defendant the Cleveland Water & Electric Light Company also answered, admitting the averments of the bill, and consenting to a decree of foreclosure. Subsequently the complainant was permitted to amend

its bill by adding averments giving it the character of a creditors' bill as well as that of a pure foreclosure bill.

Shortly after the filing of the bill, R. J. Cunningham was appointed receiver of all and singular the property of the Cleveland Water & Electric Light Company, of every description, including operating contracts, and was directed to take possession thereof, to continue the business of the company, and to institute all such suits as he might deem necessary to collect its assets. The receiver accordingly, and by leave of court in the main action, filed an ancillary bill against the city of Cleveland to collect the rentals due from it to the Cleveland Water & Electric Light Company for public hydrants and public lights, under the water and light contracts, respectively. The bill attached as exhibits the two contracts embodied in duly-enacted ordinances accepted by the grantees. It averred the assignment of the contracts to the company organized by the grantees of the franchises as sole incorporators; the erection of the works in accordance with the contracts, and the furnishing of the hydrants and lights thereunder to the city, and the complete fulfillment of the conditions by the grantees to be performed; the failure of the city to pay the rentals stipulated to be paid; and its repudiation of the contract, as excessive and void, by the passage of an ordinance repealing so much of the contracting ordinances as provided that the city should pay so much rental per year for public hydrants, and so much compensation for public lights. The bill further averred that for one year the city, through its board of mayor and aldermen, levied a tax to provide for the payment of what was due from it under the contracts, but only devoted a part thereof to the payment of the amount due for light to the company. The amount due per year under the water contract was \$2,200, and under the light contract was \$1,728, and the total amount due at the filing of the bill was \$8,319, for which a decree was asked against the city.

To this bill the city pleaded in bar that there never was such a corporation as the Cleveland Water & Electric Light Company; that it never had corporate existence or power to maintain a suit; and that the complainant, as receiver thereof, could not possess, and could not assert, any rights which the alleged company did not possess. Without waiving the plea, the defendant answered, averring: That the alleged company had brought a suit against the answering defendant in the chancery court of Bradley county, Tenn., whereby it sought a decree on the same cause of action. That therein the defendant pleaded that it had no corporate existence—First, because the signatures of its pretended corporators had not been properly acknowledged; second, because the certificate of the secretary of state, that the charter had been registered in his office, had not been registered in Bradley county, where its main business was to be conducted, as required by law; and, third, because the powers and franchises attempted to be granted by said charter were not authorized by the laws of Tennessee, and said charter was not in form prescribed by any general law of the state. That, after proof taken, a decree was passed dismissing the bill. That an appeal was taken to the court of chancery appeals of Tennessee, and the decree was affirmed on the grounds—First, that complainant was not a corporation; and, second, that no assignment of the contracts with the city to the complainant company was alleged or shown. That, on appeal to the supreme court, the decree was affirmed, as shown by filed opinion, (1) because complainant failed, in both pleading and proof, to show itself entitled to contracts of Cunningham and associates; (2) because complainant's charter was void for at least two reasons, namely, (a) it was not properly acknowledged; (b) was not properly registered. Whether the charter was void also, because amalgamating the functions of a water company and of an electric light company, was reserved, and not decided. In the supreme court the bill was decreed to be dismissed. Subsequently this order was amended "so far as to show that the bill is dismissed without prejudice." This decree was averred by the answer of the defendant herein to be a conclusive former adjudication upon the complainant receiver's cause of action, and to require a dismissal of his bill. As a third defense, the answer averred that no permission was given by the city to the alleged company to become incorporated for the purpose of exercising the functions of a water company, as required by law; and, further, that no inspectors were appointed, as required by

law, before a company should be granted a water franchise, to file a report concerning the sources of water supply; that these were conditions precedent to the due incorporation of water company; and therefore that the alleged company had no corporate existence. As another defense, the answer averred that the mortgage foreclosure suit was a collusive suit, to enable this bill to be filed; that the real party taking the franchises, and building the plants and operating the same, was the National Waterworks & Construction Company, a corporation of West Virginia; that it had not filed its charter in the office of the secretary of state of Tennessee, or recorded an abstract thereof in Bradley county, and was not authorized to do business in Tennessee, but was expressly forbidden by law to do so; and that, therefore, the contracts were void. The answer further denied that the ordinances were legally passed, and averred that the board of mayor and aldermen had no power to bind the city by contracts for water and lighting beyond the term of said board; that the limit of annual taxation in defendant city was 75 cents on \$100 of property, and that this would not permit it to pay the amounts annually due on the contracts; that the total indebtedness attempted to be imposed by such contracts was more than \$100,000; and that this could not be done under the law, except by a vote of the people, which had never been taken.

By replication, the cause was brought to an issue, and proofs were taken. It appeared from the evidence that the ordinances were duly passed by the mayor and board of aldermen. The assignment of the contracts by Cunningham and his associates to the new company was produced in evidence. The charter of the company was properly registered on February 17, 1897, long before the filing of this bill. It also appeared that the charter was duly acknowledged, and the acknowledgment duly recorded. This last was in conflict with the evidence upon the same point in the state court. The evidence showed satisfactorily that the requirements of the contracts had been fully performed by the company, and that the amounts claimed in the bill had been fully earned under the contract. Inspectors were not appointed to report upon the water supply, but the members of the board requested that the water be taken from a certain spring, if pure. The water was analyzed, and found to be pure. The water was taken from this spring. The recorder of the city of Cleveland, after getting the consent of the members of the board of mayor and aldermen, certified that leave had been granted to the new company to operate under its charter, although no formal meeting was had or resolution passed.

Frank Spurlock, for appellant.

J. B. Sizer, for appellee.

Before TAFT and LURTON, Circuit Judges, and THOMPSON, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Appellee seeks to sustain the decree, first, on the ground made below by demurrer, that there was no equity in the bill, for the reason that there was a full and adequate remedy at law. The objection to the jurisdiction in equity must fail. This is an ancillary bill, filed for the purpose of collecting the assets of an insolvent debtor whose property was being subjected to the payment of a mortgage and of its general debts. The jurisdiction in equity of the main bill supports that of the ancillary bill. The same question arose in *Peck v. Elliott*, 24 C. C. A. 425, 79 Fed. 10, in which Judge Lurton delivered the opinion of the court. He said:

"The fact that the circuit court had possession of all the assets of the Southern Malleable Iron Company, for the purpose of winding up its affairs as an insolvent corporation, is the fact which made it admissible to bring a debtor of that corporation into the court, to the end that his debt might be ascertained

and payment coerced. For the purpose of collecting in choses in action, the court might direct its receivers to institute independent suits in that or courts of the state, or cause such debtors to be made defendants in the principal cause, and determine for itself any question which might be involved by the defenses to the claim. Such a proceeding would not involve any question of citizenship, or amount in controversy, or mode of trial. The complete jurisdiction of the court over the res—the property and assets of this corporation—involved its right to bring before it persons having possession of any of those assets, or having claims thereon, or who were indebted to it, and either itself hear and determine all controversies, or refer them to a master or to a jury, as it saw fit. A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved. It might, in its discretion, submit such controversy upon issues made to a jury, or dispose of them without doing so. That the liability of appellee was one of a legal character did not operate to defeat the jurisdiction, and bring its proceedings against him to a stand. These questions seem conclusively settled by *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67,—a case which arose upon a like proceeding in the same court, and in which certain questions were certified by the court under the court of appeals statute.”

Appellee relies, secondly, on a former adjudication in the supreme court of Tennessee, in the same cause of action, that the Cleveland Water & Electric Light Company had no corporate existence, and was not entitled to sue. It is said that, as the adjudication was against the pretended company, it binds the receiver, who is in privity with the company. It is sufficient answer to this claim to say that the decree dismissing the bill was without prejudice. In *County of Mobile v. Kimball*, 102 U. S. 691, 705, 26 L. Ed. 238, it was held that a dismissal of a bill without prejudice prevented the adjudication from operating as a bar to the same claim, if the complainants could in another suit obviate the defects of the existing bill. In the supreme court of Tennessee the defects in the bill and case of the company were—First, that no assignment from Cunningham and his associates to the company was alleged or proven; and, second, that the charter was not duly acknowledged or registered. In the present cause the assignment is both averred and proven, and the charter is shown to have been duly acknowledged and recorded. The adjudication by the Tennessee supreme court would therefore prove no obstacle to recovery by the company itself on the same cause of action. Still less, as we shall hereafter point out, can it bar the complainant's action.

It is next contended by appellee that the board of mayor and aldermen had no power to make the two contracts here sued on. By an act to amend the charter of the city of Cleveland, passed by the legislature of Tennessee, April 7, 1893 (Laws 1893, c. 184, §§ 10, 24), the city was given authority “to provide for lighting the streets or public grounds by gas or electricity or otherwise, and to erect lamp posts, electric towers, or other apparatus for lighting said city; * * * to provide the city with water and erect hydrants and pumps, construct cisterns and reservoirs; to lay pipe for conducting and distributing water over the city, and keep the same in repair; to acquire and own stock in any water company organized for the purpose of supplying said city with water for domestic, irrigating, mechanical, or other purposes; to build and construct reservoirs for the storage of water; to purchase a system of water-works for the use

of the city, and enlarge their capacity from time to time, and keep the same in repair, and generally do what may be needful or necessary to be done, by contracting or otherwise, with water companies, or otherwise, or other persons, firms or corporations, in order to supply the city with water for fire, irrigation, domestic, mechanical or other purposes, and regulate the same, and fix the price to be charged private consumers thereof." All franchises and privileges granted by said city were to be limited to 20 years, and to specify the streets to which they applied; but it was stated: "Provided, however, that franchises and privileges may be granted gas, water and electric light companies in general terms, and for a longer period than twenty years, in the discretion of the board of aldermen." The contracts in question provided for the erection and complete equipment of water-works and the electric light plant by the grantees, and the enjoyment by them for 20 years of the franchise of furnishing water and light to the residents of Cleveland, at certain prices, subject to the right of the city to buy the plants, at a price to be fixed in a manner specified, at the end of any 5 years. In consideration of the benefits to be conferred upon the city and its inhabitants by the erection of the plants and the furnishing of water and light, the city agreed in one contract to rent, for the term of 20 years, unless the contract was sooner terminated by a purchase according to its terms, the public hydrants required to be erected, from the grantees for fire use only, at a specified rental, and in the other contract a similar agreement was made for the rental of public lights. The original contracts required that the grantees should provide 40 public hydrants and 18 public lights, respectively, and provided that the grantees should, at the request of the city, extend each system, increasing proportionately the number of public hydrants and lights; the city, in the case of such extensions, to pay a certain sum additional for each hydrant and light furnished as requested.

It is argued that this contract secured to the grantees the exclusive privilege of furnishing water and light to the grantors, and created a monopoly which was beyond the power of the municipal board, because not expressly conferred. *Jackson County Horse R. Co. v. Interstate Rapid-Transit Ry. Co.* (C. C.) 24 Fed. 306; *Saginaw Gaslight Co. v. City of Saginaw* (C. C.) 28 Fed. 529; *Grand Rapids E. L. & P. Co. v. Grand Rapids E. L. & F. G. Co.* (C. C.) 33 Fed. 659. The position is untenable. There is not one word in the contract forbidding the city of Cleveland from making exactly the same contract with another set of grantees. It is true that the city binds itself to use for itself 40 public hydrants and 18 public lights; but it might at once, without the slightest infraction of the contract, agree to rent 40 other public hydrants and 18 other public lights from other persons or companies than the grantees of these franchises. *Bienville Water-Supply Co. v. City of Mobile* (a decision of the supreme court of the United States, handed down November 6, 1899) 20 Sup. Ct. 40, Adv. S. U. S. 40, 44 L. Ed. —. It is true that the making of these contracts, if the city fulfilled the obligations therein contained, rendered it unlikely that the city would authorize other persons or companies to enjoy similar franchises, or would make similar con-

tracts with them; but this result arises from the nature of the subject-matter, and not from any contractual exclusion of such action by the city. Indeed, dissatisfaction with such contracts has not infrequently led municipal corporations to grant similar franchises to other persons. There is only one case which would support the contention of appellee upon this head. That is *City of Brenham v. Water Co.*, 67 Tex. 542, 4 S. W. 143. If that case cannot be distinguished from the case at bar, it suffices to say that we do not agree with it, and we follow in this the opinion of the circuit court of appeals of the Fifth circuit, in *Bartholomew v. City of Austin*, 29 C. C. A. 568, 85 Fed. 359. The truth is that it is most difficult to reconcile with the Brenham Case the decision of the supreme court of the United States in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; for, though the supreme court points out one or two distinctions between the Brenham ordinance and the Walla Walla ordinance, the main fact remains that in each ordinance the city gave to the water company the right to use the streets and furnish water for a period of years, and, for the water to be furnished for strictly public use, agreed to pay a stipulated sum for the same period.

It is further urged that one board of mayor and aldermen, though having the right to contract for their own terms, may not bind their successors in office by such a contract in reference to the use of the streets and public franchises. The power conferred upon the board of mayor and aldermen of the city of Cleveland by the amendment to its charter, stated above, is the power to contract for the city; that is, the power to bind more than the agents of the city during their official terms. It is the power to bind the corporation itself, and consequently all its future agents. The distinction between an act which is purely governmental and legislative, and capable of amendment or revocation by the municipal legislature immediately after it is done, and that which is contractual and irrevocable, though effected through the medium of legislation, is well understood, and need not be dwelt upon. It is clearly stated by Judge Sanborn, in the case of *Illinois Trust & Savings Bank v. City of Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, 76 Fed. 271. We have no doubt of the plenary power of the city of Cleveland to make the contracts here under consideration.

The objection to the incorporation of the Cleveland Water & Electric Light Company, founded on the alleged failure of the board of mayor and aldermen, by formal resolution, to assent to the same in advance, although the city recorder certified such assent, and all the members did so assent, and the further objection, founded on the failure of the board to appoint inspectors to report upon the sources of water supply to be used by the company, although the members of the board were actually satisfied, and an analysis showed the water to be pure and abundant, are not formidable. These provisions are for the protection of the city, and after the company has erected the plant, with the fullest assent of the city authorities, and the water supply has proven to be of the amplest and purest character, and the city has accepted the water without any objection, the city is, in a

suit to recover the stipulated price to be paid for the water and light furnished, on the plainest principles of justice estopped to make such objections.

The objection to the contracts, founded upon a limitation upon the taxing power, by which the municipal authorities may not impose a greater tax than 75 cents upon each \$100 of taxable property, has no application or relevancy to this discussion; for it is not made to appear what the valuation of all the taxable property in Cleveland is, or what the other municipal expenditures are. The similar objection, that the contracts provided for an expenditure of \$100,000 in 20 years, and the statutes of Tennessee forbid such expenditure without a vote of the people, is equally unsound. Such a statutory limitation does not apply to the making of a contract like this, providing for a comparatively small annual rental, obligation to pay which is dependent on the fulfillment of concurrent conditions. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19, 19 Sup. Ct. 77, 43 L. Ed. 341; *Illinois Trust & Savings Bank v. City of Arkansas City*, 40 U. S. App. 257, 22 C. C. A. 171, and 76 Fed. 271.

Finally, we are brought to the consideration of the objection to complainant's recovery which led the court below to dismiss the bill. This was that the Cleveland Water & Electric Light Company had no corporate existence, either *de jure* or *de facto*, because the laws of Tennessee make no provision for the organization of an artificial person with united powers to construct and operate waterworks and to construct and operate an electric light plant. The general doctrine that one dealing with a corporation *de facto* is estopped to set up irregularity in its corporate organization as a defense to a suit upon a contract entered into with it is not denied, but it is said that there can be no corporation *de facto* when a corporation with the same powers might not be organized *de jure* under the laws of the sovereign. We do not feel called upon to decide the nice questions thus suggested, for there is another view of this suit which renders it unnecessary. Let it be conceded that the Cleveland Water & Electric Light Company has no corporate existence which courts may recognize; we, nevertheless, are of opinion that the receiver herein was entitled to recover on his bill. These contracts were made by the city with Cunningham and his associates, who were competent contracting parties. They were the sole incorporators and stockholders of this nonexistent corporation. They consented to the contracting of the loan and the giving of the mortgage which the main bill herein was filed to collect and foreclose. If there was no corporation to receive the money and contract the debt, to erect the plant, and to execute the mortgage, then these acts were theirs. The complainant in the original bill advanced the money and accepted the lien, if not from the company, then from its pretended incorporators. It seeks by its bill to subject the land purchased and the plants erected with its money, and the contracts which make the plants valuable, to the payment of its debt against the nonexistent corporation and its pretended members. Anticipating the difficulty concerning the corporate character and existence of its nominal debtor, it made the incorporators parties to the bill, averred that they consented to the loan

and the mortgage, and sought to foreclose their interest, as well as that of the incorporate company. And the incorporators have answered, admitting the averments of the bill, and disclaiming any interest adverse to that of the complainant. The bill was not only a foreclosure, but a creditors' bill as well. Such bills are equitable proceedings quasi in rem, and may be conducted to decree with only the constructive service upon, and presence of, the debtor. They are directed rather against the thing than the person. Now, one of the things which the original complainant was entitled to subject to its debt was these lawful contracts with the city; and this, whether they were held and owned by the company or its incorporators, for both were parties to the bill. A receiver appointed to collect rents due on the contracts, therefore, was entitled to enforce, not alone the rights of a nonexistent corporation, but also those of the only other possible owners of the contracts, the pretended incorporators. The plant, the land, the contracts, the manufactured electricity, the pumped water, belonged to some one. They were not derelict. One who should steal a hydrant or a pole or a line of wire would be guilty of larceny, we presume, and, if the property could not be laid in the company, it must be laid in the incorporators. In the same way, the city is liable to some one for the water and the light which it has enjoyed under the contract, and, if the receiver represents the only persons possibly entitled to hold the city for the same, his bill should be sustained. The remarks of Mr. Justice Cooley in *Burton v. Schildbach*, 45 Mich. 504, 8 N. W. 497, would seem to sustain the justice of this conclusion. Objection is made that the extent of the representative character of the receiver is not shown in the ancillary bill. It appears, however, in the record before this court and the court below, and this is impliedly made part of the ancillary bill by reference to the proceedings. It appears in the record before the court, and the defendant can hardly be said to be prejudiced by a failure to enlarge upon it in an amendment to the ancillary bill. The receiver was appointed to take charge of the assets of the nonexistent company and to collect them. There can be no doubt that included in these were the two contracts, for they are specifically described in the original bill as such. If there was any party to the suit whose interest in these assets entitled him to collect them in case of the established nonentity of the company, the receiver represented him, even though the assets were designated in the order of appointment as those of the company.

But one further objection to the recovery of the receiver remains to be considered. It is said that the evidence shows that the incorporators were merely agents of complainant the National Waterworks & Construction Company of West Virginia, and the course taken was merely a device to enable a foreign corporation to do business in Tennessee without complying with the imperative mandate of the statute and condition precedent to the transaction of any lawful business in the state by such corporation, to wit, the registering of its charter. It is a fact that the incorporators of the Water & Electric Light Company were stockholders in the West Virginia company, but that circumstance does not show that one company was to

be a mere cloak for another. It is a common plan to have a parent company engaged in a national business of installing local companies and taking stock in the local companies, but they are distinct legal entities, and the interest of the larger company in the smaller is no reason for holding otherwise. If the Construction Company desired to do business in Tennessee, there would seem to have been no reason why it should not have registered its charter and otherwise complied with the law; for the burden, pecuniary or otherwise, thus imposed, would not have been great. The motive for the elaborate scheme of evasion charged is not commensurate with the trouble involved. We have no doubt that the averments of the original bill correctly state the real relation between the Construction Company, the Water & Electric Light Company, and its incorporators. The Construction Company merely lent money to a supposed Tennessee corporation, and was not engaged in business in that state.

The decree of the circuit court is reversed, at the costs of the appellee, with directions to enter a decree in favor of the receiver against the city of Cleveland for the full amount claimed in the bill, with interest as therein claimed, with costs.

CENTRAL TRUST CO. OF NEW YORK v. INDIANA & L. M. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 541.

1. APPEAL—MATTERS REVIEWABLE.

Where a trustee in a railroad mortgage brought suit to foreclose such mortgage, and also prayed judgment for deficiency against the mortgagor and a guarantor of the bonds thereby secured, and has appealed from a decree denying it relief against the guarantor, an individual bondholder cannot be heard in the appellate court, for the first time, to question the authority of the trustee to maintain the action against the guarantor, in the absence of any pretense of bad faith on the part of the trustee; such objection being one which could not be urged by the appellant.

2. RAILROADS—GUARANTY OF BONDS—ESTOPPEL TO CONTEST LIABILITY.

A railroad company, empowered by statute to execute a guaranty of the bonds of another company under certain conditions, and having executed such guaranty, cannot urge its noncompliance with the conditions to defeat its liability thereon, as against bona fide purchasers of the bonds.

3. SAME—POWER TO MAKE GUARANTY—INDIANA STATUTE.

It having been settled by repeated decisions of the state courts and the supreme court of the United States that a railroad company has no power under the statutes of Indiana to lease a line of road of another company, a company is not brought within the terms of 2 Burns' Rev. St. Ind. 1894, § 5216, authorizing a company "whose line of railway extends across the state in either direction" to become a guarantor of the bonds of a railroad of an adjoining state under certain conditions, by the fact that it is operating a leased line across the state, and its guaranty of bonds of a company of another state building a connecting line is ultra vires and cannot be enforced; all purchasers of the bonds being chargeable with notice of the company's want of power.

Appeal from the Circuit Court of the United States for the District of Indiana.

The appellee the Terre Haute & Indianapolis Railroad Company (herein, for brevity, called the "Indianapolis Company") was incorporated in the year

1847 by a special act of the legislature of the state of Indiana, and constructed and operated a railway extending from the city of Indianapolis, in that state, to a point on the western line of the state near the city of Terre Haute,—a distance of about 70 miles. The act of incorporation authorized the construction of the railway from the westerly line of the state, through Terre Haute and Indianapolis, to Richmond, in the county of Wayne, near the eastern boundary of the state. By a subsequent act of the legislature, passed in 1851, and presumably at its request, the Indianapolis Company was released from its obligation to construct a line eastwardly of Indianapolis. In the year 1873, pursuant to law, the company surrendered its rights under its special charter, and accepted the provisions of the general railroad law of the state, approved May 11, 1852. On February 10, 1868, the company leased for a period of 999 years a line of railway extending from East St. Louis to Terre Haute, and connecting with its line of railway at the westerly line of the state. In the year 1879 the Indianapolis Company leased of the Terre Haute & Logansport Railroad Company for a period of 99 years its line of railway extending northeasterly from the city of Terre Haute to the city of South Bend, in the state of Indiana, which latter city is located a few miles south of the northern boundary of the state, and about midway between the easterly and westerly boundaries of the state. In the year 1889 the Indianapolis Company was in possession of and operating these lines of railway, forming a continuous line from East St. Louis, in the state of Illinois, opposite the city of St. Louis, Missouri, extending northeasterly to the city of South Bend, in the state of Indiana, connecting at or near Terre Haute with its own line of railway, the Indiana & Lake Michigan Railway Company (herein called the "Michigan Company") is a corporation created by consolidation of an Indiana with a Michigan corporation, owning a line of railway extending from South Bend, Ind., to St. Joseph, Mich. By agreement between the two companies dated June 4, 1889, the Michigan Company agreed to construct its line of railway from an intersection with the line in possession of the Indianapolis Company at South Bend, Ind., to a connection with the Chicago & West Michigan Railway at the city of St. Joseph, in the state of Michigan, and to lease its line to the Indianapolis Company for a period of 99 years, under an agreed division of earnings, namely, the Indianapolis Company to retain for expense of operation 75 per cent. of the gross earnings, the balance to be applied to the payment of taxes; to the payment of interest accruing upon the bonds of the Michigan Company to an amount not exceeding \$480,000; the surplus, if any, to be paid to the Michigan Company. The Indianapolis Company, on its part, agreed to guaranty the payment of the principal and interest of the bonds to the amount stated, to be issued by the Michigan Company. This agreement was carried into effect. The line was constructed, the lease executed, and the Indianapolis Company went into possession and operation of the railway. The Michigan Company issued its negotiable bonds to the amount of \$480,000, payable to bearer, secured by a trust deed dated September 2, 1889, of which the Central Trust Company, appellant, is the sole surviving trustee. This trust deed is in the ordinary form of such instruments, and authorizes the trustee upon default to take possession, or to foreclose, but contains no covenant or provision prohibiting suit at law by holders of the bonds, or authorizing such action by the trustee, or investing it with any authority to sue at law upon the bonds for the benefit of the bondholders. The Indianapolis Company, simultaneously with the execution of such trust deed, duly executed a written guaranty, indorsed upon each bond, as follows: "The Terre Haute and Indianapolis Railroad Company, a corporation created under the laws of the state of Indiana, in consideration of the ninety-nine years lease of the railroad mentioned in the within bond, does hereby guaranty the payments of the principal and interest of said bond according to the terms and conditions thereof." And the bonds, with such guaranty upon them, went upon the market, and into the hands of bona fide purchasers for value. Subsequently, upon default in the payment of interest of such bonds, a committee was appointed at a meeting of the holders of many of them, to represent their interests; and it is stated in evidence by one of the committee that all the holders of the bonds, then or subsequently, came in under the arrangement. The written agreement executed by the bondholders recited the fact of the

guaranty of these bonds by the Indianapolis Company, and created a committee which was authorized to take such measures as it might deem proper against the Michigan or Indianapolis Company, or both, to enforce the payment of the bonds. The agreement further provided that bondholders coming in under the arrangement should deposit their bonds with the Central Trust Company, receiving its certificates therefor, and that the Trust Company should hold them subject to the order of the committee. Thereafter the trust company, at the request of the committee, filed in the court below its bill of foreclosure against the Michigan and Indianapolis Companies, and therein, among other things, prayed that for any other deficiency arising from the sale of the mortgaged premises, the trust company, complainant, might have judgment against the Michigan Company as the obligor in the bonds, and against the Indianapolis Company as guarantor thereof, which guaranty was aptly charged in the bill of complaint. The Indianapolis Company pleaded that the guaranty was ultra vires the corporation. Thereafter, on June 16, 1898, the court decreed foreclosure and sale of the mortgaged premises, but denied the application of the trust company, complainant, for a decree for deficiency as against the Indianapolis Company, holding the guaranty invalid. The Central Trust Company appeals to this court from so much and such part of the decree that holds the guaranty invalid, and refuses judgment thereon for the deficiency.

A. L. Mason, for appellant.

Lawrence Maxwell, Jr., for appellees.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

Since the hearing in this court, the counsel for certain unnamed bondholders petitioned for leave to submit an argument upon the question of the right of the Central Trust Company, trustee, to recover upon the guaranty in question; insisting that the appellant was trustee of the bondholders in respect of the mortgaged premises; that upon foreclosure of the mortgage, and distribution of the proceeds of sale, the functions of the trustee ceased, and it had no authority under the law or under the trust deed to maintain a suit at law or in equity to recover a personal judgment or decree against the guarantor of the bonds. Upon consent of the appellant, the court permitted a brief to be filed urging that contention, and we have duly considered the argument presented. It may well be that, in the absence of apt stipulations in the trust deed, a trustee is without authority to enforce the collection of the bonds to any further extent than to subject the mortgaged property to sale, and to distribute the proceeds among the holders of the bonds, and that thereupon the functions of the trustee cease. This question was not suggested in the court below, and cannot rightly be presented for the first time in an appellate court. *Railway Co. v. Henson*, 19 U. S. App. 169, 7 C. C. A. 349, 58 Fed. 531; *Bowser v. Mattler*, 137 Ind. 649, 654, 35 N. E. 701, and 36 N. E. 714; *Giraldin v. Howard*, 103 Mo. 40, 15 S. W. 383; *Davidson v. Morrison*, 86 Ky. 397, 5 S. W. 871; *Bank v. Gilpin*, 105 Mo. 17, 16 S. W. 524; *People v. Smith*, 42 Mich. 138, 3 N. W. 302. A decree was sought in favor of the trustee for the deficiency and upon the guaranty. The appellant surely cannot complain, except of the refusal of the court below to

grant its prayer. It cannot here be heard to say that its application was rightly denied, but on other ground than that held by the court below. If the trustee acted without authority of the bondholders in seeking a decree for the deficiency, the latter may not be estopped by the decree, or by the adjudication below that the guaranty was invalid. As respects the trustee, it exhibited to the court proof that the reorganizing committee was authorized to take all necessary measures for the collection of these bonds; that all the bonds were deposited with the owners under the arrangement with the trust company, to be dealt with by it under the direction of the reorganizing committee. There is sufficient to show that that committee directed the filing of the bill, praying *inter alia* a personal judgment against the guarantor upon its guaranty, and actively participated in the prosecution of the suit. Being thus the holder of the bonds upon an express trust, the appellant could doubtless maintain a suit at law upon them. Against its own application for judgment upon them, it cannot be heard to object that a court of equity ought not to entertain, in connection with the foreclosure proceedings, the question of the liability of the guarantor. *O'Brien v. Smith*, 1 Black, 99; *Law v. Parnell*, 7 C. B. (N. S.) 282. It is only just to say that the trust company has raised none of these questions. A bondholder, not a party to the suit, if he be not estopped, in the absence of any pretense of bad faith on the part of the trustee, should not be heard in opposition to the action of the trustee. If he be estopped by the deposit of his bonds under the agreement for reorganization, he is bound by the action of the trustee.

This brings us to the consideration of the main question upon its merits. It is the settled doctrine of the supreme court of the United States that:

"A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guaranty the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires*, unlawful, and void, and incapable of being made good by ratification or estoppel." *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 532, 567, 19 Sup. Ct. 817, 43 L. Ed. 1081, and authorities cited.

We must therefore look to the statutes of the state of Indiana to ascertain if power was conferred upon the Indianapolis Company to make the guaranty in question. By an act of the legislature of that state in force March 8, 1883, entitled "An act to authorize railroad corporations organized under the laws of the state of Indiana to indorse and guarantee the bonds of any railroad company organized under the laws of any adjoining state" (Acts Ind. 1883, p. 182; 2 Burns' Rev. St. Ind. 1894, §§ 5216-5218), it is provided that:

"Sec 5216. (E. S. 1049.) Guaranty of Bonds of Another Company.—1. That the board of directors of any railway company organized under and pursuant to the laws of the state of Indiana, whose line of railway extends across the state in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of

railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

"Sec. 5217. (E. S. 1050.) Petition of Stockholders.—2. The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

"Sec. 5218. (E. S. 1051.) Limitation.—3. No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies as is above mentioned to an amount exceeding one-half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act."

We dismiss without consideration the provisions of the latter two sections, because, if those provisions were not complied with by the Indianapolis Company, it cannot urge its noncompliance to defeat the guaranty upon the bonds, as against bona fide holders of them without notice. *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, supra. The record here presents no evidence of such notice, and does exhibit long acquiescence on the part of the stockholders of the Indianapolis Company, with actual knowledge of the lease and guaranty. The question thus presented is whether the Indianapolis Company is within the class of railroad companies to which the statute is applicable. The power is conferred only upon a railroad company "whose line of railway extends across the state in either direction." If the line of railway extending from the westerly line of the state near Terre Haute to Indianapolis is, within the true intent and meaning of the statute, to be deemed "the line of railway" of the Indianapolis Company, it manifestly cannot be said to have a line extending across the state in any direction; for that terminates at Indianapolis, at about the center between the easterly and westerly boundaries of the state. The purpose of the act clearly was to enable those railroad companies whose lines extended from one boundary of the state to another to form trunk lines, or to procure an outlet into an adjoining state by running arrangements over lines directly or indirectly connecting with their own lines of railway, and to enable them, when necessary for that purpose, to guaranty the bonds of the company of such adjoining state. It is clear that the Indianapolis Company does not come within the contemplation of the law, if the statute includes only a company which owns absolutely a line of railway extending across the state. It is, however, urged that the Indianapolis Company is brought within the purview of the statute because of the connecting lines leased by it. The difficulty with this contention is that it appears to be settled by repeated decisions that there is in Indiana no law authorizing a railroad company of that state to lease the line of another railroad company either within or without the state. *Board of Com'rs of Tippecanoe Co. v. Lafayette, M. & B. R. Co.*, 50 Ind. 85; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83, on rehearing, 118 U. S. 630, 7 Sup. Ct. 24, 30 L. Ed. 284; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748. It follows, therefore, that the lease by the Indianapolis Company of the Terre Haute & Logansport Railroad, by which a connection was made at Terre Haute with the line of the

Indianapolis Company, and at South Bend with the line of the Michigan Company, and also the lease in question with the Michigan Company, were ultra vires the Indianapolis Company, and are void. These leased lines cannot, therefore, be deemed part of the "line of railway" of the Indianapolis Company. It was consequently not a company whose "line of railway" extended across the state, and was not empowered to execute the guaranty in question. This guaranty expressed for its consideration an absolutely void agreement, incapable of ratification, and notice of which is imputed by the law to every holder of the bonds of the Michigan Company. It is competent for the Indianapolis Company to plead invalidity of the contract, and its own want of power to execute. We do not deem it essential to review the various provisions of the statute of Indiana applicable to the subject which have been called to our attention. They were all considered by the court in *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, supra, and the power to lease was denied. The legislation of the state with respect to railways would seem to be sporadic and fragmentary, and not in consonance with a well-defined policy and a regulated system of control of railway corporations. The omission in the legislation of the state of the grant of power to take by lease appears to be inadvertent rather than intentional. We fail to discover any sound reason of public policy which, giving to railway corporations acquiring their property under decrees of courts (1 Burns' Rev. St. Ind. 1894, § 5215) the right to purchase the lines of railway of other railroad companies, withholds that power from other railway companies whose lines have not been acquired through sale upon foreclosure. If a railroad company authorized to consolidate with another company can accomplish that purpose by purchase of the stock of the other company, as an incident to such consolidation (2 Burns' Rev. St. Ind. 1894, § 5215; *Hill v. Nisbet*, 100 Ind. 341), it is not altogether apparent why a company generally authorized to extend its railway beyond the termini expressed in its charter or articles of organization (2 Burns' Rev. St. Ind. 1894, § 5303), and to own and operate such extended lines, may not accomplish that object by permanent lease of connecting lines, and why the greater should not include the lesser power. But the question seems to be authoritatively settled. The supreme court of the United States has declared the law. We can but follow and obey. The decree is affirmed.

GROSSCUP, Circuit Judge, sat at the hearing, but, by reason of illness and absence, took no part in the decision.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CITY OF RICHMOND.

(Circuit Court, E. D. Virginia. December 30, 1899.)

1. TELEPHONES—RIGHT TO USE OF STREETS—CONSENT OF CITY.

Under the Code of Virginia (section 1287), which requires the consent of the council of a city or town to authorize the use of its streets by a telegraph or telephone line, a telephone company which acquired the right to erect and maintain its poles and wires in the streets of a city through an

ordinance, the terms of which it accepted, is bound by a provision of such ordinance reserving to the council the right to repeal the same at any time,—the repeal to take effect 12 months from its date,—and its right to maintain its lines in the streets terminates at the expiration of a year from the date of passage of a repealing ordinance.

2. MUNICIPAL CORPORATIONS—REPEAL OF ORDINANCE.

Where an ordinance granting rights in the streets of a city expressly reserved to the council the power of repeal, the reasons which induced the passage of a repealing ordinance cannot be inquired into by the courts, to affect its validity.

This was a suit in equity to enjoin the enforcement of certain city ordinances affecting the right of complainant to maintain its poles and wires in the streets of defendant city.

George H. Fearons, Leake & Carter, and Stiles & Holladay, for complainant.

Henry R. Pollard, for defendant.

GOFF, Circuit Judge. For a statement of this case, and the action of this court herein heretofore, see 78 Fed. 858. The circuit court of appeals modified the decree entered by this court, and remanded the case, with instructions as set forth in the opinion of that court. 42 U. S. App. 686, 28 C. C. A. 659, 85 Fed. 19. The supreme court of the United States, on certiorari to the court of appeals for the Fourth circuit, remanded the cause to this court, with directions that further proceedings be had herein in conformity with the principles as announced in the opinion of that court. 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162. Mr. Justice Harlan, in closing the opinion of the supreme court (174 U. S. 778, 19 Sup. Ct. 784, 43 L. Ed. 1169) says:

“What rights the appellee had or has under the laws of Virginia and the ordinances of the city of Richmond is a question which the circuit court did not decide, but expressly waived. It is appropriate that that question should first be considered and determined by the court of original jurisdiction.”

The only questions in this case at this time therefore relate to the rights of the complainant under section 1287 of the Code of Virginia, and under the ordinances passed by the council of the city of Richmond granting the consent of that city to the Southern Bell Telephone & Telegraph Company to use its streets with the poles and lines of that company, and also under the ordinances repealing the resolution of consent, and relating to the joint use of poles erected for the support of wires used in connection with the transmission of electricity. Said section of the Virginia Code is as follows:

“Every telegraph and every telephone company incorporated by this or any other state, or by the United States, may construct, maintain and operate its line along any of the state or county roads or works and over the waters of the state and along and parallel to any of the railroads of the state, provided the ordinary use of such roads, works, railroads and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the council thereof.”

The ordinance of the city of Richmond under which complainant claims the right to use the streets of that city for the poles and wires of its lines was passed June 26, 1884; and while it plainly granted

permission to the Southern Bell Telephone & Telegraph Company to erect poles, and run wires thereon, on the public streets of said city, upon the conditions and under the provisions of said grant, it also, in its fifth section, reserved to the council of the city the right to repeal said entire ordinance at any time, such repeal to take effect 12 months after the adoption of the repealing resolution. The complainant accepted the terms of the ordinance giving said consent, and erected its lines along and over the streets of the city of Richmond under the provisions of the same. Having agreed with the city, for reasons of its own, to the terms, conditions, and restrictions of said ordinance, and having for years acquiesced in the same, complainant should not now be permitted to either deny its validity or escape its requirements. The city of Richmond, exercising the right of repeal reserved by it, on the 14th day of December, 1894, repealed the ordinance of June 26, 1884, granting the right of way throughout the city to the Southern Bell Telephone & Telegraph Company, such repeal to take effect 12 months thereafter. Consequently the complainant on and after the 14th day of December, 1895, had, under the laws of Virginia and the ordinances of the city of Richmond, no legal right to occupy the streets of that city, and use the same for its poles and wires. This court is not to pass upon the propriety of the ordinance of repeal; for the power of repeal does not depend on either the necessity for it, or on the soundness of the reasons assigned for it. The supreme court having held that the act of the congress of the United States of July 24, 1866, entitled, "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes" (14 Stat. 221, c. 230), does not apply to and protect the complainant; and this court now finding that under the laws of Virginia, and the ordinances of the city of Richmond, the Southern Bell Telephone & Telegraph Company has no right to use the streets of that city, it follows that the bill is without merit, and that the relief as asked for must be denied. I will pass a decree dissolving the injunction heretofore granted, and dismissing the bill.

NEVADA SIERRA OIL CO. v. HOME OIL CO. et al.

(Circuit Court, S. D. California. December 18, 1899.)

1. MINERAL LANDS—ACTION TO RECOVER—GROUND FOR APPOINTMENT OF RECEIVER.

A court will appoint a receiver to take charge of public lands claimed by both parties under the mining laws of the United States, to the end that the required work may be done thereon for the benefit of the party entitled thereto, where the proof shows that the complainant has reasonable ground for his claim of ownership.

2. SAME—OIL PLACER CLAIMS—SUFFICIENCY OF DISCOVERY.

To constitute a prior discovery which will support a location of public ground as an oil placer claim under the mining laws, the locator must have actually discovered oil within the limits of the claim. Mere surface indications of the existence of oil therein, however strong, are not sufficient, nor is the existence of oil upon adjoining lands.

3. SAME—DISCOVERY AFTER LOCATION.

In the absence of any intervening rights, the fact that mineral is not discovered on a claim until after the notice of location is posted and the boundary marked is immaterial, and, where the discovery is the result of work subsequently done by the locator, his possessory rights under his location are complete from the date of such discovery.

4. SAME—ADOPTING DISCOVERY OF ANOTHER.

While it is not necessary that a locator should be the first discoverer of mineral upon the land, in order that a prior discovery by another shall inure to his benefit, and give validity to his location, it must have been known to and adopted and claimed by him.

5. SAME—LANDS IN POSSESSION OF ANOTHER—CLANDESTINE LOCATION.

No right can be initiated on government land which is in the actual possession of another by a forcible, fraudulent, or clandestine entry thereon for the purpose of locating it as a mining or other claim.

On Application for the Appointment of a Receiver.

Anderson & Anderson, J. H. Call, and Wm. J. Hunsaker, for complainant.

L. L. Cory, J. A. Hannah, Bicknell, Gibson & Trask, J. S. Chapman, Page, McCutchen & Eells, and C. C. Wright, for defendants.

ROSS, Circuit Judge. The subject of controversy in this suit is a piece of public land of the United States, containing under its surface petroleum, and to which both the complainant and the defendants claim to be entitled under and by virtue of the mining laws. As the defendants are extracting large quantities of oil from the ground, and prevent the complainant from doing the work thereon required by the laws of the United States in order to make good its alleged claim, an application has been made by it to the court for the appointment of a receiver to take possession of the property, and operate it, and do the required work, pending the litigation, for the benefit of the party that may ultimately be adjudged to be entitled to it; the respective parties agreeing that by reason of the operation of wells on adjoining lands no injunction ought, in any event, to be issued, because such action would necessarily result in the draining of a large part of the oil from the land in controversy by those operating the adjoining territory. Upon the hearing of the application a large amount of testimony was introduced on behalf of the respective parties, consisting in great part of conflicting affidavits. In respect to this conflict of evidence the court would not undertake, at this stage of the case, to make a decisive determination; but if the proof, taken as a whole, shows reasonable ground for the complainant's claim to the land in question, then, clearly, it will be the duty of the court to appoint a receiver to take possession of it pending the litigation, to the end that the annual work required by the laws of the United States may be performed for the benefit of the party who may ultimately prevail in the suit, and in order to conserve the property for the benefit of the party entitled thereto, and prevent the extraction and disposition, pending the litigation, of the oil, which the proof shows constitutes the chief, if not the only, value of the land. But, unless the proof does show that the complainant's case has a reasonable ground to rest upon,

it is the duty of the court to deny the application, for courts of equity do not lightly appoint receivers to take property out of the possession of any party.

The undisputed evidence shows that on the 1st day of January, 1893, the ground in controversy was unappropriated public land of the United States, which had been theretofore surveyed, and by that survey designated as the "northeast quarter of section 20, township 19 south, range 15 east, Mount Diablo base and meridian," containing 160 acres, and that on the day named J. E. Wilson, for himself and seven other persons, all of whom were competent locators, undertook to locate the ground under the mining laws of the United States, posting thereon a notice of location claiming the quarter section as a consolidated mining claim, and, it is contended, marked its boundaries in accordance with the requirements of the law. It is not pretended that Wilson or any of his associates remained in actual possession of the land, or did any work thereon under that location. On the contrary, one of the averments of the bill is that on the 1st day of January, 1896, the land was unappropriated public land of the United States, open to location under the mining laws. The undisputed evidence also shows that in the year 1895 Frank Barrett undertook to locate the same ground, for himself and seven other persons, as a consolidated mining claim, pursuant to the same laws; but neither he nor any of his associates remained in the actual possession of the ground, or did any work under that location. The evidence leaves no room to doubt that on the 1st day of January, 1896, the land was unappropriated public land of the United States, on which day, as has been said, Wilson undertook, in behalf of himself and his seven former associates, to make a second location under the mining laws, posting thereon the required notice of location, and, it is contended on the part of the complainant, marking the boundaries in accordance with the requirements of the statute. Assuming that to be so, the difficulty with his location of January 1, 1896, is that the proof fails to show that he made, prior to the posting of the notice and the marking of the boundaries, or subsequent thereto under that location, any discovery of mineral in or upon the land. The bill alleges that at the time of the posting of the notice of location of January 1, 1896, Wilson discovered seepages of oil on the land in question, as well as oil sand and shale, but there is no showing in the proof that he discovered any seepages of oil on it. On the contrary, I think the evidence shows beyond any doubt that there never were any seepages of oil on that quarter section of land. There is evidence on the part of the complainant going to show that Wilson discovered sandstone and shale thereon, as well as on adjoining lands, and that there were seepages of oil on some of the adjoining lands, as also wells on one of the adjoining tracts, which were producing more or less oil. But these were nothing more than indications of existing oil under the surface of the ground in question, which might or might not prove to be true. Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unap-

propriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. Rev. St. §§ 2320, 2329; *Mining Co. v. Doe* (C. C.) 56 Fed. 685. Indications of the existence of a thing is not the thing itself. It is entirely true that the statute, requiring as a condition to a valid location the discovery of mineral within the limits of the claim, should, as between conflicting claimants to mineral lands, receive a broad and liberal construction, and so as to protect bona fide locators who have really made a discovery of mineral, whether it be under the statute providing for the location of vein or lode claims or placer claims. As was well said by Judge Hawley in *Book v. Mining Co.* (C. C.) 58 Fed. 106, 120, in speaking of vein and lode claims:

"When the locator finds rock in place containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay. The question whether a particular piece of the public land is more valuable for mineral than for agricultural purposes is one that does not arise in cases like the present. While, as has been said, the statute requiring a discovery of mineral as one of the essential conditions of a valid location of land under the mining laws should be liberally construed in behalf of bona fide locators, no court would be justified in ignoring the statutory requirement. Mere indications of mineral, I repeat, do not constitute the discovery of the mineral itself. If so, a location made upon the discovery of such indications, followed by the proper marking of the boundaries of the claim and the doing of the statutory amount of work within the prescribed time, whether the work resulted in the actual discovery of mineral or not, would entitle the locator to apply for, and upon due proof and payment receive, the government title to the land as mineral land; which obviously would not only be unauthorized by any provision of the statute, but would be in direct conflict with the sections already cited.

What has been said in respect to the absence of any discovery of mineral by Wilson on January 1, 1896, equally applies to his pretended location of January 1, 1893, and to Barrett's pretended location of the same ground in 1895, under whom the defendants claim. Barrett, during the year 1895, undertook to transfer his right to the ground in question, which had no existence in fact or law, to the Producers' & Consumers' Oil Company, which company later undertook to transfer the same thing (which was nothing) to the defendant Miller, and on December 31, 1896, Miller undertook to relinquish to the United States what he did not have, namely, a right to the land in question, and immediately thereafter, to wit, on the 31st day

of December, 1896, without having made any discovery of mineral upon the land, undertook to locate the quarter section in question under the mining laws, for himself and seven other persons, by posting the required notice and marking the boundaries. Shortly thereafter he undertook to confer upon Barrett the right to enter upon and explore for and develop oil upon the claim, and to dispose of the oil there found. Barrett thereupon went into actual possession of the land, and early in 1897 erected a derrick thereon, and commenced boring for oil, and shortly thereafter transferred, with the consent of Miller, whatever rights he acquired from him to the defendant Home Oil Company, which company proceeded with the boring, and in October or November, 1897, at a depth of about 800 feet, actually discovered oil in the ground, since which time it has remained in the actual possession of the claim, and bored several other wells, several of which proved to be flowing wells, and in the aggregate yield a large quantity of oil. It would thus seem that, if the location made by Miller and his associates on the 31st day of December, 1896, was properly marked upon the ground, and the notice of the location properly posted, followed, as it was, by the actual possession of the ground by those claiming under it, and by the actual discovery of mineral within the limits of the claim by them, the requirements of the United States statute in respect to the location of mineral land were answered, no rights of any third party having in the meantime intervened. As said by the circuit court of appeals for the Eighth circuit, in the case of *Erwin v. Perego*, 35 C. C. A. 484, 93 Fed. 609, 611:

"The acts of congress prescribed two, and only two, prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. (And the same rule is by the statute made applicable to placer mining claims.) They are the discovery upon unappropriated public land of the United States, within the limits of his claim, of a mineral-bearing lode, and the distinct marking of the boundaries of his claim, so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but, when these requirements have been complied with, the land is no longer public, but the possession, the right to the possession, and the right to acquire the title are irrevocably vested in the locator."

The court, in the case cited, proceeded to hold that, in the absence of any intervening rights, it is immaterial that the discovery is not made until after the posting of the notice and the marking of the boundaries of the claim, saying that the order in which the statutory requirements are complied with is immaterial so long as the rights of others do not intervene before they are complied with; that "the marking of the boundaries of the claim may precede the discovery, or the discovery may precede the marking; and, if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date,"—citing *Jupiter Min. Co. v. Bodie Consol. Min. Co.* (C. C.) 11 Fed. 666; *North Noonday Min. Co. v. Orient Min. Co.* (C. C.) 1 Fed. 522; *Zollars v. Evans* (C. C.) 5 Fed. 172; *Strepy v.*

Stark (Colo. Sup.) 5 Pac. 111; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113. All of this, however, is based upon the supposition, as is expressly shown in the opinion of the court, that the location has also been made in conformity with any valid state legislation that may exist in the particular state in which the mineral land is situated, and with any valid local rules and regulations of the mining district in which the land may be situated, if any such exist. Section 2324 of the Revised Statutes makes the manner of locating mining claims and recording them subject to the laws of the state or territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States. Kendall v. Mining Co., 144 U. S. 658, 12 Sup. Ct. 779, 36 L. Ed. 583. At the time of the actual discovery of oil upon the tract of land here in controversy by the defendant Home Oil Company in the fall of 1897, at which time, if at all, the location under which the defendants claim became complete, there was in existence an act of the legislature of the state of California entitled "An act prescribing the manner of locating mining claims upon the public domain of the United States, recording notices of location thereof, amending defective locations, and providing for the deposit of district records with county recorders, and prescribing the effect to be given to recordation of notices of location and affidavits," approved March 27, 1897 (St. 1897, p. 214), the first, second, third, and sixth sections of which are as follows:

"Section 1. The location of mining claims upon the public domain of the United States shall be made and perfected as provided in this act.

"Sec. 2. The discoverer of any vein or lode shall immediately, upon making a discovery, erect at the point of discovery a substantial monument or mound of rocks, and post thereon a preliminary notice, which shall contain: First—the name of the lode or claim; second—the name of the locator or locators; third—the date of the discovery; fourth—the number of linear feet claimed in length along the course of the vein each way from the point of discovery; fifth—the width claimed on each side of the center of the vein; sixth—the general course of the vein or lode, as near as may be; seventh—that such notice is a first or preliminary notice. Such notice shall be recorded in the office of the county recorder of the county in which the same is posted within twenty days after the posting thereof. Upon the erection of said monument and posting such notice, the discoverer shall be allowed the period of time specified in section three of this act to enable him to perfect his location as hereinafter provided.

"Sec. 3. Within sixty days from the date of the discovery of a vein or lode, the discoverer must perform fifty dollars' worth of labor in developing his discovery, and distinctly mark his location on the ground so that its boundaries can be readily traced, and must file in the office of the county recorder of the county in which the claim is situated, a certificate of location, which said certificate shall state: (1) The name of the lode or claim. (2) The name of the locator or locators. (3) The date of discovery and posting of the notice provided for in section two of this act, which shall be considered as the date of the location. (4) A description of the claim, defining the exterior boundaries as they are marked upon the ground, and such additional description by reference to some natural objects, or permanent monument, as will identify the claim. (5) A statement that such certificate is the final or completed notice of location, and that he has performed the aforesaid fifty dollars' worth of labor in development work thereof within the aforesaid sixty-day period, stating generally the nature thereof. Said certificate shall be dated and signed by or on behalf of the locator or locators, and verified by them or by some one in their behalf, and when filed for record shall be deemed

and considered as prima facie evidence of the facts therein recited. A copy of such certificate of location, certified by the county recorder, shall be admitted in evidence in all actions or proceedings with the same effect as the original. The performance of such labor shall be deemed a necessary act in completing such location and a part thereof, and no part thereof shall inure to the benefit of any subsequent location."

"Sec. 6. All locations of quartz or placer formations or deposits, hereafter made, which do not conform to the requirements of this act, in so far as the same are respectively applicable thereto, shall be void."

In the view I take of the present case, it is not necessary to decide to what extent, if at all, this act, while in force, was applicable to placer claims, or whether, in view of this state legislation, the location under which the defendants assert title is or is not invalid. Assuming that the defendants failed to comply with the provisions of this state legislation, and that such failure operated to open the land to the location of any other competent locator, the fact remains that the defendants continued in the actual possession of the land, and continued to mine the same for oil, and that they were so in possession and so engaged on the 26th day of May, 1898, when Frank H. Jackson, for himself and the seven other persons who had theretofore been associated with Wilson, undertook to locate the ground in question under the mining laws. That location, according to the affidavit of Jackson, which was introduced in evidence on behalf of the complainant, was based upon these facts, as constituting his discovery, and nothing else:

"That on May 26, 1898, he (Jackson) was on said northeast quarter of said section. That on said date he discovered indications of oil-bearing strata on said quarter section at and near the southeast corner thereof. Said indications were as follows: At the said southeast corner the surface is covered with broken-up formations of sandstone, and underneath, less than one foot beneath the surface, affiant found the sandstone in place. A few feet east and northerly from said corner a ravine cuts the formation, showing the solid sandstone stratum in place, being the same stratum that underlies the said corner a short distance above said corner in said ravine, and about on the west line of section 20. There is a highly mineralized spring, charged with soda and other salts, such as are almost invariably found in the proximity of oil-bearing sand, and which indicate the oil sand is in the immediate neighborhood. The sandstone referred to has some strata of shale, and said sandstone and shale are of the character that usually carry oil in said district, and said shale bears indications of bituminous matter. That on said date he located the said northeast quarter section as a placer mining and oil claim as follows,"—giving the boundaries.

The previous observations upon the subject of discovery dispose of this attempted location by Jackson for himself and his seven associates. It was, as he himself testifies, based merely and solely upon surface indications of oil, which are insufficient to constitute a discovery. It is doubtless true, as will appear from what follows, that Jackson, at the time of the making of his attempted location on May 26, 1898, knew of the actual discovery by the defendants of oil upon the land in question; but it is perfectly plain, from his own affidavit, that he did not base his location upon any such knowledge. It is also true, as a matter of law, that it is not necessary that a locator should be the first discoverer of mineral upon the land in order to make a valid location; but he must not only have knowledge of the former discovery, but such actual discovery must be adopted and claimed by him in order to give validity to

his location. *Jupiter Min. Co. v. Bodie Consol. Min. Co.* (C. C.) 11 Fed. 666, 676. This, as has been shown, Jackson did not do, but, on the contrary, based his location upon mere surface indications of the existence of oil, which, as has been said, is insufficient to constitute a discovery. Moreover, I think it clear that the attempted location by Jackson, made on the 26th day of May, 1898, was invalid for another reason. The defendants were at that time in the actual possession of the claim in controversy, and actually engaged in mining it for oil. It appears from the affidavit of C. A. Canfield, one of the parties interested in the defendant Home Oil Company,—and this I do not find anywhere contradicted:

"That in the month of May, 1898, J. E. Wilson [who, Jackson swears in his affidavit, assisted him in marking the boundaries under the location made by him May 26, 1898] and Frank H. Jackson came to Oil City, and at affiant's invitation stayed at his cabin, and where they were entertained as guests. That the morning after they came to affiant's cabin, as aforesaid, affiant saw them engaged in the erection of a monument. He went to them, and asked them what they were doing, whereupon said Jackson told him that they were perpetuating the monuments defining the line of section 17 in said township and range. That affiant thereupon showed them where the south center corners of said section 17 were, whereupon they moved the rock over to the corner so indicated. That after the said Wilson and Jackson left the said monument, the said affiant went and got I. F. Postom, who was then manager of the Home Oil Company, operating on the northeast quarter of section 20, and he and said Postom tore down said monument, to make an examination thereof, and to see if they had left any notice of claim of any kind whatever therein, and they found nothing therein, and they thereupon restored said monument. That some time in June, 1897, some person, to affiant unknown, entered upon the said northeast quarter of section 20, went to the southwest corner thereof, and partially erected a derrick. That, as soon as said affiant discovered that the derrick was there, he went down, and made an examination of it, and found nobody around or in possession of that portion of said quarter section in connection with said derrick. That affiant says, after his first visit there, later in the same day, the same or other parties placed or added more to the structure of the said derrick, but without completing it. That thereafter no further work was done by anybody in connection with said derrick, nobody remaining in possession of or claiming it, or to the ground in connection therewith, and the next time that the affiant visited that portion of the ground, which was a few weeks later, he found said derrick was down."

There are affidavits on behalf of the complainant to the effect that the derrick thus spoken of was built by Wilson, and that he completed it at a cost of \$100, and that it was so built under and pursuant to the location made by Jackson on May 26, 1898. It is true that upon mineral land of the United States upon which there is no valid existing location any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and aboveboard, and made in good faith. *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732. One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United

States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin, or temporarily absent from his claim. I think it clear from the showing made upon the hearing of this application: First, that Jackson did not make any such open and good-faith entry upon the actual possession of the defendants of the quarter section in question, upon which he could initiate any valid location thereof under the mining laws; and, secondly, that, according to his own affidavit, he made no such discovery of mineral upon the land as the statute requires. For the reasons stated, I am of the opinion that the complainant is not entitled to the appointment of a receiver herein, irrespective of the question of the validity of the location under which the defendants assert title, and irrespective of other questions argued by counsel. An order will be entered denying the application for the appointment of a receiver.

GREER et al. v. THE DALLES NAT. BANK et al.

(Circuit Court, D. Oregon. December 14, 1899.)

No. 2,401.

BANKS—ACTING AS AGENT—RECOVERY OF TRUST FUNDS FROM RECEIVER.

Complainants, who were engaged in business in Chicago, agreed to loan a sum of money to a third person on the security of certain sheep, the security to be taken by, and the money to be paid through, the defendant, which was a national bank located in Oregon, and which was authorized to draw on complainants for the money. Defendant took the notes and security from the borrower, and forwarded them to complainants, and also drew on them, through its Chicago correspondent, for the amount of the loan, crediting the amount of the drafts to complainants on its books. On the day on which the proceeds of one of such drafts was paid to the correspondent, the defendant bank was closed by the comptroller, and placed in the hands of a receiver. *Held*, that the transaction was not one of banking, by which it was intended that the relation of debtor and creditor should be created either between the defendant and complainants or defendant and the borrower, but one in which defendant was merely the agent for both parties, which relationship was not changed by the fact that it was expected that the proceeds of the drafts would be mingled by defendant with its own funds, and that complainants were entitled to recover from the receiver as trust funds so much of the proceeds of the drafts as came into his hands.

This was a suit in equity against a national bank and its receiver to recover a sum alleged to be held by the receiver in trust for complainants.

Cotton, Teal & Minor, for complainants.

Huntington & Wilson, for defendants.

BELLINGER, District Judge. The complainants and one J. W. Blake entered into an agreement by which the former agreed to loan Blake \$13,500, on the security of 12,000 head of sheep, which the former had bought, and intended to take to Nebraska. Com-

plainants agreed to make the loan upon the condition that Blake should arrange with the defendant bank to give them a bill of sale of the sheep, and that the bank would select some suitable person to take possession of the sheep in complainants' behalf. Blake was to take the sheep by railroad and trail to Nebraska to feed and fatten, the title thereto to remain in the meantime in complainants. The money so loaned was to be paid to or through the defendant bank. Complainants authorized the latter to draw for the money, and accordingly the defendant bank, by wire, did, on the 24th day of April, 1897, request complainants to deposit \$5,000 to its credit with the First National Bank of Chicago, which was done. The amount so drawn was placed to the credit of the complainants upon the books of the bank. About the 1st of May, 1897, the formal written contract between Blake and the complainants was executed by Blake, and mailed by the bank to the complainants, together with Blake's notes for \$13,500, all of which were received and accepted by the complainants on May 5th. On the day of the mailing of the notes and contract, the defendant bank drew upon the complainants for \$8,500, and placed that amount, as before, to their credit on its books. The draft for this sum was mailed to the First National Bank of Chicago, and was received by that bank on the 5th of May, and sent by its correspondent on the same day to the stock yards for collection. The draft was paid by complainants on the same day, and after their possession of the Blake notes and contract. On the 6th of May the correspondent of the First National Bank of Chicago notified it that the draft was collected, and on the 7th remitted the proceeds to that bank, by which a credit was given to the defendant bank for the amount collected. The defendant bank did not open for business on the 7th of May, having been on that day closed by order of the comptroller of the treasury, and a receiver thereafter appointed, according to the usual course in such cases. Among other things, it is stipulated that complainants expected and that it was the right of the defendant to mingle the money received on these drafts with its own funds.

I am of the opinion that in this transaction the relation of debtor and creditor did not exist between the defendant bank and the complainants; that the transaction was not an ordinary banking transaction; that the bank was the agent and trustee of the complainants and Blake; and that the receiver should account for such portion of the moneys received by the bank under such trust as can be traced in his hands. The stipulation that the complainants expected and that it was the right of the defendant to mingle the money received with its own funds does not affect the nature of what was done. It merely shows the good faith of the defendant in mingling the complainants' money with its own. The question whether the bank received these funds as a trustee, for a specific purpose, depends upon the character of the transaction, as shown by all the facts and circumstances in the case, including the object which the parties intended to accomplish. The fact that complainants expected and were willing that the bank should mingle the money paid on the drafts with its own funds is a circumstance

which may tend to show a banking transaction, but it is not a conclusive circumstance, and, notwithstanding this, it may be shown that the money was received by the bank for a specific purpose, not within the usual course of banking. The mingling of the funds is a matter of convenience. An agent or trustee may do the same thing, without injury to the interests of the principal or beneficiary, who is not concerned in the question of the identity of the money held for him, so long as it is of the same character and value. When the defendant bank drew its drafts on complainants, the amount of each draft, as soon as drawn, was placed to complainants' credit. If this money was intended as a deposit to complainants' credit,—to create the relation of debtor and creditor between the parties,—the bank would not have drawn therefor. If the payment of the drafts was intended by the defendant bank as a payment to Blake, or for his account, the fund would not have been put to the credit of complainants. It is clear that what was thus done was not an ordinary banking transaction. It is a case where a bank undertakes to become a medium between two parties to accomplish a definite business dealing. As stated, it was not the intention of the parties that the complainants should become depositors in the defendant bank. It was neither a payment to Blake nor a credit to complainants. It was a step in a particular business transaction. Blake wanted to borrow, and complainants agreed to loan, the amount in controversy, on the security of 12,000 sheep. The parties were widely separated. They dealt with each other through the bank, which undertook to act for them. The bank became their agent in the deal. The bank acted, not as a banker, but as the agent or trustee of the parties, in what was done.

As to the \$5,000 paid, there can be no relief, since it is not possible to trace, nor is it claimed that this money has been traced in the hands of the receiver. But as to the residue of the fund, as already stated,—the \$8,500 paid at Chicago on the day on which the bank's doors were closed,—which specific sum is now in the receiver's hands or under his control, the complainants are entitled to the relief prayed for, and it is decreed accordingly.

HUNT v. HURD.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 606.

1. RAILROADS—INJURY OF EMPLOYEE—FLYING SWITCHES.

The making of a flying switch by a railroad company in its yards in the daytime, and in the usual manner, is not negligence per se as to an employé working in the yards, who is familiar with the practice to make such switches therein; and the fact that a safer method might have been adopted affords no ground for a recovery for the death of such employé by being struck by a car so switched, where he was given notice of its approach.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS—FELLOW SERVANTS.

The question whether employés are fellow servants, so as to preclude a recovery from the master by one for the negligence of the other, is one

of general law, as to which a federal court is not bound by the decisions of the courts of the state.¹

In Error to the Circuit Court of the United States for the Southern District of Illinois.

This is an action by the administrator of Edward M. Hurd against Samuel Hunt, receiver of the Toledo, St. Louis & Kansas City Railroad Company, for damages arising from the death of said Hurd, a section hand, at Coffeen, Ill., on February 8, 1898. The declaration is in two counts, which are substantially alike, charging the defendant company with negligence in carelessly and negligently making a running or flying switch, and, without notice or warning to Hurd, causing a car to run upon the side track upon which he was working, throwing him down, passing over him, and causing his death. At the time of the accident Hurd had been in the employ of the receiver for about four months, working as a section hand in the yards of the company at Coffeen and immediate vicinity. Coffeen is a village of about 1,000 inhabitants. The main track of the railroad company runs through the village, east and west, crossed at right angles by Main street and other streets running north and south. A short distance west of Main street is the depot. Sixty feet west of the depot is a side track or "passing track," so called, which leaves the main track, and extends west through the village north of, and parallel with, the main track. A track called a "house track" joins this side track at a point 180 feet from the west end of the depot, and extending in an easterly direction over Main street. About 1,080 feet west of the depot is situated the coal shaft of the Coffeen Coal Copper Company. For the purpose of handling the business of this coal shaft another side track leaves the main track at a distance of about 210 feet west of the depot, running parallel with the main track to the coal shaft. About 330 feet from the coal shaft two short side tracks branch out from this track, running parallel with it past the coal shaft, and rejoining the side track at a point about 390 feet west of the shaft. All of the tracks south of the main track were at the time of the accident used for loading and shipping coal from the coal shaft. There are two other railroads crossing between the coal shaft and the depot. Prior to the accident Hurd and a fellow workman, James Crites, were engaged in tightening bolts on the side track. Both were working under the orders of William Jones, foreman of the section. Between 2 and 3 o'clock p. m., a local freight train came into the yards from the east, stopping east of the depot. As there was a car of coal to be taken from the coal shaft and shipped out with this train, the engine was detached, and the remainder of the train left standing east of the Main street crossing while the engine went up the side track to the coal shaft to get this car. The section gang, among whom was Hurd, were then at work on the side track. When the engine went up to the coal shaft, the men stepped off the track, resuming their work after the engine had passed. The foreman, Jones, was standing close to Hurd when the train passed, and Crites was standing about 40 feet east of Hurd. There were three cars of coal standing on the side track near the coal shaft, the one to be shipped out in this train being the furthest west. The engine coupled onto this string of three cars and started east towards the depot; the intention being to drop the last car, which was a flat car loaded with slack, upon the house track, north of the depot, by detaching it from the string before the engine reached the switch, allowing the engine and two cars attached to pass out onto the main track, and then, before the detached car reached the switch, setting the switch for the house track, allowing that car to run onto that track by the momentum it had acquired before its detachment. The engine could then return with the two cars onto the side track, leaving them at the place where they had been previously picked up, and bring out the car from the house track, and couple it to the train left on the main track east of the depot. A brakeman was placed on the last car, and the engine, with all

¹As to state laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Ferrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

three cars attached, returned towards the depot. When this train was about five or six hundred feet from the section gang where Hurd was working, Jones, the foreman, told the men to get off the track and to stay out of the way; that the train crew were going to drop a car back, or to throw a car in there,—the exact words being differently given by different witnesses. The import of the warning, however, was that a car was going to be placed on the house track by a process known to railroad men as a drop or flying switch. When the engine was about 100 feet from the place where the men were working, they stepped off the track, and about the same time the brakeman on the last car uncoupled that car from the string the engine was pulling. To do this, the speed of the engine was slackened, in order to allow the drawing of the pin; and after the pin was drawn the speed of the engine was increased, so that the engine and two cars passed the sectionmen at the rate of about four or five miles an hour, according to the testimony of the witnesses Jones and Benson, or eight to ten miles an hour, according to the evidence of other witnesses. The sectionmen were standing on the main track when the engine and two cars passed them. The engine and cars were running two or three car lengths ahead of the detached car. As soon as the engine with the cars attached had passed him, Hurd, without looking to the west, from whence the car was coming, stepped upon the switch track, astride of the south rail, and bent down, apparently for the purpose of proceeding with his work. The detached car was then rapidly approaching, and was within 30 feet of him. Several bystanders shouted to him to get out of the way, but it was too late, and the car struck him and passed over him, killing him almost instantly. The accident happened between 2 and 3 o'clock on a clear day. The brakeman on the detached car was standing at the west end of the car, where the brake was placed, and, by reason of his position, probably would not be able to see Hurd when he stepped upon the track. The car was stopped just after it passed the switch onto the house track. During the time of Hurd's employment, the coal company was shipping all of its coal over the Toledo, St. Louis & Kansas City Railroad, and a great deal of switching was done in those yards, there being as many as 15 to 20 cars taken from the coal shaft and scales daily. In doing this work, running switches were of almost daily occurrence, and they had been frequently made in Hurd's presence. There is no substantial conflict in the testimony, or any dispute as to the facts of the case. The questions arising from the record are questions of law. The defendant company called but one witness, Section Foreman Jones, whose testimony in all material matters supports the plaintiff's proofs. At the close of the testimony the defendant's counsel requested the court to direct the jury to find a verdict in favor of the defendant, which request the court refused, but submitted the case to the jury, who found a verdict in favor of the plaintiff. The principal assignment of error, and the only one which we deem it necessary to consider, is founded upon this refusal of the court to take the case from the jury.

Clarence Brown, for plaintiff in error.

George R. Cooper, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

BUNN, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

It is impossible to discover any rational or satisfactory ground upon which this verdict can be sustained. There was no evidence in the case that the switching of cars upon side tracks by a running switch is of itself dangerous or unlawful. It is not claimed to be the law that such a practice is unjustifiable, or constitutes negligence per se on the part of the railroad company. The truth is that it is the common practice in most or all of the railroad yards in the country. It is claimed in this case that a separate engine

could have been attached to these particular cars, and the cars drawn behind or shoved ahead of such engine with greater safety to employés and the public. That is quite possible. If an employé will not take heed to such a warning as was given Hurd in this case,—to get off the track and keep off,—he might be saved by the fury of an approaching engine, and the noise of a whistle and the ringing of a bell. But this does not furnish any solution to the question. Because the business might be done in some other and slower way, less dangerous, it does not follow that the method employed involves negligence. The real question is whether the method is the one in general use by other railroad companies, and is reasonably safe. If it is, then it is not negligence of itself, and without regard to circumstances, to employ that method. 3 Elliott, R. R. par. 1162; Kelley v. Railroad Co., 53 Wis. 74, 9 N. W. 816; Schaible v. Railway Co., 97 Mich. 318, 56 N. W. 565, 21 L. R. A. 660. A railroad company has, say, a half dozen or more cars standing in its yards, which it wishes to place upon as many different side tracks. Instead of hitching a separate engine to each car, and taking the car where it is wanted, it attaches one engine to the entire train. When all is under motion the engine is suddenly slacked up. This slack is communicated from the engine through all the intermediate cars until it reaches the rear car. This enables the brakeman to draw the pin and detach that car just at a point before it reaches the first switch, which is drawn at the proper moment, allowing the detached car to go upon another track by the momentum received from the engine. The engine with the remaining cars proceed upon their way until another side track and switch are reached, when the same process is repeated, and so on until all the cars are deposited in their proper places. Where there are no public streets to be crossed, and the traveling public are not concerned, it cannot be said that such a method of moving cars is extrahazardous, or implies any negligence on the part of the company. It facilitates business, and that is what the public want, although the danger may be somewhat increased over that of slower methods. It would, no doubt, be less dangerous to employés and to the public if all passenger trains should be run at a speed not exceeding 10 miles an hour, instead of from 30 to 60 miles an hour, and yet no one would venture the opinion that it should be held as negligence per se to run trains at the higher rate of speed. The business public demands it, notwithstanding the extra hazard. There is no doubt that under some circumstances it would be gross carelessness to shunt a train upon a side track, leaving it to run across a grade crossing over a public street where footmen were constantly passing, without an engine and an engineer to control it. The cases cited from Illinois, and relied upon by the defendant in error, are, for the most part, cases of this kind, where the traveling public are interested, and where there are grade railroad crossings over public streets. But there are no such extraordinary circumstances in this case. Here the switching was done in the defendant's yards, upon its own private grounds. It was done in the usual manner, in broad daylight. The deceased was an employé of the company. He had

worked in those yards several months, and had seen, and must have well known of, this practice of making flying switches. He was distinctly notified by his foreman to get off and keep off the track, as they were going to make a drop switch upon that track. All the other employes took heed to the warning, except Hurd. He paid enough attention to it to get off with the others until the engine and two attached cars passed, and then, forgetting or for some reason being totally oblivious of the approach of the shunted car, stepped upon the track, apparently to resume his work of fastening bolts. The other workmen, Jones and Crites, knew about the danger, and heeded it. Hurd knew just as much about it as they did, but was the only one who paid no attention to or failed to realize the danger.

It is said that the jury are to judge of the circumstances, and draw their own inferences from facts. This is true, where there are circumstances and testimony from which inferences may properly be drawn. But the difficulty lies in the fact that there are no circumstances in evidence from which the inference of negligence on the part of the company, or of any employé of the company, can properly be drawn. The court, in its general charge, instructed the jury:

"That they were to judge in the first place (for that is most important) whether this so-called running or flying switch was such an operation of the road, or of the switch, or switching of cars, as was reasonably compatible with the safety of the parties employed to work there. If it was reasonably safe, then the party employing the deceased, perhaps, had complied with his undertaking; but if it was not a reasonably safe operation, so to speak, of the engine and cars,—of the switching process that was going on there,—then perhaps the defendant would be guilty."

This instruction and others of a similar import were objected to, and exception thereto taken by defendant's counsel. We mention these things here only for the purpose of saying that it seems altogether probable, from these instructions and from the verdict, that the jury supposed they were authorized to say that if they found these flying switches to be dangerous, or more dangerous than other methods that might have been employed, in that case they should find the defendant company guilty of negligence. But this, as we have seen, cannot be the law. And apparently the jury must also have found that the contributory negligence of the deceased in going upon the track in front of a moving car after being warned by his foreman of the danger would not prevent a recovery, if the jury found this method of switching dangerous. The instructions, however, on the subject of contributory negligence were quite correct and full. It is true that there is evidence to show that the yard was within the corporate limits of a village of 1,000 or 1,200 inhabitants, and that 30 or 40 feet away was a public street crossing. But how can these facts change or influence the duty of the company to the employé Hurd? Not at all. If he had been a traveler upon the public crossing, then the question in regard to the propriety of switching a car over the crossing without an engine attached would have some significance.

As we have seen, the charges of negligence in the declaration are

of a very general character. No specific negligence is alleged on the part of the engineer or brakeman or other employé in charge of the switching train. The charge is apparently one of negligence on the part of the company for operating cars in that way, as though it were negligence per se. And the question seems to have been left to the jury as a question of fact, though there are no circumstances in the case tending in any way to show negligence, unless it was the bare fact of switching cars by a flying switch, so that the jury were in reality left to determine the law as well as the fact.

Counsel for defendant in error lay some stress upon the fact that the brakeman sent in charge of the shunted car was located on the rear end of the car, instead of the front. But he was where his brake was by which the car was controlled, and he was not there for the purpose of giving warning. Other means were provided for that. But assume that the brakeman was negligent in not being in the right place. It is quite clear that the plaintiff cannot recover for the negligence of the brakeman or foreman or other employés in charge of the train. They were fellow workmen with the deceased. This is not a question of local law, as is claimed by counsel for the defendant in error, but is one of general law, to be determined by a reference to all the authorities. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. And the decisions of the United States supreme court are controlling upon this question. *Martin v. Railroad Co.*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 944; *Same v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999. These cases are quite conclusive of the case at bar, so far as any question of negligence on the part of the engineer or brakeman in charge of the train is concerned, if any such negligence were charged or proven. But no such negligence is charged, and, if it were, there is no evidence tending to support the charge. The judgment of the circuit court is reversed, and the case remanded, with instructions to award a new trial.

WILSON v. MERCHANTS' LOAN & TRUST CO. OF CHICAGO, ILL.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 612.

1. APPEAL—SPECIAL FINDINGS—AGREED STATEMENT OF FACTS.

An agreed statement of facts on which a judgment is rendered will be treated on appeal as the equivalent of a special finding as to the ultimate facts stated therein, but as to the inferences to be drawn from facts stated which are merely evidentiary the general finding is conclusive.

2. NATIONAL BANKS—ASSESSMENTS ON STOCKHOLDERS—LIABILITY OF PLEDGEE.

A pledgee of stock of a national bank, with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security, without intending to assume liability as a stockholder, cannot be treated as one, and subjected to an assessment, under Rev. St. § 5151, on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt.

3. SAME—ACTION BY RECEIVER—BURDEN OF PROOF.

Defendant held shares of stock in a national bank as collateral security. The bank was subsequently consolidated with another national bank, and

stock of the latter was issued in lieu of the stock of the former. Defendant surrendered the shares it held, and caused stock in the consolidated bank to be issued in lieu thereof in the name of an employé, but continued to hold the same as security for the original debt. *Held*, in an action by the receiver of the consolidated bank to recover an assessment from defendant, in which he alleged that defendant had purchased and become the owner of the stock, on the theory that its having caused the substituted stock to be issued amounted to a conversion of the collateral, that the burden rested on the plaintiff to prove that the exchange was made without the consent of the pledgor.

In Error to the District Court of the United States for the Northern Division of the Northern District of Illinois.

This action was brought by E. T. Wilson, as receiver of the First National Bank of Helena, Mont., to recover of the Merchants' Loan & Trust Company, a banking corporation of Illinois, an assessment of \$100 per share on one hundred and twenty shares of the stock of that bank, of which shares the bill alleges the trust company to have become the purchaser and owner at some time between December 1, 1894, and June 1, 1895. The pleas are: First, nil debit; second, denial of purchase and ownership of stock in the bank; and, third, that the 120 shares of stock were, and always had been, held in the name of P. C. Peterson, as trustee, and as security for the payment of the promissory note of Shirley C. Ashby to the trust company. Trial by jury was waived by agreement in writing, and the court made a general finding of the issues for the defendant, and, having overruled a motion for a new trial, entered judgment upon the finding.

The evidence in the case, it appears by the bill of exceptions, consisted wholly of an agreed statement of facts, in substance as follows: On the 15th day of April, 1893, Shirley C. Ashby, then president of the Helena National Bank of Helena, Mont., borrowed of the trust company \$12,000, for which he gave his promissory note payable on the ensuing 16th day of August, and as collateral security delivered to the trust company a certificate, assigned in blank, representing 150 shares of the capital stock of the bank. The note recited the fact of the pledge, and contained authority, on the usual conditions, for the sale of the shares, and the application of the proceeds to the payment of the debt and expenses. On July 26th following, Ashby made an assignment of his property, including the pledged shares, for the benefit of his creditors, to Robert S. Ford, of Grand Falls, Mont., and resigned the presidency of the bank; E. D. Edgerton succeeding him in that office. There followed correspondence between the trust company and Edgerton, as president of the bank, by which the latter was told how the 150 shares were held by the trust company, and the trust company was informed of a proposed consolidation with the First National Bank of Helena, but that the stock of the Helena National Bank had been reduced from \$500,000 to \$400,000, and consequently the 150 shares would be reissued in the same amount, less twenty per cent.; and on December 26, 1894, the vice president of the trust company wrote to Edgerton, president, as follows: "I inclose herewith certificates of stock for 150 shares, for which please send me two certificates of 50 shares each, and one for 20 shares, in the name of P. C. Peterson. Mr. Peterson's address is 'care of this bank,' and we will be very glad to furnish you with proxies if you will inclose us blanks for that purpose. Where can Ashby be found? In a matter of this kind, we would like very much to have him consent to our action." The certificate was inclosed as stated, and under date of December 31, 1894, Edgerton, as president, responded as follows: "In your letter you instruct us to issue two fifty and one twenty certificates. Undoubtedly, this was under the assumption of the retirement of one hundred thousand dollars I spoke of in my letter. While we have the order, we have never acted on it by making the formal change, inasmuch as about that time we arranged this consolidation, and thought it useless to bother our people twice. We have issued this stock just as it stands on our books. But under the consolidation the new issue of the First National Bank will be as you suggest,—one hundred and twenty shares. Mr. Ashby is still here in Helena, but I doubt if you could get his concurrence on anything, as he has apparently

gone all to pieces." Subsequently, and before April 22, 1895, the proposed consolidation was consummated, with the consent and approval of the controller of the currency, the basis being an allowance to the stockholders of the Helena National Bank of eighty per cent. of the face value of their stock in the stock of the consolidated bank, which was named the First National Bank of Helena; and on or about May 17, 1895, the certificates for 150 shares in the Helena National Bank standing in the name of Peterson were surrendered by direction of the trust company, and in place thereof new certificates for 120 shares in the consolidated bank were issued to Peterson. "These last-named certificates," to quote the language of the agreement, "have ever since been, and now are, in the possession and control of the defendant, and are held by it in the same way and for the same purpose as the certificates for one hundred and fifty shares of the capital stock of the Helena National Bank were originally held, except as the conditions may have been changed by the facts hereinbefore stated, but that neither the defendant nor the said Peterson ever took any part in the management of either of said banks, or participated in the administration of their affairs." There followed a correspondence between the trust company and Ashby's assignee, commencing with the letter of October 14, 1895, in which the company inquired of Ford whether a sale of the stock was possible, to which three days later Ford replied, stating certain matters concerning Ashby and his litigation, and concluding as follows: "I have never desired you to make a forced sale of the stock, but felt during the twenty-six months past you might have found sale at a fair price, and trust you will try and secure a fair price before parting with it. I have never desired you to make a forced sale, though it lies in your power to do so." Under date of January 4, 1896, Ford wrote again, saying: "I am now trying to get an offer on the forty-eight shares I hold. Should I meet with an offer, will let you know the price offered. I take it you still hold this stock, and so held same when I sent you a dividend of \$1,680, being 14% of the amount of your claim, or [at] date of assignment, July 26, 1893. Kindly let me know if you still hold this stock, and whether 150 shares of the Helena National Bank, or 120 shares of the First National Bank, which number of shares would be issued to you on transfer." On January 7, 1896, the trust company responded: "The 150 shares of Helena National Bank stock which we held as collateral to the Ashby loan has been exchanged for 120 shares of First National Bank stock. This stock is not in our name, but is controlled by us. We shall be glad to sell it if we can get what seems to us a reasonable price. Please advise us of any offer you may get for it." Peterson, at the time of the transfer of the stock to him, was a clerk in the employ of the trust company, and was without pecuniary responsibility. The shares in the Helena National Bank were directed to be placed in the name of Peterson, and the new certificates of consolidated stock were issued to him by direction of the trust company, in pursuance of a custom and policy of that company to avoid liability as a registered shareholder of corporate stocks. The Ashby note is still held by the trust company, and, excepting two credits of \$1,680 and \$960, paid December 12, 1895, and October 6, 1896, by the assignee, remains unpaid. The facts of the suspension of the bank, the appointment of a receiver, the assessment of \$100 per share on the stock, notice to shareholders, and demand of payment are all stated in detail.

Three errors are assigned,—the finding of the issues for the defendant, the overruling of the motion for a new trial, and the entry of judgment in favor of the defendant.

D. A. Holmes, for plaintiff in error.

John N. Jewett, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

It is urged by the defendant in error that the specifications of error call for an inquiry into issues of fact, and present no question

for review. The response for the plaintiff in error is that the agreed statement of facts is to be treated as a special finding, on which the question arises whether the facts stated are sufficient to sustain the judgment rendered. It is well enough settled that an agreed statement of facts, on which judgment has been rendered, will be taken as the equivalent of a special finding. *Supervisors v. Kinnicott*, 103 U. S. 554, 26 L. Ed. 486; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *St. Louis v. Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380. "But, manifestly," as we said in *Burnham v. Railway Co.*, 46 U. S. App. 670, 23 C. C. A. 677, 78 Fed. 101, "it is necessary that the ultimate facts be stated, and not evidence, merely, from which the facts to be established may be inferable." See, also, *Mutual Reserve Fund Life Ass'n v. Curtis' Adm'r*, 56 U. S. App. 586, 29 C. C. A. 354, 85 Fed. 586. The agreement before us, to a large extent, contains a statement of ultimate facts,—sufficient, the plaintiff in error insists, to justify a judgment in his favor,—but it consists in part of letters written by or to the defendant in error, which, in so far as their contents are pertinent to the issues, are not conclusive, but only evidentiary.

The decisions of the supreme court touching the liability of shareholders for assessments upon the stock of national banks were reviewed, and the principles deducible from them comprehensively stated, in the recent opinion of that court in *Pauly v. Loan & Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844. While the rule is well established "that the real owner of the shares of the stock of a national banking association may in every case be treated as a shareholder, within the meaning of section 5151" of the Revised Statutes, it is also true, as there stated, and as was decided in *Anderson v. Warehouse Co.*, 111 U. S. 479, 4 Sup. Ct. 525, 28 L. Ed. 478, "that if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another, under an agreement that they are to be held as security for the debt due from the real owner to his creditor,—the latter acting in good faith, and for the purpose only of securing the payment of that debt without incurring the responsibility of a shareholder,—he (the creditor) will not, although the real owner may, be treated as a shareholder, within the meaning of section 5151." The facts in *Anderson v. Warehouse Co.* differ but little from the facts disclosed in this record, and this case is governed by that, unless the one distinction insisted upon by the plaintiff in error must be recognized, namely, that the turning of the shares in the Helena National Bank into shares of the First National Bank of Helena was effected without the consent or authority of Ashby, the pledgor, and therefore was a wrongful conversion, which made the trust company the absolute owner of the stock, and liable for the assessment upon it, notwithstanding its being taken in the name of Peterson. This proposition is subject to more than one objection. In the first place, if the change was made

without Ashby's consent or authority, it was nevertheless a matter of election on his part whether he would ratify it; and, in the second place, it is not shown by the statement of facts that the consolidation and the substitution of one stock for the other were not effected by his authority, or were not afterwards ratified by him, nor that they were not effected by the authority of, or afterwards ratified by, his assignee, Ford. Neither is it shown that the assignee, under the law, and by order of the court, and by the consent of Ashby, did not have authority to consent to the substitution. The letters show that the trust company desired Ashby's consent, and that Edgerton did not think it likely that he would give it, but that does not prove that it was not in fact obtained. It is fairly inferable from the letters of the assignee that before hearing from the trust company, and presumably from the beginning, he knew of the scheme of consolidation; and it may well be supposed that he approved it. The fact of subsequent consent and ratification by him is quite clear. It was alleged in the declaration, and the plaintiff in error therefore had the burden of proof, that the trust company "purchased and became the owner of 120 shares of the capital stock of the said First National Bank of Helena." To establish that averment it was necessary to show that the original shares, confessedly held as collateral, were wrongfully converted into the new stock without the consent of the pledgor; but the fact is not so stated in the agreement, the letters and other circumstances all indicate the contrary, and the general finding of the court is conclusive of the question. The judgment below is affirmed.

NICHOLS et al. v. HAINES.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 627.

1. DAMAGES—CONSTRUCTION OF PROVISION IN CONTRACT.

A provision in a contract for the purchase of a crop of oranges, then upon the trees, for a lump sum, that the purchaser "is also to pay the party of the second part \$1,500 at the time of making this contract as part payment of the entire purchase price of said fruit, and, in case the said party of the first part refuses or fails to comply with the conditions of this contract, then the said payment of \$1,500 is to be forfeited," is one for a forfeiture, and not for liquidated damages.

2. ASSUMPSIT—PROOF OF CONTRACT—SEAL.

In an action in assumpsit based on a written contract which was not required to be under seal, the authority of the agent who signed the defendant's name to such contract need not be shown to have been under seal, although he affixed a seal to the signature of his principal.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This is an action of assumpsit brought by Harriet M. Haines, as executrix of the last will of B. F. Haines, against Elisha R. Nichols and Robert B. Gillies, co-partners doing business as E. R. Nichols & Co., to recover money alleged to be due on the following contract:

"This contract, made this 30th day of November, A. D. 1894, between E. R. Nichols & Co., of the county of Cook and state of Illinois, party of the

first part, and B. F. Haines, of the county of Volusia, state of Florida, party of the second part: E. R. Nichols & Co., party of the first part, has purchased from said party of the second part the entire crop of marketable oranges in the grove known as the 'B. F. Haines Grove,' in Volusia county and state of Florida. Said grove is estimated to contain 7,000 boxes of oranges, more or less, at \$5,000, with the right to said party of the first part to have said oranges picked and packed as he desires. And the party of the second part hereby agrees not to pick or ship said oranges, and not to sell the same to any other person, and that, until the fruit is removed by the party of the first part, the said party of the second part is not to give any one permission to enter the above premises who will in any way interfere with or take said fruit. Said fruit is to be taken off the trees on or before the first day of February, 1895, in such quantities as desired by the party of the first part, unless the time for the removal of said fruit is extended by mutual agreement. The fruit is to be [paid for] as follows: \$300 for each car, as fast as picked, until the balance of \$5,000 is paid. And E. R. Nichols & Co., the said party of the first part, is also to pay the party of the second part \$1,500 at the time of making this contract, as part payment of the entire purchase price of said fruit; and, in case the said party of the first part refuses or fails to comply with the conditions of this contract, then the said payment of \$1,500 is to be forfeited. Witness our hands and seals the day and year above written.

E. R. Nichols & Co. [Seal.]
 "B. F. Haines. [Seal.]"

The declaration contained common counts, besides a special count on the contract. The defendants pleaded (1) the destruction of the crop of oranges by freezing before February 1, 1895; (2) the payment to Haines in his lifetime of the sum of \$1,500 as liquidated and agreed damages; (3) non assumpsit; (4) that there was no crop nor any quantity of marketable oranges on the plantation referred to in the contract on November 30, 1894, or thereafter at any time before and including February 1, 1895; and (5) non est factum. To the fourth plea a demurrer was sustained, and upon the other pleas issue was joined. There was a trial by jury, which, in obedience to a peremptory instruction, returned a verdict for the plaintiff for \$2,250, for which the court gave judgment. The assignment of error contains numerous specifications, but they need not be restated. It was admitted on the trial that \$4,500 was the sum agreed to be paid for the crop of oranges.

Herbert S. Duncombe, for plaintiffs in error.

Thomas M. Hoyne and John O'Connor, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The first error insisted upon is the admission of the testimony of Harriet M. Haines, who testified to certain conversations between Elisha R. Nichols and B. F. Haines, whose widow she said she was. It is a sufficient technical answer that she is not shown to have been the wife of the deceased at the time of the conversations concerning which she testified, but it is a more satisfactory answer that the testimony tended to prove nothing which was not established by the uncontradicted testimony of another witness, of whose competence and credibility there was no question. No evidence was offered by the defendants, there was no conflict in that offered by the plaintiff, and there was therefore no available error in the court's charge or in the refusal of instructions asked, unless in some essential respect there was a lack of evidence to justify the verdict for the plaintiff. Besides the \$1,500 paid at the time of the execution of the contract, there was a subsequent payment of \$1,000, and it is claimed that

the first sum should have been treated as liquidated damages, the payment of which discharged the plaintiffs in error from all further liability. The proposition is manifestly unsound. The evidence does not show the quantity or value of the oranges taken by the plaintiffs in error from the place. The stipulation in the contract is not for liquidated damages, but for a forfeiture, and there is nothing disclosed which requires it to be treated otherwise. If there remained unpaid upon the contract a sum less than \$1,500, say only \$500, it is evident that the plaintiff could be entitled to recover only that sum and interest; and the amount unpaid being greater than the stipulated forfeiture, and being definitely ascertainable, that amount, with interest, is the proper measure of the recovery.

The next contention is that the execution of the contract by the plaintiffs in error was not proved. Their co-partnership name was signed to the agreement by an agent whose authority, otherwise amply proven, was not shown by an instrument under seal. The contract is one to which a seal was not necessary. The action is in *assumpsit*, not *covenant*, and the seals attached may be regarded as surplusage. For authorities, see 1 Am. & Eng. Enc. Law (2d Ed.) p. 953.

It is suggested, further, that proper proof was not made of the plaintiff's appointment as administratrix. Her appointment was not specifically denied, and, if proof on the point was necessary, it is found in her own testimony, which in that respect was admitted without objection. The judgment below is affirmed.

NEW YORK, N. H. & H. R. CO. v. BAKER.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 51.

CARRIERS—LIABILITY FOR INJURY TO PASSENGER.

An act of the legislature of New York required the elevation of the track of a railroad in New York City, and created a municipal board, which was given entire charge of the work through a designated portion of the city. While the work was being done the railroad company constructed temporary tracks on either side of the structure being built, over which it ran its trains. Through the negligence of the employés of a contractor under the board, engaged in the work, a derrick was permitted to swing over one of the tracks, and struck a car in a passing train, injuring the plaintiff, who was a passenger therein. *Held*, that the state having taken the work entirely out of the hands of the railroad company, and placed it in the hands of others, over whom the company had no control, the latter was not liable for their negligence, or for the injury to the plaintiff, unless its own employés failed to exercise proper care to anticipate or avoid the danger.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error to the circuit court, Southern district of New York, to review a judgment in favor of defendant in error, who was plaintiff below, entered upon the verdict of a jury against plaintiff in error, who was defendant below. The action was brought to

recover damages for the loss of services of plaintiff's wife, caused by an injury received by her while a passenger on a train operated by defendant. The facts sufficiently appear in the opinion.

H. W. Taft, for plaintiff in error.

John J. Crawford, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The accident happened April 17, 1895, in that part of 4th avenue called "Park Avenue," near 109th street, New York City, at which place the work known as the "Fourth Avenue Improvement" was at that time in progress. The plaintiff's wife was riding in the last coach of a passenger train of defendant coming from Mt. Vernon to Grand Central Depot, New York City. The circumstances of the accident are accurately set forth in the brief of plaintiff in error as follows:

"The train was running past that portion of the avenue where there is now an elevated stone viaduct. The viaduct was not then completed, but the walls on either side were in process of construction. Trains were being run on a temporary wooden trestle which was built over the avenue, and outside of the walls of the viaduct. Incoming trains ran on the east of these walls; outgoing trains, on the west. At the place of the accident the walls which now sustain the roadbed were being erected, and a derrick was placed between the walls for the purpose of placing stone upon them. This derrick stood from 16 to 18 feet from the nearest rail of the incoming or south-bound track. * * * To the end of the derrick boom was fastened a fall and block, with a hook attached. The boom was elevated and lowered and the derrick swung by horse power. When the boom of the derrick was lowered sufficiently and swung towards the track, it projected over the track. * * * Just before the accident a stone had been placed upon the wall next to the south-bound track, and one of the inspectors in charge of the work had found fault with the way it was set, and had directed Flaherty [a subcontractor who was doing the masonry work] to reset it. At that time the chain, block and fall were over the place where the stone had been set on the wall. Flaherty gave the order to pick up the stone and reset it, the first direction being to throw the boom up. While the boom was being lifted, the train which carried Mrs. Baker passed by, the boom swung over the track, and the hook suspended from the chain in some way caught in one of the cars and threw the boom towards the south, causing it to strike against a guy rope and swing back. On the rebound some portion of the tackle struck one of the windows of the car in which Mrs. Baker was riding, causing the injuries complained of. The derrick and boom could be used in such a manner that the boom would not interfere with passing trains, and it was customary so to operate it. This was the first accident resulting from the use of this derrick, though it had been in use some months."

Manifestly, the proximate cause of the accident was a careless manipulation of the derrick by those who had it in operation. A single assignment of error has been presented in the argument, namely, that the trial judge erred in charging the jury as follows:

"If by due diligence on the part of those men who were handling the derrick * * * this accident might have been prevented, the plaintiff is entitled to a verdict;" and later on: "If it was the fault of those who were doing that work that caused this injury to this woman, the defendant is liable."

The roadbed and railroad on which the accident happened were owned by New York & Harlem Railroad Company. The defendant's trains were run over them under a lease made in 1848. The legisla-

ture of the state of New York, having determined to raise the grade of the railroad bridge at Harlem river, and the approaches thereto, provided for the changes necessary to that end by chapter 339, Laws 1892, and some amendatory acts (chapter 548, Laws 1894, and chapter 594, Laws 1896). The relevant parts of such legislation directed that the grade of the New York & Harlem Railroad be changed from 106th to 149th streets, and that the viaduct be adapted to the new grade line by raising the parapet walls, etc. So much of the work as consisted in raising the bridge and the approach from the north, it left the railroad company to do in its own way and at its own cost. As to so much, however, as lay south of the Harlem river, which included the location of the accident, it took the work entirely out of the hands of the railroad company, confiding the execution, direction, and superintendence of the work to a board to be known as the "Board of Improvement of Park Avenue above 106th Street, in the City of New York." This board was to consist of five members, two of them skilled engineers, all appointed by the mayor of New York, who was authorized to fill any vacancies that might occur. The board were given power to pass suitable by-laws, to select a presiding officer and a secretary, to keep records, and accounts, and were expressly required "to take entire charge and control of said improvement from 106th street to Harlem river, to execute the same in a substantial and workmanlike manner." They were further required to do such work as far as possible by contract. One half of the expense (but such half not to exceed \$750,000) was to be assessed upon property benefited and on the city at large. The other half was to be paid by the New York Central & Hudson River Railroad Company, or by the New York & Harlem. In pursuance of the powers conferred, and of the requirements of this act, the board for the improvement of Park avenue contracted with Norton & Hulsekemper for the doing of the work, under the superintendence of the "engineer of said board in charge, and such assistants and inspectors under him as may be appointed by him or by said board." Flaherty was a subcontractor of Norton & Hulsekemper.

The measure of responsibility of a railroad company to the passengers it contracts to carry is well settled, and the authorities cited on the argument do not conflict. The carrier is not an insurer of the safety of the passenger. For the careless or malicious act of a trespasser upon the track, tampering with the rails or switches, it would not be responsible, although it would be for any lack of "proper care" to protect against such interference. So, too, it would not be responsible for the carelessness of a workman employed by the owner of property contiguous to its line to blast out rock, whereby a flying fragment was thrown against a train, but it would be liable for lack of "proper care" in anticipating and guarding against the probable effects of blasting dangerously near its track. What is "proper care" in all such cases will depend upon, and probably vary with, the circumstances of each particular case. *Deyo v. Railroad Co.*, 34 N. Y. 9; *Worth v. Railway Co.* (C. C.) 51 Fed. 171; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Thomas v. Railroad Co.*, 148 Pa. St. 180, 23 Atl. 989; *Fredericks v. Railroad* (Pa. Sup.)

27 Atl. 689; *Missimer v. Railroad*, 17 Phila. 172. The degree of care required is well expressed in *Pennsylvania Co. v. Roy*, 102 U. S. 456, 26 L. Ed. 144, as follows:

"Although the carrier does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to the extent that he or his agents, when he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely. * * * [He must] observe the utmost caution characteristic of very careful, prudent men."

And this obligation the carrier cannot get rid of by any act of his which substitutes some one other than himself as the conservator of the safety of his track or of the vehicles which run upon it. Thus, if, instead of building, equipping, and managing its own road-bed and tracks, it leases from some other company the right to run upon that company's line, it is nevertheless its duty "to make the track hired as safe as the track owned." "It must see and know that the track is in good and safe condition, and that the trains of the other company are so ordered as not to interfere with the full discharge of its own duty to its own passengers, because such trains would be a danger against which it would be bound to provide." *Murray v. Railroad Co.*, 66 Conn. 512, 34 Atl. 506; *Thomas v. Railway Co.*, L. R. 6 Q. B. 266. If it allows some other railroad company to run trains on its track, it will be liable for damages to its own passengers from the mismanagement of such trains, the same as if they were operated by its own employes. *Railroad Co. v. Barron*, 5 Wall. 90, 18 L. Ed. 591. If it chooses to put the passenger, not into its own cars, but into those of some sleeping-car company which it runs with its trains, it owes the same duty of inspection as if they were its own; and the conductor and porter of the sleeping car "become in law, so far as the passenger is concerned, the servants and employes of the railroad company." *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Dwinnelle v. Railroad Co.*, 120 N. Y. 117, 24 N. E. 319. If, "whilst using its track for the carriage of passengers, a railroad company engages in a work to be done on its road, and in the immediate proximity of its track, negligence in the performance of which would, in the estimation and opinion of cautious persons, involve the hazard of obstruction to the passage of its cars, it would be just as incompetent for it, in the case of an accident to a passenger caused by an obstruction arising from negligence in the performance of such work, to show merely that it had placed the work in the hands of a contractor, and that the carelessness was caused by one of his employes, as it would be for it, in the case of an accident to a passenger arising from a want of skill in the management and conduct of the train, to show that such management and conduct had been let out to a contractor, and that the accident was due exclusively to the carelessness of one of his employes." *Railroad Co. v. Sanger*, 15 Grat. 230; *Carrieco v. Railway Co.*, 39 W. Va. 86, 19 S. E. 571.

It will be observed that through all these cases there runs the idea of choice,—the power to act or to refrain from acting. The company need not have taken a lease; it could have built and oper-

ated its own road. It need not have allowed an independent road to run cars on its track; it could have kept them off. It need not have carried its passengers in cars of another company; it could have provided its own. It need not have turned the work in the vicinity of its track over to an independent contractor; it could have done it by its own workmen, under the direction of its own engineers and inspectors. The case at bar is unlike any that have been cited supra, but is closely parallel to the one relied on by defendant, where the work which resulted in disastrous consequences was being prosecuted by the corporation of the city of London. *Daniel v. Railway Co.*, L. R. 3 C. P. 216; 594; on appeal, L. R. 5 H. L. 45. The fact that the accident happened on the road of a lessor company is not material. Under the authorities the situation is the same as if the defendant owned the roadbed and tracks of the New York & Harlem Company. But would the latter have been liable for the negligence of the men operating the derrick if the plaintiff had been one of its passengers riding in its cars? We think not. That road had no choice left to it. The state intervened, and directed that a work, which it had the power to require to be done, should be done, not by the railroad, nor even by the city, but by an independent board, in the creation of which the defendant had no voice, over whose selection of employes it had no control, with the discharge of whose functions it could not interfere, and whose operations it was powerless to prevent. Whether, knowing that such work was being done, and that the men engaged in it might be careless, and so produce disaster to defendant's cars and injury to its passengers, it "observed the utmost caution characteristic of very careful, prudent men," is another question,—one properly for the jury to decide upon consideration of all the circumstances of the case. But the charge went further. Under the court's instructions, the derrick gang or some or one of them being evidently negligent, the jury might have found the defendant liable, although they were satisfied that the utmost measure of human skill and vigilance had been exercised by the defendant in anticipating every possible danger and avoiding or guarding against it. Nor can we say that this instruction did not operate to the defendant's prejudice. The jury were directed to return a general verdict, and also to answer the following question:

"After the boom of the derrick or its attachments had begun moving towards the track, could the train have been slowed down or stopped after coming in sight in time to avoid the accident?"

They failed to answer the question, the foreman stating that they were about evenly divided upon it, but brought in a general verdict against the defendant. It would seem that the instruction that, independent of any negligence on the part of its own employes or of those of the lessor company, defendant could be held liable if the persons handling the derrick were negligent, must have been persuasive to such a result. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

CLAFLIN & KIMBALL v. MATHER ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 73.

1. ACTION—SPLITTING CAUSE OF ACTION BY AGREEMENT.

As the rule prohibiting the severance of a cause of action is for the benefit of the defendant, he may waive the rule, and consent to a division; and where, upon a consideration moving from him, the plaintiff enters into an agreement for forbearance as to a portion of his claim, defendant cannot plead a judgment on the remainder of the claim as a bar to a second action, brought after the time of forbearance agreed upon has expired.

2. SAME—CONDITIONAL SETTLEMENT OF PART OF CAUSE OF ACTION.

Plaintiff, which held claims against defendant, a corporation, growing out of a contract, accepted stock of defendant in satisfaction of a specified part of the claims upon certain conditions, to be performed by a time stated. The conditions not having been performed within such time, plaintiff tendered back the stock received. It had previously brought a suit on its unadjusted claims, which was then pending. *Held*, that the judgment in such suit could not be pleaded by defendant in bar of a subsequent suit upon the portion of the claims covered by the adjustment.

3. SAME.

Plaintiff, not having the right to sue on such portion of its claim at the time it commenced its first suit, could not be required to introduce its cause of action thereon into such suit by amendment after the same accrued.

In Error to the Circuit Court of the United States for the District of Connecticut.

F. L. Hungerford, for plaintiff in error.

C. E. Perkins, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In March, 1892, the parties entered into a written contract, by which the plaintiff became the exclusive agent for the sale of electric appliances and machinery which the defendant was then producing. Article 13 of the contract provided that the defendant should protect the plaintiff "from loss arising from mechanical or electrical defects in goods of their manufacture." On February 2, 1894—

"The defendant was indebted to the plaintiff for causes growing out of this contract, and was also indebted to certain banks in the city of Hartford, and, in order to enable it to continue in business, it became necessary for it to make some compromise of said claims, and to that end it was on said day agreed between the plaintiff and defendant that the defendant, by way of compromise, should pay to the plaintiff, and the plaintiff should accept in payment of these claims, the sum of fifteen thousand dollars (\$15,000) in the preferred stock of the defendant company at its par value, and pursuant to said agreement the defendant delivered to the plaintiff, and the plaintiff accepted, a certificate for said one hundred and fifty shares of said preferred stock, but it was made by agreement an express condition of said compromise that the said banks in Hartford to which the defendant was indebted should take the entire amount of their claims in the preferred stock of said company on or before January 1, 1895, and that there should be not less than fifteen thousand dollars (\$15,000) in cash put into the business of the company for the purpose of continuing it in business, and the plaintiff's right of action upon the claims in this suit was suspended until after the 1st day of January, 1895." "The banks in Hartford did not take any amount of their claims in the preferred stock of the defend-

ant, either before or after January 1, 1895, the sum of fifteen thousand dollars (\$15,000) in cash was not put into the business of said company for the purpose of continuing it, and the defendant company did not continue in business." "On the 17th day of January, 1895, the plaintiff tendered back to the defendant company the one hundred and fifty shares of preferred stock, and notified it that the conditions upon which the stock had been received had not been fulfilled, and that the agreement was, therefore, null and void."

On August 9, 1894, the plaintiff brought a suit in the circuit court of the United States for the district of Connecticut against the defendant to recover, under the provisions of article 13, for losses which had arisen to it as selling agent, and for moneys due as commissions and otherwise. No cause of action in this suit was included in the agreement of February, 1894. More particular statements in the complaint and bill of particulars were given of these claims. The cause was tried by the court, a jury having been waived, and judgment was rendered in April, 1897, for the defendant to recover, under a claim of set-off, one dollar and costs against the plaintiff. On January 17, 1895, after the agreement of compromise came to an end, the plaintiff brought a second suit in the same court against the defendant to recover for the amount due upon the claims which were attempted to be compromised, which consisted of losses for which indemnity had been promised by clause 13, and of moneys due to the plaintiff as a selling agent, which were sought to be recovered under the common counts. The defendant pleaded in bar the judgment in the first suit, upon the ground that the causes of action set forth in both suits were breaches of the same clause, and accrued, if at all, before the bringing of the first suit, and that the items in the bill of particulars in each suit were under the same contract, and matured before the date of the first suit, and that all the causes of action in the second suit might have been included in the issues upon the trial of the first suit. The reply to this answer set up the matter contained in the agreement of compromise of February, 1894, to which the defendant demurred. The demurrer was sustained by the court, and this writ of error was brought to review the judgment for the defendant. (C. C.) 87 Fed. 795.

It is conceded that what is commonly known as "splitting a cause of action" is denounced by courts, or, as it is stated in *Secor v. Sturgis*, 16 N. Y. 548:

"The rule is fully established that an entire claim cannot be divided, and made the subject of several suits, and, if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment in either will be available as a bar in the other suits."

It is said in *Welles v. Rhodes*, 59 Conn. 498, 22 Atl. 286:

"It is now an established principle in our law of civil procedure that two suits shall not be brought for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights or to both, when such determination can be had as effectually and properly in one suit."

The courts of Connecticut have been rigorous in the enforcement of this principle. *Pinney v. Barnes*, 17 Conn. 420; *Town of Marlborough v. Sisson*, 31 Conn. 332; *Burritt v. Belfy*, 47 Conn. 323; *Wildman v. Wildman*, 70 Conn. 710, 41 Atl. 1.

The plaintiff, in answer to this proposition, says that the sets of claims which are sued upon in the second suit were, by the agreement of February, 1894, divided and severed from the sets of claims which were sued upon in the first suit, and that its right of action upon the claims included in that agreement was postponed and suspended, so that at the commencement of the first suit the plaintiff could not maintain an action for the causes of action described in the second suit. The defendant asserts that the agreement of February, 1894, was simply an executory agreement to compromise a portion of the debts due to the plaintiff, which never became executed, and that at the date of the first suit these claims, having matured and being admitted, could have been included in the complaint. The effect of the agreement was more than that of a mere executory agreement to compromise in case others did the same, and in case fresh capital should be added. The plaintiff received a certificate for 150 shares of preferred stock in full of a specified class of debts, if other events took place on or before January 1, 1895, and had thereby given forbearance for the payment in cash of these debts, and had, upon a consideration moving from the defendant, extended the time of payment in money till that date. If it had sued upon those debts before they had matured, or before a rescission and abandonment of the agreement, the defense of an agreement, for value received, of forbearance until January 1, 1895, could have been interposed. A recovery by suit brought before that date was prevented by what is called in the opinion of the circuit court "a temporary bar"; that is, the suit would have been prematurely brought. The plaintiff could not, after having received and accepted the certificate for preferred stock, and still insisting upon its right to the fruits of its agreement, sue upon the debts, until the time when by the terms of the agreement it was to become of no effect. This forbearance of payment of a part of its debts was at the instance of the defendant, who thereby waived the benefit of the rule of law that the plaintiff must, at the date of his first suit, include his existing and matured claims arising from the nonperformance of a single contract; in other words, as the rule prohibiting the severance of the causes of action is for the benefit of the defendant, he may waive the rule, and consent to a division. This principle is one of natural equity, and is forcibly asserted in *Mills v. Garrison*, 42 N. Y. 40; *Burritt v. Belfy*, 47 Conn. 323; *O'Beirne v. Lloyd*, 43 N. Y. 248; *Stickel v. Steel*, 41 Mich. 350, 1 N. W. 1046. It may be said that, if the defendant had waived his right to insist that plaintiff's debts or claims should be embraced in one suit, it was a temporary waiver, and that, the compromise agreement having become null on January 1, 1895, the claims which were not settled should have been introduced into the first suit by amendment. It is evident that, if introduced at all, they must have been introduced by leave of court, for the plaintiff had so thoroughly stated, by bill of particulars and by new counts, the extent of the demand for which it was suing, that additional claims must have been presented by an amendment of the complaint or of the bill of particulars. An amendment by new counts might have been allowed, but the allowance would have been, unless consented to, technically improper, because

the claims sought to be introduced by amendment could not have been sued upon at the date of the first suit, and new counts in an action at law should not be inserted by amendment "unless they might have been originally inserted therein." Gen. St. Conn. § 1023. It is, however, said that a statute of Connecticut (Gen. St. § 1050) permits the plaintiff in any action, founded in contract, for the recovery of damages, to offer evidence "of any damages that may have accrued from the same cause of action subsequent to the bringing of this suit, provided that he shall have given notice to the defendant of the damages so designed to be proved." This statute was evidently intended to refer to a breach of contract, the damages from which continue after the bringing of the suit. It is, however, probable that, under the liberal spirit which prevails in regard to amendments, and by a broad construction of this statute, the bill of particulars made a part of paragraph 8 of the first complaint would have been amended if such an amendment had been asked for. The question then arises, was it incumbent upon the plaintiff to ask and attempt to obtain this amendment? Inasmuch as the claims had been severed at the instance of the defendant, and the plaintiff was prevented from suing upon the claims in the second suit when the first suit was brought, we see no adequate reason for saying that it was the duty of the plaintiff to undertake to assemble the severed claims after January, 1895, in the then pending suit. The principle which prohibits severance of claims was established for the benefit of a defendant, and if he has waived, upon a consideration moving from himself and for his benefit, conformity to the rule, he ought not to insist upon the plaintiff's obedience to it. The judgment of the circuit court is reversed, with costs.

CROCKER v. CROCKER.

(Circuit Court, D. Massachusetts. December 15, 1899.)

No. 831.

HUSBAND AND WIFE—ACTION FOR ALIENATING HUSBAND'S AFFECTIONS.

A wife cannot, under the laws of Massachusetts, maintain an action against a third person for merely alienating the affections of her husband.

On Demurrer to Declaration.

Frank D. Allen, for plaintiff.

S. K. Hamilton, for defendant.

PUTNAM, Circuit Judge. This action was brought by a wife for the alienation of the affections of her husband. There is no charge in the declaration of criminal conversation, and the identity of the surnames of the parties suggests that the case may be one of a class of which *Hutcheson v. Peck*, 5 Johns. 196, is an example. If so, the ultimate determination of the suit, if it can be maintained at all, would involve much careful consideration. *Hutcheson v. Peck* was brought by the husband against his wife's father for loss of consortium, and Kent, then chief justice, says, in his opinion, that in a

suit of that nature between such parties the verdict should be for the defendant, unless he had been actuated by improper motives. At common law, at the time the wife was regarded, for many purposes, if not essentially, as a servant of the husband, actions of this character were maintained on such broad rules that it was hazardous for a stranger to assist the wife, even in case of sudden, actual stress. The later views of the law, however, yielding to the principles of modern civilization, together with the urgent necessity of securing freedom of individual action, and the admitted fact that actions of tort will not lie merely for sentimental injuries, unaccompanied by any act unlawful in itself, make it the more difficult to maintain any suit of the character of the case at bar without specific proof that the defendant was actuated by improper motives. Passing by this, and coming to the question whether or not an action of this class will lie in a jurisdiction where modern legislation permits a married woman to maintain actions for torts as if sole, there has been so much discussion whether a married woman may maintain such a suit as, under reverse circumstances, the husband may admittedly do since *Winsmore v. Greenbank*, Willes, 577, decided in 1745, that we think we could not add anything by a protracted opinion. Moreover, the necessity of this is, we think, obviated by the evident leaning of the supreme judicial court of Massachusetts against the maintenance of a suit of this character, as shown by the decisions which have been cited to us. We therefore will only undertake to point out the peculiar history of the law from which flows the result which we have reached.

Poll. Torts (4th Ed.), than which there is no higher authority, at page 209, observes, in reference to the general topic, as follows:

"There seems, in short, no reason why this class of wrongs should not be treated by the common law in a fairly simple and rational manner, and with results generally not much unlike those we actually find, only free from the anomalies and injustice which flow from disguising real analogies under transparent, but cumbrous, fictions. But, as a matter of history,—and pretty modern history,—the development of the law has been strangely halting and one-sided."

It follows, therefore, that the law applicable to this suit cannot be worked out philosophically, and we must look to its history. This is given with sufficient fullness by Mr. Pollock, at pages 208 to 212, to render it unnecessary to attempt to add anything to what is there stated. It will be seen that the common law gives the husband three different suits arising out of three different classes of circumstances. One is that "*per quod consortium amisit*," arising out of a physical injury done the wife by trespass. The development of the law led to including in this class cases of injury to the wife's person arising from mere negligence. The next class of cases consists of those commonly known as actions of "criminal conversation." The basis of this is trespass *vi et armis*, on the theory that the wife is not a free agent or separate person, and that, therefore, her consent is immaterial, so that the adulterer is pursued as a mere trespasser. The inapplicability of this class of actions as a remedy for a wrong complained of by the wife is at once apparent when it is remembered that

it lies at common law, in behalf of the husband, even though the wife may be the actual seducer. The third class, as shown by Mr. Pollock at page 212, includes, theoretically, actions for enticing away servants, and originated either at the common law or under the statute of laborers (23 Edw. III.; A. D. 1349), as to which Mr. Pollock seems to be doubtful. This Mr. Pollock makes the basis of the action for merely persuading or enticing the wife to live separately from her husband without sufficient cause; but it is with this class that *Hutcherson v. Peck*, and also the suit at bar, if it can be maintained, must stand. In *Lynch v. Knight*, 9 H. L. Cas. 577, the proposition came up practically as a moot question. It was contended that, if there were some illegal act,—in that case a slander,—which is recognized by the law as laying the basis of an action, the wife might recover, in connection with it, for the loss of the consortium of her husband; but the case apparently went off on the ground that the loss of consortium was not, in that instance, the natural and reasonable consequence of the slander. In the course of the opinion of Lord Campbell, which was read by Lord Brougham after the death of Lord Campbell, the view is expressed that, independently of any peculiar basis for a suit, the wife stood with practically the same rights of action as the husband; but Lord Wensleydale, who, as compared with Lord Campbell, must be regarded as the correct lawyer, shows that there was no foundation for such an action in the principles of the common law. The result of all the opinions was practically expressed in the syllabus as follows:

“Quære: Whether a wife can maintain an action against a third person for words occasioning to her the loss of the consortium of the husband?”

The law in England has not progressed beyond this. Eversley, in the *Law of the Domestic Relations* (2d Ed.; 1896), so far as we can discover, neither makes any mention of *Lynch v. Knight*, nor of the topic which this case involves. Lush, *Husb. & W.* (2d Ed.; 1896), at page 10, says as follows:

“If it be correct that the husband might recover damages in certain cases for an injury to the wife, there seems to be no good reason why a wife should not, under similar circumstances, sue for an injury to her husband inflicting consequential damage upon herself.”

This, however, does not attempt to state any rule of law, and the furthest that the author goes when he assumes to do this is as follows:

“It is conceived, therefore, that a wife could now recover damages for a libel concerning herself whereby she loses the consortium of her husband, though in the previous state of the law relating to married women it was considered doubtful whether such an action would lie.”

The pith of this statement, even if sustained by the English authorities, is that, if the wife has, as the basis of an action, some other matter which the law recognizes as such, she may include in the damages to be awarded the loss of consortium of her husband, if it is a natural and reasonable consequence of the injury for which the law gives her a remedy.

We are left, therefore, so far as the common law is concerned, with the statement of it as given by Mr. Pollock, according to which each

class of actions by the husband is based on some principle of law peculiarly applicable to him, affording no analogy out of which the present suit can spring. At the common law, as we have already said, the husband had an action for a trespass committed on the person of the wife, and for the consequences of a negligent act through which the wife suffered personal injury; but, even in those jurisdictions where the wife has been given a sole cause of action for tort, it has been found necessary to apply to the legislature before a like action could be given her, even for the maiming of the husband, through which her pecuniary support, to which she has been accustomed, might be taken away. We believe that, so far as we can read the views of the supreme judicial court of Massachusetts,—which would guide us in this case if positively expressed,—the relief to be obtained by the wife in actions of this nature in this state must originate from the same source.

There is nothing in the declaration showing where the alleged cause of action arose; so that, although the plaintiff is described as a citizen of Rhode Island, suggesting that possibly it might have originated in that state, we have treated the case as though it arose in Massachusetts. The declaration is adjudged insufficient, the demurrer is sustained, and judgment will be entered for the defendant, with costs, according to rule 20.

SHUTTS v. FIRST NAT. BANK OF AURORA.

(District Court, D. Indiana. December 29, 1899.)

(No. 6,050.)

1. BANKRUPTCY—PREFERENCES—PAYMENT OF MORTGAGE DEBT.

Where an insolvent debtor, within four months prior to the filing of a petition in bankruptcy against him, pays to a mortgage creditor the amount of the note secured by the mortgage, with the effect of enabling such creditor to obtain a larger percentage of his debt than other creditors of the same class, such creditor having reasonable cause to believe that it was intended thereby to give him a preference, the amount so paid may be recovered from the creditor by the debtor's trustee in bankruptcy.

2. SAME—JURISDICTION—SUITS BY TRUSTEE.

The district court, sitting as a court of bankruptcy, has jurisdiction, under the bankruptcy act, of a suit in equity by a trustee in bankruptcy against a mortgage creditor of the bankrupt to recover from the defendant sums of money paid to him by the bankrupt, within four months prior to the filing of the petition, in satisfaction of the note secured by the mortgage, where it is alleged that such payments constituted a preference voidable under the act.

In Equity. On demurrer to bill.

Dennis F. Cash and Frank J. Dwyer, for complainant.

E. E. Stephenson, for defendant.

BAKER, District Judge. This is a suit by the complainant, as trustee of the estate of Ernest H. Neibaum, a bankrupt, against the defendant, for the recovery of the amount of two payments alleged to have been made to it in fraud of the bankruptcy act. It

is alleged that the bankrupt was indebted to the bank by a note of \$1,200, secured by a mortgage, and that on November 7, 1898, the bankrupt paid on said indebtedness the sum of \$500, and that on January 3, 1899, the further sum of \$700 was paid, and that at the times these payments were respectively made to the defendant, and long before that time, the said Ernest H. Neibaum was insolvent, and that the effect of such payments was to enable the defendant to obtain a larger percentage of its indebtedness than any other creditor of the bankrupt of the same class, and at the times the defendant received the payments so made it had reasonable cause to believe that it was intended thereby to give it a preference, and that each of the payments was made to and received by the defendant within four months prior to the filing of the petition in bankruptcy against the said Ernest H. Neibaum. To this complaint the defendant has interposed a demurrer on the ground that the court is without jurisdiction to entertain the suit, and on the further ground that the complaint does not state facts sufficient to entitle the complainant to equitable relief. The last ground of demurrer does not seem to be seriously urged, and, in the opinion of the court, it is without merit. If the court possesses jurisdiction to entertain a suit to recover from the party receiving it money paid on a pre-existing debt when such payment is made in fraud of the bankruptcy act, then undoubtedly the complaint discloses a good cause of action.

Counsel for the defendant earnestly contends that the court possesses no jurisdiction to entertain a controversy at law or in equity for the recovery of any indebtedness by an adversary suit against a person who is a stranger to the bankruptcy proceeding. The defendant is not a party to the bankruptcy proceeding. The bankrupt, the trustee, and the creditors of the bankrupt include all who are, strictly speaking, parties to the bankruptcy proceeding. This court has held that it possesses jurisdiction to entertain a suit to recover property by adversary proceedings wherever a right of action is conferred on a trustee in bankruptcy for the recovery of property transferred or incumbered in fraud of creditors (*Carter v. Hobbs*, 92 Fed. 594); and it might dispose of the demurrer on the authority of that case. The insistence of counsel, however, justifies some further consideration of the question of jurisdiction. It is certainly true that the court has no jurisdiction unless it is conferred by the provisions of chapter 2, § 2, of the bankruptcy act. This section provides that: "The district courts are hereby made courts of bankruptcy and are hereby vested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers and during their respective terms as they are now or may be hereafter held," to accomplish the purposes specified in the 19 subdivisions of the section which follow. The section expressly invests the district courts with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to "cause the estate of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided." Manifestly, the controversies referred to cannot be those

relating to claims by creditors against the estates of bankrupts, for subdivision 2 of this section expressly provides for the disposition of all such claims and controversies. The controversies referred to in subdivision 7 must be those in reference to claims in favor of the estate against strangers to the bankruptcy proceedings proper,—that is, to controversies arising in the collection and administration of the estate,—or else we must impute to congress the folly of providing for the same thing in two independent subdivisions of the same section. By section 70, subd. “a,” the trustee is vested with the title of all the property of the bankrupt as of the date of the filing of the petition, including all property transferred in fraud of creditors. It is provided in subdivision “e” of this section that the trustee may avoid fraudulent transfers, and recover the property, or its value. By section 67, subd. “e,” all property fraudulently conveyed, incumbered, or transferred is made assets of the estate, and passes to the trustee, and it is made his duty to recover it by legal proceedings or otherwise; and by subdivision “f” of this section all levies, judgments, attachments, and liens obtained by legal proceedings within four months prior to the filing of the petition, and while the bankrupt is insolvent, are declared to be void, and the property passes to the trustee discharged of all such liens. By section 47, subd. “a,” it is made the duty of the trustee to collect and reduce to money the property and assets of the estate. It follows from these provisions that these must be the controversies in relation to the bankrupt's estate referred to in subdivision 7, and they are controversies between the trustee and some party, not a creditor, whose interest is adverse to the estate; and they must also, from their nature, be controversies at law or in equity. From the foregoing considerations it would seem to be manifest that the district courts as courts of bankruptcy are vested with such original jurisdiction at law and in equity as will enable them in a bankruptcy proceeding to determine controversies between a trustee and an adverse party in relation to the estate of the bankrupt, except as otherwise provided.

Some courts of the United States, in determining the jurisdiction conferred by the present bankruptcy act, have applied to it the decisions under the act of 1867, and have held, in effect, that section 2 only confers jurisdiction upon the district courts to entertain bankruptcy proceedings simply, as distinguished from actions at law and suits in equity. They have apparently assumed that the jurisdictional provisions of the two acts are substantially the same. After an attentive consideration of the two acts, I find myself unable to concur in this conclusion. In my opinion, the jurisdictional provisions of the present act are to be interpreted from the language employed by giving it its plain and ordinary meaning, with a view to effectuate, rather than to defeat or embarrass, the purposes sought to be accomplished by its enactment. The two acts are the same only in the parts constituting district courts courts of bankruptcy, while in other respects they employ different language. The present act invests the district courts, as courts of bankruptcy, with such original jurisdiction at law and in equity as will enable them to exercise jurisdiction in bankruptcy proceedings to do 19 different

classes of things, among which are the collection and administration of the estate and the determination of controversies in relation thereto, while the act of 1867 gave the courts original jurisdiction in all matters and proceedings in bankruptcy, and by other provisions limited it strictly to proceedings in bankruptcy. Jurisdiction is the power to hear and determine a matter, and its nature and extent must depend on the matter to be heard and determined; and, since the act of 1867 gave the power to hear and determine all matters and proceedings in bankruptcy as restricted by other provisions of the act, the jurisdiction thereby conferred was such as was necessary to administer such a proceeding, and was special and limited, and was required to be exercised in a summary manner, and not in accordance with the forms of procedure at law or in equity. On the other hand, under the present act the power to hear and determine by appropriate forms of procedure in a bankruptcy proceeding the 19 classes of matters specifically named is directly granted, and the jurisdiction must, therefore, be of the nature and extent necessary and appropriate to entertain and determine each matter named. Inasmuch as some of these matters are formal and administrative, and others are controversies at law and in equity,—such as the determination of controversies in relation to the estate of the bankrupt,—it would seem necessarily to follow that the jurisdiction conferred must be special, and limited in respect of the former, and must be exercised in a summary way, while in respect of the latter it must be the general original jurisdiction at law and in equity essential to the hearing and determination of controversies at law and in equity, and must be exercised in the formal modes of procedure required in such proceedings.

What effect, then, by way of limitation, has the exception at the end of subdivision 7 of section 2? The exception must, of necessity, refer to some other part or parts of the act providing for the determination of controversies relating to the estates of bankrupts. The act discloses three methods of determining controversies in relation to such estates, other than by a suit in the district court. Section 23 gives the circuit courts of the United States jurisdiction of certain "controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees and adverse claimants." Section 26 provides that "the trustee may submit to arbitration any controversies arising in the settlement of the estate"; and section 27 also provides that the trustee "may compromise any controversies arising in the administration of the estate." In opposition to these views, it is claimed, and some courts have held, that the exception is intended as a limitation on the jurisdiction conferred by subdivision 7 of section 2, and that such limitation is found in subdivision "b" of section 23, which is construed as a provision that all adversary suits brought by a trustee must be brought in a state court, except such as may be brought in the circuit courts of the United States. In the case of *Carter v. Hobbs*, supra, such contention is shown to be indefensible; and, in addition to what is there said, there are other considerations which show that a construction of subdivision "b" which would wholly deny to district courts juris-

diction to entertain and determine controversies between the trustee and a stranger to the bankruptcy proceeding is untenable. Such a construction would take from the district courts as courts of bankruptcy the power to hear and determine those "controversies in bankruptcy proceedings" which are made the subjects of appeal by section 24. Those controversies must be of a legal or equitable character to be the subject of appeal, and they must be heard and determined by the district courts as courts of bankruptcy, because the appeal allowed is from those courts. Therefore, if section 24 is to be given any force and effect, the district courts as courts of bankruptcy must have jurisdiction of controversies at law and in equity, otherwise there could be no appeals from such courts under this section. Appeals in bankruptcy proceedings proper are provided for in section 25, subd. "a." Besides, subdivision "b" of section 23 affords persuasive evidence that the original jurisdiction at law and in equity conferred upon district courts as courts of bankruptcy by subdivision 7 of section 2 is not thereby taken from them, and that the contention is unfounded that the state courts, to the exclusion of district courts, have jurisdiction of all adversary suits brought by trustees in the collection and administration of the bankrupt's estate, except such as may be brought in the circuit courts of the United States. If any legal proposition may be regarded as settled with axiomatic certainty, it is that jurisdiction of the subject-matter of a controversy must be conferred upon judicial tribunals by statutory authority, and that such jurisdiction cannot be created or conferred by the consent of parties. Consent will confer jurisdiction of the person, but jurisdiction of the person, whether obtained by consent or by the service of process, will confer no authority on a court to hear and determine a cause judicially, unless jurisdiction of the subject-matter in controversy has been conferred upon such court by statutory authority. The consent of the defendant provided for in subdivision "b" presupposes that the district courts as courts of bankruptcy have jurisdiction of the subject-matter of all controversies embraced therein, and that the consent provided for simply confers jurisdiction of the person of the defendant; thus giving the court jurisdiction of the defendant by consent, jurisdiction of the subject-matter already existing by authority of the statute. It is apparent that subdivision "b" does not operate as a limitation upon the jurisdiction of district courts over the subject-matter of controversies growing out of the settlement of estates of bankrupts, but is impliedly an affirmation of the existence of such jurisdiction over the subject-matter. A very similar provision is found in the present judiciary act of 1887-88, which provides that no civil suit shall be brought before the national courts against an inhabitant of the United States by any original process in any other district than that of which he is an inhabitant. No one would contend that this provision was a limitation of the jurisdiction over the subject-matter of any controversy conferred on those courts in other sections of the statute. It in no wise operates as a limitation on their jurisdiction over the subject-matter. If an inhabitant is sued in any other district than that of which he is an inhabitant,

he is not compellable to submit his person to the jurisdiction of that court, if, before an appearance, in proper time and manner he presents the objection. It is, however, a mere personal privilege, which he may waive; and he does waive it by a general appearance to the suit. Under subdivision "b" the right of the defendant is not greater, for if, when sued in a district court, he appears, and fails in apt time and manner to claim his personal privilege, he will be deemed to have consented to be sued in such court. In *Carter v. Hobbs*, *supra*, this court held that district courts have jurisdiction of suits to recover property transferred or incumbered in fraud of creditors without the consent of the defendant, and that principle rules the present suit. It is not necessary now to determine whether, in other classes of controversies, suits would abate if the defendant seasonably availed himself of his personal privilege. The demurrer is overruled.

In re HUBBARD.

(District Court, N. D. Illinois, N. D. December 23, 1899.)

BANKRUPTCY—EFFECT OF DISCHARGE—STAY OF PROCEEDINGS.

A discharge in bankruptcy will not release the bankrupt from the obligation to obey an order made by a state court requiring him to pay a certain sum per week for the support of his minor children; and therefore proceedings for the enforcement of such order, so far as relates to the collection of weekly installments due after the filing of the petition in bankruptcy, will not be stayed by the court of bankruptcy.

In Bankruptcy. On motion to modify an order restraining the further prosecution of pending proceedings in a state court.

McClellan & Spencer, for bankrupt.

KOHLSAAT, District Judge (orally). In this matter a restraining order was heretofore entered *ex parte*, upon a petition which did not show the purpose of the order of the state court, and this is a motion to modify said restraining order by vacating such portion thereof as restrains the enforcement of the payment of \$3.50 per week for the support of the bankrupt's two minor children subsequent to the filing of the petition herein. The bankruptcy act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness, but it was not intended to, nor does it, subvert the higher rule, which casts upon a parent the care and maintenance of his offspring. The welfare of the state, as also every principle of law, statutory, natural, and divine, demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children. Creditors, as well as all citizens, are interested in the enforcement of this rule. The restraining order heretofore entered will be vacated as to such portion as restrains the collection of said \$3.50 per week subsequent to the filing of the bankrupt's petition herein.

In re NEW YORK & W. WATER CO.

(District Court, S. D. New York. January 8, 1900.)

1. INVOLUNTARY BANKRUPTCY—CORPORATIONS—WATER COMPANY.

A water-supply company, engaged in the business of obtaining, transporting, and supplying pure water for municipal and domestic use, receiving compensation from consumers in the shape of fixed rentals, is not "engaged principally in trading or mercantile pursuits," within the meaning of Bankr. Act 1898, § 4b, although it obtains part of its water supply by purchase, and therefore is not liable to be adjudged bankrupt upon involuntary proceedings against it.

2. SAME.

Although a water company may be authorized by its charter to "buy, sell, use, and deal in water for power, manufacturing, and hydraulic purposes," yet, if its business is actually confined to supplying water for domestic consumption and to municipal fire departments, it cannot be said to be "engaged principally in trading or mercantile pursuits."

3. SAME—QUASI PUBLIC CORPORATIONS.

Seemingly, a corporation otherwise amenable to the bankruptcy law is not exempted from its operation on the ground of being a quasi public corporation and subserving a public use, if its franchise is assignable, so that its functions might be exercised by any transferee to whom its powers might pass through proceedings in bankruptcy.

In Bankruptcy.

Edward Harding, W. Kintzing Post, and William G. Choate, for petitioning creditors.

William C. Prime and Allan McCulloh, for alleged bankrupt.

BROWN, District Judge. This matter arises upon a petition of various creditors of the New York & Westchester Water Company to have that corporation adjudged a bankrupt, alleging its insolvency and several acts of bankruptcy. The answer to the petition as was ruled upon the hearing of the issue, a jury trial being waived, admitted in effect the insolvency of the corporation, but denied the acts of bankruptcy alleged, and also denied the jurisdiction of the court, on the ground that this corporation is not subject to the provisions of the bankrupt act (section 4b), because not "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits," as alleged in the petition. The evidence as respects the acts of bankruptcy is somewhat complicated; but from the conclusions I have arrived at on the other branches of the case, it will not be necessary to consider that subject.

The company was incorporated under the Laws of 1873 of the state of New York, for the supply of pure and wholesome water to the village of Westchester and others, under contract with the local authorities. By an amendment of its charter in 1895, its business and powers were extended so as to include the right "to accumulate, conduct, store, furnish, buy, sell, use and deal in water for power, manufacturing and hydraulic purposes." Its water supply was derived mainly from the Hutchinson river in Westchester county and from wells and other sources of supply owned or leased by the company. It had some 80 miles of mains laid in the streets of the several villages supplied with water, and received, both from the public authori-

ties, as well as from private citizens, large rentals for the supply of water distributed for private and public uses. On December 31, 1897, a contract was executed, dated December 2d, with the city of New York, whereby the latter authorized this company to tap the city's Bronx river supply pipe in Yonkers, and to draw therefrom not to exceed 500,000 gallons per day, to be paid for by the corporation at the rate of 10 cents per 1,000 gallons, by assigning to the city authorities "hydrant rentals" to become due from the city for water supplied to it by the company for fire protection in the Twenty-Fourth ward; with the privilege to the company of severing such connection with the supply pipe at pleasure and of discontinuing the taking of water from the city supply, and the privilege of subsequently again making connection and resuming the use of the water, as the company might desire.

For some period preceding the trial, how long does not appear, the company had been drawing from the city's supply at about the average rate allowed of 500,000 gallons per day. This was resorted to, as I infer from the evidence, to insure a uniform distribution to the company's customers, partly in consequence of inefficiency in one of the company's pumps and machinery, and the liability to occasional breakdowns, and partly to insure a full supply.

Although the company, by the amendment to its charter, above referred to, was empowered "to buy and sell water for power, manufacturing and hydraulic purposes," this power does not appear ever to have been used, since it has never supplied, according to the testimony, any water for those purposes, nor done any commercial or mercantile business; "but has confined itself entirely to obtaining and furnishing water for the customers, cities and municipal boroughs mentioned," that is, to the residents of the villages, and to the municipal corporations referred to, for fire purposes and the supply of fire hydrants. At Pelhamville the company had 16 driven wells; and besides the amount drawn from the city's supply pipe, the ordinary consumption from the company's own sources of supply was about 750,000 gallons daily.

I am of opinion that this water company is not within the provisions of the bankrupt act, because not "engaged principally in either trading or mercantile pursuits," in the sense in which I think those words are used. The question depends entirely upon the proper construction to be given to those words, since there are plainly no other words in the present act that could include an incorporated water company like this.

The act of 1898 is much more limited in its application to corporations than the act of 1867. By the latter act it was declared (section 5122, Rev. St.) to "apply to all moneyed, business or commercial corporations and joint stock companies." The present act is restricted to corporations "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits."

The intention of congress greatly to restrict the application of the present act appears manifest, not only from comparison of the phraseology of the two acts, but also from the report of the congressional conference committee upon this point, showing that at

least railroad and transportation corporations and banks were intended to be omitted and left to be dealt with under the state laws. 31 Cong. Rec. p. 6247, June 28, 1898. In the recent case of *In re Cameron Town Mut. Fire Lightning & Windstorm Ins. Co.* (D. C.) 96 Fed. 756, it was accordingly held, that the present act does not apply to a mutual insurance company, and the petition in that case was dismissed. On the point here considered, Phillips, J., observes:

"Can it be said that a company 'organized for the sole purpose of mutually insuring the property of the members, and for the purpose of paying any loss incurred by any member thereof by assessment,' is principally engaged in a mercantile pursuit? When the legislature changed the statute from 'moneyed, business or commercial corporations' to the language 'principally engaged in mercantile pursuits,' it is to be presumed it was done for a purpose. The word 'mercantile,' in its ordinary acceptance, pertains to the business of merchants, and has 'to do with trade, or the buying and selling of commodities.' A merchant is one who traffics, or who buys and sells goods or commodities. * * * The term 'mercantile pursuit' necessarily carries with it the idea of traffic, the buying of something from another or the selling of something to another, and is allied to trade. This concern has nothing in its business of the character of mercantile pursuit." 96 Fed. 757, 758.

The case of a water company like this, obtaining by purchase about two-fifths of the supply which it furnishes to its customers, is not so clearly excluded as a mutual insurance company. But in each case as it arises the limitations imposed by the act must be carefully observed. No such corporation can be subjected to the operation of the bankrupt law, nor can the court acquire jurisdiction over it, unless it is found to be "engaged principally in trading or mercantile pursuits." These words must be interpreted in the sense in which they are commonly used and received, and not in any strained or unnatural sense for the purpose of including or of excluding particular corporations.

In *Bouv. Law Dict.* a trader is defined as "one who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making a profit." *Black, Law Dict.*, says: "One whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings;" and the weight of authority seems to be, that the proper description of the business of a trader includes both buying and selling, either goods or merchandise, or other goods ordinarily the subject of traffic. *Per Lord Ellenborough, in Sutton v. Weeley, 7 East, 442; Thompson, C. J., in Wakeman v. Hoyt, 28 Fed. Cas. 1351; Lowell, J., in Re Chandler, 4 N. B. R. 213, 5 Fed. Cas. 447; In re Smith, 2 Low. 69, 22 Fed. Cas. 395; Love v. Love, 15 Fed. Cas. 999.*

The words "mercantile pursuits" may have a little broader signification than "trading." "Mercantile" is defined by the *Century Dictionary* as "having to do with trade or commerce; of or pertaining to merchants, or the traffic carried on by merchants; trading; commercial." It signifies for the most part the same thing as the word "trading"; and by "mercantile pursuits" is meant the buying and selling of goods or merchandise or dealing in the purchase and sale of commodities, and that too not occasionally or incidentally, but habitually as a business. *Norris v. Com., 27 Pa. St. 494; Com. v. Natural Gas Co., 32 Pittsb. Leg. J. 310.*

Selling merely the natural products of one's own land, it has been held, does not constitute trading, or a mercantile pursuit, even though some yearly purchases may be made by the seller in order to keep up his regular supply. *In re Woods*, 7 N. B. R. 128, Fed. Cas. No. 17,990; *Port v. Turton*, 2 Wils. 169; *In re Cleland*, 2 Ch. App. 466; *Ex parte Gallimore*, 2 Rose, 424. These terms are restricted also to dealings in merchandise, goods or chattels, the ordinary subjects of commerce; so that a railroad contractor, or a speculator in stocks, whether on his own account, or as broker, is not deemed a trader or merchant. *In re Smith*, 2 Low. 69, 22 Fed. Cas. 395; *In re Marston*, 5 Ben. 313, 16 Fed. Cas. 857; *In re Woodward*, 8 Ben. 563, 30 Fed. Cas. 542; *In re Moss*, 19 N. B. R. 132, 17 Fed. Cas. 901, per Choate, J. It has also been held that incidental purchases or sales by a person not otherwise a trader, will not make him such. Lord Eldon, *Ex parte Gallimore*, 2 Rose, 424; *Patten v. Browne*, 7 Taunt. 409; *In re Duff* (D. C.) 4 Fed. 519, per Choate, J.; *In re Kimball* (C. C.) 7 Fed. 461, per Lowell, J.

No doubt the powers of a corporation are to be determined by its charter and by the statutes applicable to it. The amendment of the charter of this corporation authorized it "to buy, sell, use and deal in water for power, manufacturing and hydraulic purposes." As above stated, however, the evidence is that it did not furnish water for these purposes; and under the bankrupt act the question is, not how extensive the company's powers may be, but in what pursuits the corporation is in fact principally engaged, and whether these pursuits are principally trading or mercantile.

In view of the above definitions and precedents, it seems to me a strained and unnatural use of terms to describe the ordinary business of a water-supply company as a "trading or mercantile pursuit." In common parlance, I think such a business would never be so described; and if only those corporations are subject to the bankrupt act that are engaged in "trading or mercantile pursuits" in the commonly received meaning of those words, I do not see how water-supply companies can fairly be held to be within the act. In the case of *First Nat. Bank v. Council Bluffs City Waterworks Co.*, 36 Hun, 412, 9 N. Y. Supp. 859, the court observes: "This water company was not a trading or banking corporation."

This view is confirmed by observing more particularly the precise nature of such a company's business, its undertaking, its methods and its mode of compensation.

Its business is to obtain pure water, and by means of mains and pipes, to transport it from its sources, often through long distances, under considerable pressure, so as to serve its customers by a running stream at the elevations desired.

Water is a natural product. In its natural condition, it is not usually considered merchandise. At the sources of supply, when the company's plant is once established, the water itself costs little or nothing. In its natural state, it has no commercial value. When bottled or inclosed in casks and put upon the market, it becomes a commodity, and is a subject of trade and commerce in the proper sense. But that is not the business, nor would that meet the re-

quirements, of a water-supply company. Such a company does not sell water as a commodity deliverable from hand to hand in specific quantities, or at any specific price. The characteristic feature of its business, as I have said, is to transport the water as a running stream and in its natural condition, from the sources of supply to the elevations at which it is to be served. Its cost to the company is chiefly the cost of transportation under pressure; and what its customers pay to the company, is not the price of any specific amount of water, as upon a direct sale, but for the use of the company's transportation service, in the form of rentals for the privilege of tapping its mains or pipes and drawing therefrom. The rentals no doubt vary with reference to the number and size of pipes used and the amount of water liable to be drawn; but when fixed, the rentals are payable irrespective of the particular amount drawn, or whether any water is drawn or not.

These circumstances seem wholly to distinguish the business of a water company from a trading or mercantile pursuit, as those words are commonly understood. The leading idea of the company is, not to trade or traffic in water as merchandise, but to transport it under pressure from distant sources to the consumer in the form above stated, renting out privileges to draw from its pipes. This characteristic feature naturally brings such companies within the classification of transportation companies, among which it is recognized and classified by the Laws of New York, in the revision of the laws entitled, "An act in relation to transportation corporations, excepting railroads." Laws 1890, c. 566. This chapter treats of ferry, navigation, stage-coach, tramway, pipe-line, waterworks, gas and electric light, telegraph and telephone, turnpike, plank-road and bridge corporations. This statutory classification is, I think, founded upon the true conception of the main functions of the company, which excludes it from the class of trading or mercantile pursuits intended by the bankrupt act.

The contract with the city by which the company recently secured about two-fifths of the water supplied by it to the different villages and municipal corporations for private and public uses, certainly does not change the essential character of its business, nor make it principally engaged in trading or commercial pursuits. That was but a single contract incidental to the general purpose of the corporation, and to enable it to furnish a regular and unfailing supply through its mains, but terminable at pleasure when its machinery and other sources of supply should be more complete.

Considerable has been said in argument on the question whether water companies like this, incorporated under the act of 1873, are quasi public corporations, exercising in some degree a governmental agency. So far as any such claim might exempt these corporations from taxation, it was rejected by the court of appeals in the Case of the Mills Waterworks Co., 97 N. Y. 97. The language of Danforth, J., in delivering the opinion of the court in that case, seems to deny the exercise by such companies of any public functions whatever, or that the company's means are devoted to any public use, or other than simply to the earning of money for the corporation's own use.

The general language employed seems to go beyond the requirements of the case. It is, however, well settled in other cases that such companies do subserve a public use so far as to justify the exercise of the right of eminent domain; and that the uses they subserve are none the less public, because procured through private enterprise. *Water Co. v. Stanley*, 39 Hun, 424, 426, affirmed in 103 N. Y. 650; *Waterworks Co. v. Bird*, 130 N. Y. 249, 259, 29 N. E. 246. And the same view has been frequently expressed in the federal courts. *San Diego Land & Town Co. v. City of National City*, 174 U. S. 739, 755, 19 Sup. Ct. 804, 43 L. Ed. 1154; *New Orleans Gas-light Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S. 650, 669, 6 Sup. Ct. 252, 29 L. Ed. 516; *Walla Walla Water Co. v. City of Walla Walla (C. C.)* 60 Fed. 957, 960.

I do not attach much importance, however, to any quasi public character, more or less, that water companies may have in consequence of the public uses they subserve. For the franchises of this company, by its contract with the local authorities, are assignable; so that there is nothing to prevent the exercise of its functions by any transferee to whom its powers might pass through bankruptcy proceedings, if lawfully subject to the operation of the bankrupt act. For the reasons previously stated, however, I do not think this company is within the act, and the petition is, therefore, dismissed.

In re EMSLIE et al.

(District Court, S. D. New York. January 4, 1900.)

1 MECHANICS' LIENS—SUFFICIENCY OF NOTICE.

Where the mechanic's lien law of the state (Laws N. Y. 1897, c. 418, § 9, subd. 6) provides that a notice of such lien, to bind the property, shall state, among other things, the time when the first and last items of work were performed or materials furnished, a notice which wholly omits to give these dates is insufficient, although the statute also provides that a "substantial compliance" with its provisions shall be sufficient for the validity of the lien.

2. BANKRUPTCY—DISSOLUTION OF LIENS—MECHANICS' LIENS.

Where, under the laws of the state, a mechanic's lien is created and made to attach to the property only upon the filing in the office of the county clerk of a notice claiming such lien, and not from the doing of the work or furnishing the materials, a lien acquired by the filing of such a notice within four months prior to the filing of a petition in bankruptcy against the insolvent debtor will be dissolved by his adjudication as a bankrupt, being a "lien obtained through legal proceedings," within the meaning of Bankr. Act, § 67f; and a proceeding in a state court for the foreclosure of such lien should be stayed.

3. SAME.

Where the mechanic's lien law of the state provides that the lien shall attach from the filing of a notice claiming such lien, which may be done at any time during the progress of the work, a lien acquired by a notice filed two or three months after the completion of the work is not within the terms of Bankr. Act, § 67d, providing that "liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, shall not be affected by this act," is a lien but for an antecedent debt, and will be dissolved by the adjudication of the debtor as a bankrupt within four months after the filing of the notice.

In Bankruptcy.

Charles H. Young, for petitioner.

T. V. W. Anthony, for trustee.

BROWN, District Judge. This is an application to stay a suit pending in the state court, brought by Thomas Smith to foreclose a mechanic's lien for \$1,700 due under a contract with the bankrupts, filed on April 28, 1899. On the next day, April 29th, the bankrupts made a general assignment for the benefit of their creditors; on May 29th an involuntary petition in bankruptcy was filed against them, and bankruptcy was adjudged on August 17th. On August 16th the suit now sought to be stayed was brought to foreclose the above lien, claiming \$1,618, with interest from February 11, 1899, to be due.

On a recent application of the same nature, a stay was granted (*In re Emslie* [D. C.] 97 Fed. 929) on the ground that the lien acquired by filing the notice was annulled by section 67f. A further question is here raised as to the sufficiency of the notice to create a lien, which requires a more particular examination of the New York statute and of the terms of the notice of lien.

The bankrupts in June, 1898, had contracted with one Zabriskie to build a dwelling house at Sands Point for \$17,319. On July 6, 1898, Smith contracted with the bankrupts to do the mason work and furnish mason's materials therefor for the sum of \$6,168. The contract was subsequently performed, together with extra work to the amount of \$150. For this Smith was paid by the bankrupts the sum of \$4,700 on account, leaving unpaid as now appears the sum of \$1,618. In the notice of lien filed April 28, 1899, Smith states "that all the work and material for which the claim is made, has been actually performed or furnished," and that a lien is claimed under chapter 342 of the Laws of 1885 of the State of New York; it also states that the work was done and the materials supplied "under contract" with the bankrupts, but does not state when the contract was made or completed, or when the last work was done or the last materials furnished, nor the agreed price or value of the work or materials to be performed or furnished; but only that "there remains due and unpaid the sum of \$1,700."

The petition of the trustee for a stay, alleges that the last materials were furnished and the last work performed on February 11, 1899, and that there remains due from Zabriskie to the bankrupts upon the contract of the latter, the sum of \$3,319. The answer of Smith to the petition avers that the work was all performed and materials furnished, including extra work, on February 11, 1899, on which day he received a payment of \$700, leaving a balance of \$1,700, for which sum he became "entitled to a lien on said February 11, 1899, * * * more than four months prior to the alleged bankruptcy herein."

The answer further alleges that Smith has paid all workmen for all the labor and wages under said contract, and has satisfied and discharged eight liens, which were filed prior to his lien and for which he was legally liable, amounting altogether to \$551.66, to which he

claims to be subrogated; and that the lien obtained by him was obtained under chapter 418 of the Laws of 1897.

1. It is objected that the notice filed by Smith was insufficient to create a lien, because it does not state the time when the first and last items of work and materials were furnished. The law governing the subject is found in chapter 418 of the Laws of 1897. Section 120 of that act repeals section 4 of the act of 1885, which prescribed the contents of notices filed under the act of 1885. The notice claimed a lien under the act of 1885. This false reference would be immaterial, if the notice in fact substantially conformed to the requirements of the act of 1897; since section 22 of the latter act provides that "a substantial compliance with its several provisions shall be sufficient for the validity of a lien."

Both acts (section 4, Laws 1885; section 9, subd. 4, Laws 1897) required the notice to state "the agreed price or value of the labor performed or to be performed, or materials furnished or to be furnished," which, as above stated, are omitted in Smith's notice. The act of 1897, moreover, introduced a new requirement under a separate subdivision, requiring a statement of, "6. The time when the first and last items of work were performed and materials were furnished," and this also is wholly omitted.

A compliance with this last requirement would subserve the useful purpose of showing on the face of the notice whether it was filed within the lawful period of 90 days or not (section 10); and it would thus tend to check the filing of fictitious liens after that period. Whatever the actual purpose of subdivision 6, the disregard of this new requirement inserted in the act of 1895 cannot be treated as immaterial. The fact that this new requirement was enacted shows that it was deemed important. Where the notice shows an endeavor to comply with all the different requirements of the act, any mere informality or slight variations will be disregarded. *Ringle v. Iron Works*, 149 N. Y. 439, 44 N. E. 175. But this cannot apply to a total nonobservance of one of the distinct and express statutory requirements. Article 22 itself shows that there must be at least a "substantial compliance with the several provisions of the statute" in order to give validity to the lien. Subdivision 6 of the act of 1897 is one of the distinct and several provisions of section 9; and that section provides that "the notice of lien shall state" what is required in the succeeding seven subdivisions. For wholly disregarding the sixth requirement I must, therefore, hold the notice of lien invalid. *Luscher v. Morris*, 18 Abb. N. C. 67; *Close v. Clark* (Com. Pl.) 9 N. Y. Supp. 538; *Brandt v. Verdon* (Com. Pl.) 18 N. Y. Supp. 119; *Foster v. Schneider* (Sup.) 2 N. Y. Supp. 875.

It is unnecessary to consider the effect of the further omission to state "the agreed price or value of the labor and materials furnished, or to be furnished" required by subdivision 4 of section 9, as this omission is of the same nature as the former.

2. Irrespective of any insufficiency in the notice filed, it was recently held by me in the case of *In re Emslie* (D. C.) 97 Fed. 929, that a preference for an antecedent debt, acquired within less than four months of the filing of the involuntary petition, through the

New York mechanic's lien law, was null and void under section 67 of the bankrupt act. As that question has been again fully argued, and the grounds of the former decision seem not to have been fully understood, I will state them somewhat more fully.

The mechanic's lien law of the state of New York is materially different from that of most of the states as respects the time when the lien arises. In most other states, as in Massachusetts, New Jersey, Pennsylvania, Wisconsin, Ohio, Michigan, Missouri, Nebraska, Maryland and others, a lien is created directly by the statute itself from the time the building is commenced or the work or materials furnished, and from the very act of doing the work, without any further act or proceeding whatever on the part of the lienor. A subsequent notice of the lien is, indeed, required to be filed in those states; but that is not for the purpose of creating the lien, but only to prevent its loss afterwards, and to give notice of it to the public. The lien itself, under that system, exists anterior to the notice and independently of it. Those liens arise as the work is done; they are strictly contemporaneous liens; they are given by the statute, and received by the creditor, "for a present consideration" within the spirit certainly, if not within the exact letter, of section 67d. They are, moreover, in no way in fraud of the bankrupt act, nor contrary to its intent or policy, because as stated by Deady, J., in *Re Coulter*, 2 Sawy. 42, 6 Fed. Cas. pp. 637, 638 (No. 3,276):

"The lien is only equivalent to the additional value which the creditor has by this means given the property of the debtor, and therefore does not diminish the assets of the latter applicable to the payment of his pre-existing debts."

Such liens stand, therefore, upon the same footing as mortgages, pledges, or any other security given upon a new and full consideration, and are in no way subject to the condemnation of the bankrupt act, as preferences of antecedent debts. It was upon these grounds that a lien acquired under the statute of Michigan was upheld in *Re Kirby-Denis* (D. C.) 94 Fed. 818; *Id.*, 36 C. C. A. 677, 95 Fed. 116.

Liens like the present, arising under the New York mechanic's lien law, are in all these respects fundamentally different.

(a) This lien was not acquired at the time of doing the work, nor until the notice was filed, from two to three months afterwards. By the New York statute (section 3) the lien exists only "from the time of filing the notice." Under this statute it has long been settled that the filing of the notice originates the lien; and that up to that time a mechanic has no greater right or equity than any other creditor; and that the notice when filed has no retroactive effect. *Payne v. Wilson*, 74 N. Y. 348; *McCorkle v. Herrman*, 117 N. Y. 297, 22 N. E. 948; *Stevens v. Ogden*, 130 N. Y. 182, 29 N. E. 229. The New York statute (section 10) does, indeed, expressly permit the notice to be filed "at any time during the progress of the work and the furnishing of the materials," and when that is done, the lien, as I understand, is fed by the work done under it, so as to make it in effect a contemporaneous lien upon "a present consideration," within section 67d, upon which a recovery could be had of whatever might be due at the time of trial. *Ringle v. Wallis Iron Works*, 85 Hun, 279, 32 N. Y. Supp. 1011. But in the present case that course was

not pursued. The creditor by voluntarily waiting from two to three months until after his work was done and the debt due, took the risks incident to his voluntary delay. The claim of the lienor in his answer that he had a lien on February 11th is without foundation.

(b) For the same reasons this lien was not for "a present consideration," so as to fall within the saving clause of section 67d; it was only for an antecedent debt, which that clause plainly intends to exclude.

(c) This lien, moreover, instead of being created by the statute alone and by the mere fact of doing the work, and without any other "proceeding" on the creditor's part, could only be obtained, as it was in fact obtained, by the creditor's own adverse proceeding against the debtor's property, by invoking the statutory remedy of a proceeding in rem, provided by the New York lien law for the collection of building debts.

(d) The lien, if upheld, will by so much deplete the debtor's assets, and create a preference for an antecedent debt in favor of a single creditor over all others.

(e) Such a preference violates the manifest purpose and policy of the bankrupt act, the fundamental law of which is equality of distribution among creditors.

(f) A voluntary preference of an antecedent debt by an insolvent within four months of bankruptcy is a fraud upon the act. *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481. An involuntary proceeding which accomplishes the same result, should be equally condemned.

(g) Section 67d, in saving liens which are for "a present consideration" and "not in fraud of the act," by necessary implication condemns liens like the present, which are not for "a present consideration, and which are in fraud of the act, by creating preferences.

(h) This lien was obtained through a "legal proceeding," within the meaning of section 67f. The words "legal proceeding" are not terms of art. They have no strictly technical meaning, but are here used in a general sense. In their narrower meaning, they signify a suit or proceeding at law or in equity. But in a wider sense, they embrace every proceeding established by law for acquiring a right, or enforcing a remedy. In this sense, the foreclosure of a mortgage by advertisement under the statute, is as truly a "legal proceeding" as a foreclosure by a suit in equity; the one is a statutory remedy out of court; the other, a remedy in and through the court. Both are equally legal proceedings. If there were doubt in which sense the expression "legal proceedings" is used in section 67f, the wider sense should be adopted, "Ut res magis valeat quam pereat," that the main object of the act, viz. equality among creditors, may be saved and not lost.

The mechanic's lien law of this state provides a statutory remedy, by a proceeding in rem, for the collection of building debts. It consists of two legal steps; one, for acquiring the lien, and thereby subjecting the property to the jurisdiction of the court; and the other, for foreclosing the lien as in actions of foreclosure in equity. Code Civ. Proc. §§ 3399-3401. Such is the action the court is here asked to stay. The two steps in the statutory proceeding are in-

dispensable to each other; each without the other would be worthless. They are manifestly but parts of one entire proceeding or remedy, having in view the single purpose of appropriating the property charged to the payment of the debt. The first legal step, filing the notice of claim, by creating the lien, operates in effect as process; it seizes upon the property, like an attachment, and subjects the res to the jurisdiction of the court; the second step applies it to the debt by foreclosure. The first step in acquiring the lien, is the indispensable foundation of all that follows; and the entire proceeding, considered as a whole, and as a single remedy provided by law, is as much a "legal proceeding" for the collection of a debt, as an ordinary suit prosecuted to judgment and execution for a similar purpose. There is no doubt, as it seems to me, that a preference for an antecedent debt sought to be obtained in this way against an insolvent, by notice of lien and suit and judgment thereon, would, if not discharged before sale, etc., be an act of bankruptcy under section 3 (3), as suffered or permitted through "legal proceedings," since the "preference" could not be consummated, or realized, except through "legal proceedings" in its narrowest sense, i. e. by proceedings in court; and if so, the preference thus acquired is void; as an assignment within section 3 (4) is not only an act of bankruptcy, but void as against subsequent bankruptcy proceedings within four months, without any express provision to that effect. *In re Gutwillig* (D. C.) 90 Fed. 475; *Id.*, 34 C. C. A. 377, 92 Fed. 337; *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098.

The bankrupt act of 1898 is much more sweeping than that of 1867, and shows unmistakably, as it seems to me, its intent to treat voluntary and involuntary preferences alike, and to annul both within the period of four months prior to bankruptcy. There is not the least reason in principle for any discrimination between them; if one is prohibited, the other should be; since the resulting inequality of distribution is the same in both. See *In re Vaughan* (D. C.) 97 Fed. 561. Section 3, accordingly, as above observed, makes a preference consummated through any "legal proceeding" suffered by the bankrupt an act of bankruptcy unless discharged.

In the case of *In re Gutwillig*, 34 C. C. A. 377, 92 Fed. 337, Wallace, C. J., referring to the provisions of section 67 says, page 339, 92 Fed., and page 379, 34 C. C. A.:

"These provisions manifest unmistakably the intention of congress not only not to permit preferences to be acquired upon the bankruptcy of a debtor when he is about to become a bankrupt, but also to annul all dispositions of his property, except to innocent purchasers, which will defeat the rights of creditors to a distribution by the instrumentalities and according to the scheme of the bankrupt act. * * * This clause must be interpreted in a sense which harmonizes with the general intent of the section as gathered from the other clauses."

(j) The intent of the act to avoid all preferential liens, voluntary or involuntary, is further shown by what is saved, as well as by what is expressly annulled. Only those are saved (section 67d) which (1) are obtained or accepted upon "a present consideration"; that is, such as do not deplete the estate, and hence do not presumptively work any preference; and which at the same time (2) are "not

in fraud of the act"; that is, do not work a preference, or defraud creditors of their equal rights under the act. *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481. This lien violates both these conditions. It is not saved by section 67d or any other provision of the act. Sections 60 and 67 embrace both voluntary and involuntary preferences; and the term "legal proceedings" in section 67f should be construed in the broad sense, as including a statutory proceeding to recover antecedent debts, which like this is partly in court and partly out of court.

It is urged that the words "legal proceedings" in section 67f should be held to mean the same thing as the words "any suit or proceeding at law or in equity" in section 67c. On the contrary, since it is patent from the general scope of section 67f that it was intended to be much broader in its application than section 67c, the use of the broader words "legal proceedings" in section 67f should be taken to have been deliberately chosen, so as not to confine its operation to preferences acquired through proceedings in court alone, but in order to effect with other sections a complete and harmonious execution of the bankrupt act, by avoiding all intentional preferences of antecedent debts, however acquired, whether voluntarily by the bankrupt's own act, or involuntarily by any adverse proceeding authorized by law and resorted to by the creditor for the same end.

As respects the hardships referred to, the New York statute seems itself to furnish a sufficient answer, in permitting the notice of lien to be filed "at any time during the progress of the work" for labor or materials "furnished or to be furnished." Sections 9, 10. The meritorious claims of workmen and others for their wages, are liberally provided for in the bankrupt act by a system of its own, section 64 (4); and if contractors or merchant dealers in building materials forbear to acquire contemporaneous liens, as they may do, by filing the early notices which the statute permits, and if by such laches, or by giving a personal credit for a season, they permit their claims to fall within the class of antecedent debts, I do not perceive any general principle of equity, or anything in the policy of the bankrupt law, that discriminates in their favor, or entitles them to a preference over other creditors.

The stay is granted.

In re POPE.

(District Court, S. D. Iowa, C. D. January 10, 1900.)

1. BANKRUPTCY—EXEMPTIONS—HOMESTEAD—ABANDONMENT.

Under the laws and judicial decisions of Iowa relating to homestead exemptions, a bankrupt will be entitled to have his homestead set apart to him as exempt, although he has, for several years past, leased it to third parties, instead of occupying it himself, provided he has not abandoned the property as a home, but has always intended to resume his occupancy of the premises at some future time.

2. SAME.

Where a married woman held title to a homestead in her own right, and she and her husband occupied it as a home until they were divorced, the decree of divorce making no provision as to the homestead, after which

she leased it to strangers, but without abandoning her intention to resume her occupancy of it at some future time, and she becomes bankrupt, she will be entitled to claim the homestead as exempt, notwithstanding the provisions of a state statute (Code Iowa, § 2973), giving the right of homestead "to the party to whom it is adjudged in a decree of divorce, during continued personal occupancy," as that statute refers only to cases in which the right to occupy the homestead is fixed by such a decree.

In Bankruptcy. Submitted on petition to review ruling of referee in bankruptcy.

Dudley & Coffin, for trustee.

James C. Hume, for bankrupt.

SHIRAS, District Judge. This case is submitted to the court upon the facts found and reported by the referee, and the question for determination is whether the referee ruled rightly in holding that the bankrupt is entitled to hold, as exempt, the premises, consisting of a house and lot in Des Moines, which she claims as a homestead. It appears that the title to the property is in the bankrupt, and has been since October, 1895, and that the money used in erecting the house was furnished by the bankrupt; that the bankrupt and her husband, John M. Pope, began to occupy the premises in August, 1893, as a homestead; that in November, 1895, the husband and wife separated, and in April, 1896, the wife, being the bankrupt, obtained a decree of divorce from her husband, the decree being wholly silent as to the homestead rights of the parties. In March, 1896, in order to make provision for the taxes accruing on the property, and to meet the interest coming due on a mortgage upon the property, the bankrupt rented the premises for one year, not intending to abandon the premises as a homestead, but with the intent to resume the occupancy thereof, leaving in the house part of her furniture; and this intent she has not changed, although she has continued to rent the premises to the original tenant. It also appears that the bankrupt has no children, but has dependent upon her her mother, whom she supports, and who at times has lived with her daughter in the premises claimed as a homestead. The referee found, as a matter of fact, that the bankrupt, in renting the premises, did not intend to abandon the premises as a home, and still has the purpose to return thereto, and therefore held that she was entitled to have the premises set apart to her as a homestead, under the provisions of the Code of Iowa (section 2972), which enacts that "the homestead of every family, whether owned by husband or wife, is exempt from judicial sale, where there is no special declaration of statute to the contrary." In construing this section, it has been uniformly held by the supreme court of Iowa that a temporary removal from the homestead, and renting it to third parties, would not be deemed to be an abandonment of the homestead, if the party having the homestead right intended to return to the premises, and resume the occupancy thereof. *Fyffe v. Beers*, 18 Iowa, 4; *Davis v. Kelley*, 14 Iowa, 523; *Morris v. Sargeant*, 18 Iowa, 90; *Bradshaw v. Hurst*, 57 Iowa, 745, 11 N. W. 672; *Dunton v. Woodbury*, 24 Iowa, 74; *Jones v. Blumenstein*, 77 Iowa, 361, 42 N. W. 321; *Painter v. Steffen*, 87 Iowa, 171, 54 N. W. 229.

In the light of the doctrine laid down in the cases cited, and in view of the facts found by the referee which are not contested, it is clear that the referee ruled correctly in holding that the premises, having been the homestead of the husband and wife, did not cease to be homestead of the wife, simply because she left them for a time intending to return thereto, nor would they cease to be her homestead because her husband abandoned her. *Woods v. Davis*, 34 Iowa, 264. It is not within the power of the husband to deprive his wife of her homestead rights, especially in property of which she holds the title in her own right. It is contended by counsel for the trustee that these rules, which were established under the Code of 1873, cannot be held applicable to a divorced woman; for the reason that in section 2973 of the Code of Iowa, now in force, it is enacted that "a widow or widower, though without children, shall be deemed to be the head of a family, within the meaning of this chapter, while continuing to occupy the real estate used as a homestead at the death of the husband or wife, and such right shall continue to the party to whom it is adjudged in a decree of divorce, during continued personal occupancy." As already stated, the decree of divorcement granted to the bankrupt contained no statement about the homestead, and therefore the bankrupt cannot base a right to the homestead upon the provisions of that decree. There may be cases wherein the title to the homestead is in one of the parties, and the court deems it proper to assign the homestead to the other, and in such cases the decree would be the basis upon which the right to occupy the premises after the divorce would be founded. This provision of the statute was intended to cover this class of cases, and its purpose is to enact that where, in divorce proceedings, the right to occupy the homestead premises is conferred, the right thus decreed will continue to exist only so long as the party to whom it is decreed actually occupies the premises. Thus, in cases wherein the title and actual ownership of the realty constituting the homestead is in the husband, the court may in the divorce decree award to the wife the right to occupy the premises as a homestead, but to maintain the right, thus granted, against the husband, the wife must continue to personally occupy the premises. If the contention on part of the trustee is sustained, it would, in effect, construe the statute to mean that a husband and wife, while being together, have the right to temporarily leave the homestead, renting the same to third parties, and creditors cannot subject the property to judicial sale; but that if the husband abandons the wife, leaving her, perhaps, with a family of children to support and care for, and the wife obtains a divorce from the husband, then, although the title to the homestead property is in the wife, in order to save the property as a homestead she must continuously occupy it. There can be no reason assigned why the rights of the creditors should be enlarged as against a woman left to struggle to support her family, under such circumstances, over what they would be if the husband and wife had not separated, and I do not believe that the state legislature intended to thus increase the burden upon the woman left to struggle alone over what it would have been if the husband had properly performed his duties in the marital relation. In the case

now before the court, the bankrupt's homestead right was not created by the decree of divorce, nor is it affected thereby. The right is derived, not from the terms of the divorce decree, but from the fact that she is the owner of the property, and that the character of a homestead was fully impressed thereon by the use and occupancy of the premises as a home by herself and her husband, and, as she has never in fact abandoned the premises as a homestead, she is entitled to hold the same as exempt as against the creditors represented by the trustee. The ruling of the referee is therefore affirmed.

UNITED STATES v. ALEXIS CLUB.

(District Court, E. D. Pennsylvania. December 30, 1899.)

INTERNAL REVENUE—RETAIL LIQUOR DEALERS—SOCIAL CLUBS.

An incorporated social club, which purchases a stock of liquors, and supplies the same to individual members for their consumption in its club rooms on their orders, and receives payment from them therefor, is a retail dealer in liquors, within the meaning of Rev. St. § 3244, which defines a retail dealer as any one who "sells or offers for sale" liquors in quantities less than five gallons at the same time, and is subject to the special internal revenue tax imposed by such section.

This was an action by the United States to recover a special internal revenue tax from defendant as a retail liquor dealer. On motion by defendant for judgment on special verdict.

James M. Beck, U. S. Atty., and Francis F. Kane, Asst. U. S. Atty., for the United States.

Thos. R. Elcock and Matthew R. Dittman, for defendant.

McPHERSON, District Judge. The facts upon which the question for decision arises appear in the following special verdict:

"The jury find in the above-entitled case the following facts:

"That the defendant is a bona fide organization organized in the year 1871, and incorporated under the laws of the state of Pennsylvania on the 10th day of December, 1881.

"That prior to July 1, 1897, and for some time after July 1, 1898, the said defendant had its club house and headquarters at the northeast corner of Seventh and Vine streets, in the city of Philadelphia, and in the First collection district of the state of Pennsylvania.

"That the said defendant had, during the period last mentioned, a bar on the third floor of the said club house, and kept a stock of malt and spirituous liquors for the consumption of the members of the said club only, and sold and furnished to them in quantities not exceeding five wine gallons; that is to say, simply by the glass or single drink. That the said liquors were purchased by a committee of the said club known as the 'refreshment committee,' which made a weekly report to the general weekly meeting of the members of the club of all purchases made on behalf of the said club. That after a resolution had been passed at such meeting of members for the payment of all purchases made, orders were signed by the president of the club, attested by the secretary, and the treasurer made payment out of the club's funds.

"That members of the club purchased with money from the steward checks which were used in payment for all refreshments bought, said checks being only sold to and used by members of the club. The furnishing of liquors was a mere incident to the use and enjoyment of the club. That, as a matter of fact, checks were not purchased in equal amounts by members of the club,

it being optional with each member to purchase none, or to purchase any quantity he might desire, and the money derived from the sale of such checks went into the treasury of the club.

"That the said club owned the property in fee simple at the northeast corner of Seventh and Vine streets, having owned the same since June, 1884, which cost the defendant, together with the library, over \$20,000. Literary and musical entertainments for the members, their families and friends, were given from time to time, and, among other modes of recreation, the club maintained a bowling alley, pool and billiards, chess, and checkers.

"That the membership of the said club was limited, and among the requisites for membership the applicant was required to be a citizen of the United States.

"That the collector of internal revenue for the First collection district aforesaid returned the said defendant organization as a retail liquor dealer, and assessed a tax of \$25 as such retail liquor dealer from July 1, 1897, to June 30, 1898. That said tax was not paid, and that, in accordance with law, a penalty of fifty per cent. was added, making a total indebtedness of \$37.50 for the period last mentioned.

"That the said collector, on the last day of July, 1898, again returned the said defendant organization as a retail liquor dealer, and assessed a tax of \$25 as such retail liquor dealer from July 1, 1898, to June 30, 1899, which latter sum not having been paid, the penalty of fifty per cent. was again added, making a further indebtedness of \$37.50, and a total indebtedness of \$75 for taxes and penalties claimed to be due the plaintiff by the defendant as such retail liquor dealer as aforesaid from July 1, 1897, to June 30, 1899.

"Upon the foregoing facts the jury find a special verdict in favor of the United States and against the defendant in the sum of seventy-five dollars (\$75), if the court should be of the opinion that the law is with the plaintiff; otherwise, they find for the defendant."

The question for decision is this: Upon the foregoing facts, is the defendant a retail dealer in liquors, within the meaning of section 3244 of the Revised Statutes? That section provides in its fourth clause that such dealers shall pay a special tax of \$25, and then goes on to give the following definition of a retail dealer: "Every person who sells or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors." That the defendant is a "person" is not now denied, and the question, therefore, may be stated thus: Is the transaction described by the special verdict such a "sale" of liquor by the club to its members as the section intends? If so, the defendant falls within the statutory definition, and must pay the tax. If not, no tax is imposed by the section.

Whether a club organized in good faith for the purpose of social enjoyment sells drink to its members when they order and receive this kind of refreshment, and pay for it, or whether the club is then engaged in distributing its stock of liquor among consuming members, has been much discussed and variously decided. The question has usually arisen upon the construction of a law licensing the sale of intoxicating drink, and the decisions that declare the transaction not to be a sale have naturally and properly been much influenced by the language of the particular law, and also by the fact that such a statute is generally—perhaps always—a penal statute, which punishes a violation of its provisions by fine and imprisonment, and is, therefore, to be construed strictly in favor of the accused. When such a statute speaks of a "dealer," or of a "dramshop keeper," or

of "selling by retail," or of "the business of selling," without defining these terms, the task of definition falls upon the trial court; and there may then be little difficulty in concluding that a social club does not "deal" in liquors, or is not engaged in the "business" of selling, within the common meaning of these words. Nearly all the cases that were decided before 1892 are collected and reviewed in an excellent article by Judge Endlich in 12 Cr. Law Mag. p. 541.

But section 3244 of the Revised Statutes differs in an important particular from the statutes that were construed in these cases, and in some others that are cited upon the defendant's brief. This section declares expressly what is meant by a retail "dealer," and necessarily implies what is meant by a "sale." Every person is a retail dealer "who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than five wine gallons at the same time." Nothing is said about selling as a business, or selling as an innkeeper; nor is there any other limitation of the words "sells or offers for sale" than the single limitation concerning the quantity to be sold at one time. In the face of language so clear, there is no room for construction. In my opinion, the plain meaning is that a single sale of spirits or wines, by any person, in a smaller quantity than five wine gallons, constitutes the seller a retail dealer in liquors, and makes him liable to pay to the United States a special tax of \$25.

Did the defendant, then, sell liquor to its members? I shall not review the irreconcilable cases upon this subject, nor make the superfluous attempt to produce a new argument in support of my conclusion. I content myself with saying, briefly, that I agree with the general opinion of the community, and hold the transaction to be a simple, ordinary sale. If a chartered club, such as the defendant, buys liquor, the legal title to this property is in the corporation, and not in the members. If the club, having a stock of liquor on hand, should resolve to go out of business, it would scarcely be denied that the liquor could be sold only by the corporation, and not by one or more of the members. The legal title, then, being in the corporation, it is further to be observed that, when the title passes to a consumer, it passes by a transaction that exhibits every element of a sale, and shows no outward sign of being anything else. The intending consumer asks to be served with a definite quantity of intoxicating drink. The owner of the legal title to the liquor, acting by a paid servant, agrees to the request, requires the price to be paid in cash, or accepts the consumer's promise to pay in the future, and thereupon delivers the subject of the bargain. Nothing else takes place, and, if this is not a sale, but is really a partial distribution of the common stock, the truth is so veiled that the participants in the transaction, I venture to assert, rarely suspect that they are taking part in anything but a commonplace sale. It is safe to say that—except, perhaps, among those lawyers that may be familiar with the discussion upon the subject—to order and receive liquor at a club is always regarded as a sale, and I see no sufficient reason for declining to accept the popular estimate of an act so generally known and so easily comprehended.

There are decisions in several states supporting a similar conclusion concerning the effect of state legislation, but it is perhaps of more value in this court to observe that the question has been several times before the federal tribunals, and that the position now taken by the government has been uniformly upheld. *U. S. v. Wittig*, Fed. Cas. No. 16,748; *U. S. v. Woods*, Id. 16,759; *U. S. v. Roliger*, Id. 16,190a; *U. S. v. Kallstrom*, 32 Int. Rev. Rec. 152; *U. S. v. Giller* (C. C.) 54 Fed. 656.

Perhaps the dictum of Judge Simonton in *U. S. v. Rennecke* (D. C.) 28 Fed. 847, that the section under consideration permits a casual sale to a friend as a matter of personal accommodation, may be sound; but, even if this be conceded, the dictum does not apply to the facts now before the court. This is a revenue law of the United States, coming up for construction in a federal court, and in such an inquiry the decisions of other federal judges upon the same statute are naturally entitled to much weight.

At the argument of this motion the defendant's counsel stated that the government's demand was resisted because of the fear that, if the tax in suit were decided to be lawful, the state of Pennsylvania might also demand that a license be taken out under the laws of the state. It is hardly necessary to say, in reply to this apprehension, that my decision does not attempt to construe the license laws of the state, and, moreover, that the supreme court of Pennsylvania has distinctly ruled that such laws do not require a license to be taken out by a bona fide social club. *Klein v. Livingston Club*, 177 Pa. St. 224, 35 Atl. 606, 34 L. R. A. 94. Until the legislature sees fit to change the law in this respect, the defendant is in no peril from the state. Neither (to reply to another suggestion of counsel) is a mere dining club—an association of persons that meet at intervals, and pay a certain sum for food and drink—liable to pay this special tax, as long as the club itself does not sell the liquor consumed. The meetings of such clubs are often held at a hotel, and the members separately, or a committee as agent for the others, buy the liquor from the landlord, and direct it to be delivered to the consumers. Obviously this is not a sale by the club or by its members, but a purchase, and bears no resemblance to the state of affairs found by the special verdict.

I may perhaps be permitted to add a single word in conclusion. If the result that I have reached is correct, I believe it to be in the line of enforcing equality before the law; and equality before the law is a principle of American society, than which there is none more vital. Privilege and a privileged class are, and ought to be, intolerable; and it comes irritatingly near to a privilege when social clubs, offering advantages of comfort and luxury that are only within the reach of the more prosperous, escape a share of the public burdens, because a refined reasoning declares that they are doing no more than distributing a common stock of liquor among their members, while the robust sense of the community, not excluding the club members themselves, knows the transaction to be a sale.

Judgment will be entered for the United States upon the special verdict.

AMERICAN GRAPHOPHONE CO. v. TALKING-MACHINE CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 618.

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A complainant is not entitled to a preliminary injunction against infringement of a patent by defendant where the proofs establish prima facie that defendant is manufacturing the articles claimed to infringe under a license given by a contract made by the president of the complainant corporation, in making which he acted, as was supposed by defendant, and so far as shown by the proofs, in fact on behalf of complainant.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Philip Mauro, for appellant.

Howard W. Hayes and John W. Munday, for appellees.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

SEAMAN, District Judge. This appeal is from an order denying the complainant's motion for a preliminary injunction in a suit for infringement of letters patent No. 341,214, issued May 4, 1886, to Bell and Tainter, now owned by the complainant, for "an improvement in recording and reproducing speech and other sounds," being one form of the instrument known as the "graphophone." The patent specifies 47 claims, which purport to cover both the mechanism for making the "sound record" and its product; and the alleged infringement consists in making duplicates of the product, but by a different means, except that the copy is made on the blank tablets manufactured by the complainant and its licensees for sale, sold in open market, and not covered by the patent in suit. The action is founded on claims 7, 8, 10, 17, and 18, of which claim 7 is the broadest, and reads as follows:

"(7) A sound record, consisting of a tablet or other solid body, having its surface cut or engraved with narrow lines of irregular or varied form, corresponding to sound waves, substantially as described."

The validity of the patent has been sustained on various claims in several adjudications, of which the reported cases are: Graphophone Co. v. Amet (C. C.) 74 Fed. 789; Same v. Walcutt (C. C.) 86 Fed. 468; Same v. Leeds (C. C.) 87 Fed. 873,—and the bill avers that the claims in question were expressly sustained, and like infringement adjudged, in the Walcutt Case on final hearing. On the other hand, the defendants contend that no issue was raised in either of the cases respecting the validity or application of these claims in the patent, that they are not, in terms, applicable to the duplication of sound records by other means not conflicting with that described in the patent, and that such use is expressly covered by a separate patent, No. 241,287, granted to the same patentees, of even date with the patent in suit, and not referred to in the bill. The main contention, however, in the arguments upon this appeal relates to a special defense of license for the alleged infringement,—the ground

on which preliminary injunction appears to have been refused by the district judge; and, if the order is sustainable on that basis, it is unnecessary to consider, before final hearing, the fundamental inquiry as to the scope of these claims.

The affidavits and exhibits in the record show substantially the following facts: The complainant is the owner of several patents relating to graphophones and phonographs, including the patent in suit, and as such was extensively engaged in the manufacture and sale of such instruments in 1892, and before and since that year, with its headquarters at Washington, D. C.; but its devices for making duplicates of sound records were unsuccessful, and the company was seeking other means to that end. The principal defendant, Douglass, prior to 1892, had devised methods and constructed apparatus for the purpose, and was engaged in making duplicate sound records, at Chicago, which were sold to and through the Chicago Central Phonograph Company, a licensee of the complainant, of which Douglass was superintendent; and he also claims to have sold them to the complainant. E. D. Easton was then "director of agencies" and one of the directors of the complainant, and subsequently became its president. On March 3, 1892, Easton called upon Douglass, in Chicago, in reference to the means so devised, which the latter held as a secret, and refused to divulge, and the meeting resulted in the acceptance by Douglass of an invitation to visit Washington for negotiations, where he made samples of his records, which were exhibited to the directors of complainant. On March 14, 1892, an agreement in writing was made between Douglass and Easton, providing for transfer to Easton of the process, in consideration, besides other matters, of certain royalties to be paid to Douglass; and Douglass was to make improvements, aid in procuring patents to be assigned to Easton, and meantime not to communicate the process to others. Provision was also made to execute further agreements to carry out such purposes. Subsequently this agreement was made more specific in a writing between the same parties, bearing date March 16, 1892; and another agreement, with like provisions, which was prepared by Easton, and is stated to have been signed at the same time, although bearing date March 17, 1892, was executed between Douglass and the complainant, whereby the invention of the former and the desire of the company to use his process are recited, and Douglass agrees, for substantially the same considerations named in the Easton contract, to disclose his method to the president and to the directors of agencies, and procure the apparatus therefor at the expense of the complainant. Thereupon Douglass entered the service of the complainant in Washington, and so remained until his return to Chicago, in July, and subsequently there were other contract relations between them from time to time, of which the details do not appear. Application for a patent for the Douglass process was made in accordance with the agreements, and letters patent No. 475,490 were issued to him May 24, 1892, but it is asserted that the process thus described was not successful. Improvements were afterwards made by Douglass, as contemplated by the agreement, were furnished to Easton, and are

alleged to have been employed by the complainant, to have proved successful; and to constitute the devices used in making the alleged infringement. When these improvements were thus turned over, Easton was president and general manager of the complainant, and Douglass claims that it was his understanding that Easton represented the company in all the transactions, and especially on this occasion, and that Easton stated their wish to enter more extensively into the manufacture of duplicates, and suggested an arrangement for the waiver of royalties by Douglass on the granting to him of a permanent license for like manufacture and sale; that this proposal was satisfactory to Douglass, and Easton agreed to send him an agreement to that effect, and sent by mail the following letter as such modification:

"Jan. 3rd, 1895.

"Mr. Leon F. Douglass, No. 98 Madison St., Chicago, Ills.—Dear Sir: Referring to the contract of March 16th, 1892, this is to evidence a modification of said contract as follows: Application is now pending for a patent for an improvement in your process for duplicating, and you have assigned the same to me before issue. You are hereby licensed under the patent already issued, and are authorized to use the process covered by the pending application in such way, personally, as you please, the consideration to me being a waiver of the royalty of two cents per cylinder specified in your contract with me of March 16th, 1892. It is understood that this is a personal license; that it is not assignable, nor salable; but that you may make, for sale, as many phonograph records as you please under this license. The above is not intended to in any way modify or affect any agreement you may have with the American Graphophone Company.

"Yours, truly,

E. D. Easton."

On this final arrangement the defendant Douglass entered into the manufacture of duplicates, the other defendants being employéés; and it is manifest that the defense of license is clearly presented, and even established *prima facie*, if the action and agreement of Easton is attributable to the complainant. The concluding clause in the agreement, that it is not intended to "modify or affect any agreement you may have with the American Graphophone Company," is explained by undisputed testimony as referring to collateral contracts not involved in this controversy, and so conceded by the affidavit of Easton, although counsel for the complainant do not recognize this distinction in their argument. No satisfactory explanation appears for making independent contracts, one with Easton individually and the other with his company, each with like provisions, which necessarily conflict unless treated as identical in purpose; and in the face of the relations existing between Easton and the complainant, and of the evident understanding on the part of Douglass that Easton acted on behalf of his company throughout, it cannot be presumed, from the mere separate form of the contracts, that the transactions were independent and antagonistic. If facts existed and entered into the understanding of the parties on which the agreements may be so construed, they do not appear in this record, and any issue thereupon must be left for determination at final hearing. A fundamental requisite is wanting, therefore, to establish the right to a preliminary injunction, and the motion was properly denied. The order of the circuit court is affirmed, with costs.

**BILLINGS & SPENCER CO. et al. v. VAN WAGONER & WILLIAMS
HARDWARE CO.**

(Circuit Court, N. D. Ohio, E. D. December 23, 1899.)

No. 5,612.

PATENTS—INVENTION—COMMUTATOR BAR FOR DYNAMO-ELECTRIC MACHINES.

The Billings patent, No. 392,490, for a commutator bar for dynamo-electric machines (claim 1), which covers, as an article of manufacture, a bar made of commercially pure copper, rolled or drawn, and subjected to the drop-forging process, in view of the prior art and the well-known character of the process by which the article is made, does not disclose patentable invention, and is void.

This was a suit in equity for infringement of a patent. On final hearing.

Thomas B. Hall, for complainants.

Squire, Sanders & Dempsey and Mitchell, Bartlett & Brownell, for defendant.

TAFT, Circuit Judge. This is a bill to enjoin the infringement of a patent issued to Billings November 6, 1888, for a commutator bar for dynamo-electric machines. A dynamo-electric machine produces electricity by the rotation of conducting coils of wire in close proximity to the poles of a powerful magnet. These conducting coils are wound upon an iron core, generally of a cylindrical form, which is journaled so as to rotate between the opposite poles of the magnet; the poles being shaped so as to embrace the cylindrical rotating part. The rotating part is known as the "armature," and the stationary magnet is known as the "field magnet." The commutator of a dynamo-electric machine is the means by which the generated electricity from the rotating armature is collected. The electric currents generated are alternating, and the commutator, as its name indicates, commutes or changes these currents, flowing first in one direction and then in another, into direct currents, flowing constantly in one direction. The endless coil of the armature is connected with a series of commutators or metallic plates, grouped together in cylindrical form about the same shaft as that upon which the armature rotates, so as to be concentric with it, and to rotate with it. These commutators are segmental in form, and arranged around the shaft so as to complete the cylinder. They are insulated from each other by insulating material, and their outer surfaces come in succession under contact brushes, and deliver to the brushes the current which they receive from the coil. Each commutator bar is connected to the generating coil.

The first claim of this patent, and the one which is said to be infringed, is as follows:

"(1) As an article of manufacture, a full-sized commutator bar for dynamo-electric machines, which has two arms whose longitudinal axes form an angle one with the other, and which is composed throughout of one piece of unalloyed copper of an almost homogeneous molecular structure,—the fiber or grain of the copper being so arranged as to be everywhere parallel with the axis of the arm, and of the greatest possible density,—substantially as and for the purpose described."

The specifications describe the method by which the article patented is made. Commercially pure copper, in a rolled or drawn form, is heated, and then upset or bent roughly into the general shape to be reached. The piece of copper is then subjected to the drop-forging process,—a well-known mode of dealing with metals,—by the use of a heavy steam hammer and die. It is admitted that the shape of the commutator bar of the patent is old. It is admitted that copper was a material frequently used before for making commutator bars. It is admitted that it was known and well understood that the density and uniformity of molecular structure throughout the copper increased its conductivity. In prior patents in which dynamo-electric machines were described, commutators made all of copper are shown by the specifications. The method of their making does not appear. Cast-copper commutator bars do not effect as good a result as commutator bars produced by the method of drop forging, for the reason that in the casting air bubbles are apt to form on or near the surface, which is brought into contact with the brushes, and, as the copper wears away, will produce sparking and a waste of electrical energy. Rolled or drawn copper bars, however, had been used before this time for the surface brought into contact with the brushes. These bars, made from commercially pure copper, have substantially the same density, and the same freedom from air bubbles, as the patent in suit. The process of drop forging does not increase the density or uniformity of molecular structure to an appreciable degree. The rolled or drawn copper bars, however, had not been bent so as to make the smaller arm, to which was connected the wire from the generating coil, of the same piece; but the upward arm had been riveted and soldered to the lower and principal arm of the commutator. The parallelism of the fiber with the longitudinal axes of the arms is something which has been dwelt upon at great length in the expert evidence for the complainant, but the result of the experiments of the expert, when subjected to cross-examination, shows that the increase in conductivity of the commutator due to this parallelism is practically unworthy of note. The fact is that the commutator bar is used to transmit a current carried through a very small wire from the coil, and the large increase in the mass of copper or other material used in its manufacture over the mass of copper wire through which the current is conducted from the coil makes the question of the conductivity of the commutator comparatively unimportant, because the larger mass will certainly take care of and conduct all the current that can come through the small wire. So far as the necessity for a highly-conductive surface with which to contact with the brushes is concerned, copper of practically the same density, homogeneity of molecular structure, and parallelism of fiber had been used before for the contact surface. The only question is whether the application of drop forging, so as to have the instrument made of one piece, with parallelism of fiber and the same density throughout, is patentable, in view of the fact that drop forging was a well-known method of treating metals, and in view of the fact that the advantage, if it be an advantage, of having the commutator made of

one piece, had been foreshadowed and suggested in the prior art. We think a negative answer must be given to this query. The invention was simply the taking of commercially pure copper, and drop-forging a commutator bar. The somewhat large-sounding phrases of the claim in describing the supposed characteristics of a commutator bar drop-forged from a bar of commercially pure copper ought not to mislead the court into giving a monopoly to a very simple instrument, made in a form, out of materials, and by methods, all of which were well known at the time the patent was taken out.

Much reliance is placed upon the fact that the commutator bar has had a large sale, to show that its adoption involved invention. This alone, however, does not prove the patentability of an alleged invention. The complainant company is a manufacturer of many articles by drop forging, and, in the rush for the manufacture of electrical machines, it might very well be that a large drop-forging establishment could, by reason of its economy in manufacture, secure the patronage of the three or four large electrical companies, by fixing a reasonable price for the instrument, and thus seem to secure an acquiescence in its claim of a patent right, because there was no sufficient motive for its infringement on the part of those to whom the commutators were offered for sale. However this may be, after reading all the voluminous record carefully I am clearly of opinion that the use of the drop forging for the commutator bar does not produce an article which, in view of the prior art, entitles its first discoverer and user to a patent and monopoly. The bill is dismissed.

SUPERIOR DRILL CO. et al. v. NEY MFG. CO.

(Circuit Court, N. D. Ohio, E. D. December 23, 1899.)

No. 5,924.

PATENTS—EFFECT OF ASSIGNMENT—REVIVOR OF SUIT FOR INFRINGEMENT.

An assignment of a patent does not carry with it the right to recover damages for past infringements, and one to whom the administrator of a deceased owner has assigned a patent is not entitled to revive a suit begun by the decedent to enjoin infringement, and also to recover damages for past infringements.

On Demurrer to Bill of Revivor.

F. W. Bond, for complainants.

Chas. R. Miller, for defendant.

TAFT, Circuit Judge. This is a bill to revive a suit in equity to restrain the infringement of a patent, and to recover damages for past infringements. The case proceeded to decree for injunction and to a reference to a master to ascertain and report damages. After that, the complainant in the former suit, Edwin L. Hall, died. His administratrix assigned the patent to the Superior Drill Company, and that company assigned one-half of its interest in the patent to its co-complainants. The heir of Edwin L. Hall also as-

signed his interest in the letters patent to the complainants. The interlocutory decree restraining further infringement was entered on November 30, 1887, and the master filed his report, awarding damages, shortly thereafter. These facts appear in the bill. The bill is demurred to.

Among other grounds of demurrer, it is urged that the complainants do not entitle themselves to succeed to the rights of Edwin L. Hall, because they only show assignments of the patents from his administratrix, and no assignment of the right to recover damages for past infringements. This, it seems to me, is a fatal defect in the bill, and must require the sustaining of the demurrer. Claims for damages for past trespasses do not pass by any conveyance of the thing trespassed upon. They are mere choses in action, independent of the thing injured, which pass to the administratrix as such, and which must be specifically assigned if they are to pass with the patent.

As the complainants do not show that, either by law or by assignment, they represent Hall, the former complainant, in all the rights which he sought to have vindicated by his bill, they are not entitled to revive the suit. The demurrer is sustained, and, if the complainants do not, within 10 days from the entry of this ruling, take leave to amend, the decree dismissing the bill on demurrer may be entered.

THE THORNLEY.

(Circuit Court of Appeals, Fifth Circuit. December 12, 1899.)

No. 841.

1. SALVAGE—AMOUNT OF RECOVERY—NATURE OF SERVICES.

Where a vessel, grounded on a dangerous reef, where she suffered injury from pounding, even during calm weather, was released, entirely through the efforts of her salvors, only in time to escape a gale, in which she would certainly have been destroyed, and she had in her cargo a large quantity of dynamite, on account of which the services rendered were believed at least to be attended with considerable risk, they cannot be considered as of a low order of salvage services, to be sufficiently compensated by payment for the actual labor expended.

2. SAME—REVIEW ON APPEAL.

Where an award made for salvage services is based on correct principles, and is not clearly exorbitant, it will not be interfered with on appeal, although it may be greater than the appellate court would have allowed.

3. SAME—VALIDITY OF CONTRACT FOR COMPENSATION.

A contract for salvage services, made at the instance of the master of a grounded vessel, who was also a part owner, after such services had commenced, and when the salvors expressed a willingness to continue such services, and allow the amount of compensation to be fixed by the courts, will be upheld, where there was no fraud, misrepresentation, or other misconduct on the part of the salvors, and it appeared that the master was as fully advised as any one of the situation, and as competent to act for himself and the other owners, and where by the contract the salvors relinquished any lien they might have had on the cargo salvaged, and agreed to accept a stipulated sum, the payment of which was entirely contingent upon the saving of the vessel.

4. SAME—CONSTRUCTION OF CONTRACT—VESSEL TO BE SAFELY DELIVERED IN PORT.

A salvage contract, by the terms of which no payment for the services rendered was to be made unless the vessel was delivered "safely" in port, does not require that she shall be delivered without injury, where, at the time the contract was made, she was grounded in such a position that she was continually receiving injury, but only that she shall be delivered in a safe place.

5. SAME—ACTIONS—PLEADING.

Where a libel to recover for salvage services set out a full history of such services, including a contract for compensation made after the services had commenced, and prayed for the sum named in the contract, to which libel no exceptions were filed, but the answer expressly put in issue the validity of the contract, under the liberal rules of pleading in admiralty, it is competent for the court, on finding the contract to be valid, to treat the suit as one based thereon, and to decree compensation to the libelants in accordance with its terms.

6. SAME—REASONABLENESS OF CONTRACT.

A contract for the payment of \$20,000 for salvage services, contingent upon their success, is not so exorbitant that it will not be enforced, where the vessel, which, with her cargo, was of the value of \$105,000, was grounded upon a dangerous reef, where vessels had previously gone to pieces, where there was no other assistance available, and as a result of the services both vessel and cargo were saved, with slight loss.¹

Appeal from the District Court of the United States for the Southern District of Florida.

On the 1st of December, 1898, the steamship Thornley, Legg, master, bound from New York to Tampico, ran on the part of the Florida coast known as "Pickles Reef." She had a cargo of about 3,800 tons of coal; also a quantity of dynamite, being four shipments, aggregating 3,350 cases, weighing net 79,829 kilograms, nearly 80 gross tons weight, which was stowed in the stern of the ship. The ship grounded at a quarter past 8 in the morning, running at full speed, and she went upon the reef from her bow to amidships before she stopped. It was within an hour and a half of high water. There were two large boulders under the ship, one beneath No. 2 hatch. There is a slight difference as to the soundings around the wreck. Both sides agree that she was lifted by the reef forward over three feet. The character of the bottom—boulders, with sharp coral projections with sand holes—partly accounts for variations in the soundings. After the tide had receded about one-fourth, Capt. Baker took casts of the lead as follows:

	Starboard Side.	Port Side.
Opposite stem.	17 feet.	17 feet.
Abreast fore chains.	14	19
Amidships.	19	19
Under engines.	17½	
Under stern.	27	20

The ship's proper draft was 20 feet 6 inches forward, and 21 feet 9 inches aft. At this time Capt. Baker says the ship was heading S. W. by W. ½ W. Capt. Legg claims he was heading one point more to the southward, but he admits his compass was "out" three degrees. His log book, on the day of the stranding, has an entry of a westerly deviation of 3° 20'. The wind was moderate from N. N. E. The diagram from the Coast Survey Chart, in the record, shows that the ship went on between Pickles and Conch Reefs, and had driven so far inshore as to be well to the westward of, and within, the range extending from the light on Alligator Reef to Conch Beacon. Capt. Legg at once reversed the engines full speed astern, and then ordered his men to jettison cargo. Capt. Baker, one of the libelants, a licensed wrecker on the Florida coast for 23 years, residing at Key Largo, observed the steamer aground, and

¹ Awards in federal courts, see 30 C. C. A. 280.

went out in his wrecking schooner, arriving at the Thornley between half past 9 and 10. There were already other vessels alongside,—two or three schooners, with small boats, four in all. Capt. Baker hailed Capt. Legg, and proposed to save his cargo being jettisoned, and offered to get barrels to take off the coal, and was finally permitted to take measures for getting the ship afloat. He then arranged to take out the Thornley's starboard anchor. The schooner was brought alongside, the lines of the other boats taken, and the steamer's starboard anchor (4,200 pounds), with 15 fathoms of chain and 90 fathoms of wire, carried out astern of the Thornley, and a line made fast to the steamer's winches. Subsequently the steamer Miami, a vessel of 1,500 tons, plying between Miami, Key West, and Havana, also took a hawser from the Thornley's port quarter, and brought all her power to bear, with the result that the Miami broke the hawser, and then went away. During the afternoon the crew was engaged discharging coal. Capt. Baker and the salvors brought barrels from shore, cut some up into tubs, and at 1 o'clock began discharging the coal, with the salvors' men also below filling the tubs. Later in the day an attempt was again made to heave on the anchor, aided by the engines full speed astern, but without effect. The salvors continued discharging coal throughout the night, working all the hatches except No. 3, which could not be used, as the winch at that hatch was required to heave on the anchor.

In the beginning no arrangement was made for compensation, as the work had been proceeding on the usual salvage basis. On the first day there were more than a hundred men from shore working on the ship. In the afternoon of that first day, Capt. Legg requested Capt. Baker to come into the cabin to have a talk. As to this interview Capt. Baker testifies as follows: "After all my men had gone to work, about one o'clock that same day, after I had come aboard of the ship, the captain said to me, 'I would like for you to go down in my cabin; I want to have a talk with you.' I went down in this cabin, and he told me that he had eighty tons of dynamite in his number four hatch, and he would like for me not to tell my men; that he thought they would not like to work aboard the ship, because they would be scared, and would go away, and would not work; and I told him I would not tell the men. He says then, 'I would like to enter into an agreement with you to say how much you will take my ship off for.' I then told him that I did not wish to enter into an agreement on the reef; that I had entered into several agreements, and found they were not worth the paper they were written on. If he entered into an agreement, he must state that he entered into it freely and voluntarily, and that I was not taking any advantage of him. He then asked me what I would take it off for. I told him that I would not make any offer, but what would he be willing to give. He told me, under the circumstances, with the dynamite on board, he thought it was a great risk, and said that twenty thousand dollars would be enough, and be reasonable for all interested. Then he wrote the contract,—agreement,—and then called his first and second officers down in the cabin, and they witnessed, and I did also. * * * Q. At what time, captain, was it that the contract was made and signed? A. It was somewhere about one o'clock p. m. Q. How long had you been working then? A. Not more than a half hour. Q. Now, previous to the making of this contract, did you have any conversation with the master in regard to the value of your services being determined by the court? A. We did, sir; and I offered to do it, and would rather have it settled by the court; and he asked me what court we had here, and I told him, 'United States admiralty court.' Q. What did he say as to that? A. He said he would rather enter into an agreement, and know what it would cost to relieve the ship; that he and his two brothers owned a large portion of the ship."

On the subject the master testifies as follows: "Q. Is it the fact that Baker offered to do this on a salvage basis, and take what the court gave him? A. I understood him to say that when he came on board at first. Q. But you preferred to do it by contract? A. After some trouble, some two or three hours considering the matter, I concluded it was better for the interests of all concerned that I should have an agreement with him. Q. And this agreement that was drawn up was in whose handwriting? A. My own. Q. Is this copy that is annexed to the libel (Exhibit A),—is this the copy of it? Just look at it. A. Yes; I consider that is. I haven't the original before me, but I consider

that is a copy. Q. Did you consult with Mr. Welling, the first officer, and Mr. Landers, the second officer, at the time of the making of this agreement? A. No. Q. I see their signatures are on as witnesses. A. Yes; I read the agreement in their presence, and asked them to sign it. Q. As near as you can tell, what time in the day was it when this agreement was made? A. I should say about four o'clock in the afternoon. Q. That is, you had already been on the reef then? A. For eight hours. Q. Had any work proceeded before the paper was signed? A. Yes. Q. You say that Captain Baker didn't really care for a written agreement of this kind? A. I don't know that he cared. What the man said to me was this: If I preferred to sign an agreement— It was words to the effect that he didn't consider it worth the paper it was written on. Q. Did you have any discussion before you reached the sum of \$20,000? A. No; I asked him to sign the agreement, and he said this. Q. Who suggested the \$20,000? A. He, himself. Q. Then you were not obliged to make any such agreement, and it was rather your idea to have the agreement? A. It was my own idea."

The salvage contract entered into reads as follows:

"S. S. Thornley.

"It is this day mutually agreed between John Legg, master of the above steamer, and Capt. Enoch Baker, master wrecker, that the said Enoch Baker agrees to float the ship off Florida reef, and deliver safely in the port of Key West, for the sum of \$20,000 (twenty thousand dollars). If the ship is not floated off the reef, no payment to be made.

"Dec. 1, A. D. 1898.

"[Sd.]

John Legg, Master.

"[Sd.]

Enoch W. Baker.

"Witnesses:

"S. Waldo Welling, 1st Officer.

"Frank Ellsworth Landers, 2d Officer."

At 7:20 p. m. the hawser was again hove taut, and engines went full speed astern, which was continued till 10:15, when the log shows the engines were stopped, "ship not moving." From 11 p. m. till morning the discharge of cargo was continued. At 7 a. m. Friday the steamer's stream anchor (2,000 or 2,500 pounds) was taken out by the wreckers' boat Winfield, with 180 fathoms of 5-inch manila rope from the port quarter, and another ineffectual attempt was made to heave the ship off. Between 9 and 10 a. m. the tugboat Geo. W. Childs came and pulled on the steamer. The log records: "Ship swinging slightly on center. Noon. Wind east. Sea raising. Ship rolling and grinding. Found 1 & 2 tanks leaking; also starboard 1 & 2 bilge and port No. 2. Wind freshening."

Capt. Legg testified: "Q. What was the effect during Friday on the vessel? A. She was striking heavily on the reef,—rolling heavily and grinding. The more solid the ship was on the reef, she didn't roll so much. Q. Did it have any effect upon your vessel in the way of showing leaks? A. Yes; she began to leak when she began to knock about. Q. When was that? A. During the early hours of Friday morning. Q. Where was that leak indicated? A. She leaked slightly in the bilge,—in the No. 2 hold and the bilges,—and she leaked considerably in the No. 1 and 2 tanks; No. 2 particularly. Q. How much water was there? A. I think during the night something like 34 inches of water accumulated in No. 2. Q. Were there any other indications of strain on the vessel besides this leak? A. Yes; I knew the ship was straining. I could see the effect of it on the cabin. The doors wouldn't close, and the mantelpiece in the cabin was smashed, and the marble hearth was broken. Q. The mantel was of marble? A. Yes, sir; and the hearth marble tiles. Q. They cracked? A. Yes."

Naturally, this state of things caused great alarm and solicitude regarding the dynamite, which was stowed aft between the cabin. Capt. Baker testifies: "On Friday morning, about two o'clock, the ship commenced to pound very heavily on the reef. I had gone down in the cabin to rest myself a little while, and I told the captain to call if he wanted me, and I would come immediately, and left a foreman to superintend the work. I hadn't been there

more than twenty minutes when the captain came and spoke to me, and asked me if I was not afraid to lie down there; that the ship was pounding so heavily that at any time one of those cartridges might explode, and explode the entire amount, and not only the vessel, but all the vessels around it, and possibly everybody would be killed, and the houses of Key Largo, too; that it would be as bad as if the entire amount should explode. Q. What was done then? A. I told him, then, to let me take the cargo. I says, 'I haven't a vessel that is large enough to take the whole of the cargo, but I can take the small schooners alongside, and put it on their decks, and take it out in the Gulf, and throw it overboard. He said, 'Have you ever handled dynamite?' and I said, 'No.' He said, 'If you take that dynamite on your vessels, and go out in the Gulf into fifty fathoms of water,' and he says the first case that strikes the bottom is likely to make a concussion that will explode all on the deck. He says then, says to me, 'Can't you send to Key West, and get a vessel large enough to take off enough to relieve the vessel the next tide?' I told him I thought I would relieve the ship the next tide."

The master of the tug Geo. W. Childs was finally induced to proceed to Key West for this additional vessel to take off the dynamite. On this occasion Capt. Legg had a conversation with Capt. Ocasta, a pilot not interested. Capt. Ocasta testifies as follows: "That very day, about the time I was talking to him, the tide then was about to slack, and the ship was pounding pretty heavily aft, and every time she would strike he would jar himself, and I says, 'What is the matter, captain?' and he says, 'Don't talk about what is the matter; I am scared.' 'We are standing here now,' he says, 'and we don't know what minute we may go up.' I said, 'You never heard of sailors going up; they always go down.' And he stated right there that there was eighty or eighty-four tons of dynamite in the No. 4 hatch."

The log notes that there was "quite a roll on," and that they continued discharge of cargo. At 8 p. m. another attempt was made to heave the vessel off, and at 12:15, shortly after midnight, they desisted, as the vessel did not move. Saturday morning they were again engaged casting over cargo, and found that tank No. 2 had leaked so as to fill 34 inches. At 9:45 again the attempt was made to heave the ship off and work the engines astern. The Thornley moved slightly, and then quickly, off the reef. Though the engines were stopped as soon as the motion astern was felt, they were unable to pick up the starboard anchor and chain, which had to be let go to allow the ship to go back far enough to float in deep water. Some 600 tons of coal had been taken out to lighten the ship. Except the occasional use of the ship's donkey engines, all this shoveling, hoisting, and discharging of coal was done by the wreckers. About 40 vessels were engaged, and after the first day some 204 men were employed in the day and night gangs into which this wreckage force was divided.

The Thornley then proceeded to Key West. Her log entries during the stranding were written up, and read over to the libellant, who, at the master's request, signed his name at the foot of each page, in attestation of the details recorded. On Sunday morning libellant arrived with the Thornley at Key West, where she was safely anchored, and the salvage service then concluded. All that day Sunday it blew a gale, so severe that even in the port of Key West the master had considerable difficulty in getting ashore from his steamer.

On December 7th a libel in admiralty was filed in the district court for the Southern district of Florida by Capt. Baker and his associate wreckers. It averred the facts of the stranding; the wrecking operations, with the result; and alleged that the master requested an agreement, which was set forth, a copy being appended to the libel; which concluded with the prayer "that this honorable court will be pleased to decree to the libellants the sum of \$20,000 as a reasonable and proper salvage in proportion to the value of said steamship and cargo." The answer denied that libellants had jettisoned as much as 600 tons of coal; that the reason the master sent the tug Geo. W. Childs to Key West "was for the reason that the salvors would not work at discharging the dynamite, which comprised a part of his cargo, and, further, for the reason that salvors had no vessel of sufficient tonnage to take the same." Regarding the contract, the answer continued: "Twelfth. For further answer to this libel, respondent says that it is true that he entered into a contract with salvors to

relieve his vessel for the sum of twenty thousand dollars (\$20,000.00), but that said contract was made by him while upon the reef, and without his having an opportunity to communicate with his owners or agents, and that the same was made under duress, and is out of all proportion to the value of the ship and cargo, the skill displayed, and the risk and danger of salvors. Thirteenth. For further answer to said libel, this respondent says that the services of the salvors were never especially meritorious nor skillful; that the service which they performed was an ordinary one, and consisted mainly of jettisoning cargo and running an anchor, and did not require the exercise of any great skill, nor were salvors or their vessel exposed at any time to any great risk." It was stipulated that the Thornley was worth \$80,000, and her cargo \$25,000, making in all \$105,000.

The district judge (Honorable James W. Locke) held (1) that there was no inconsistency in pleading the contract and averring the salvage services; (2) that the contract was entered into fairly, without fraud, concealment, or pressure, and the amount was neither exorbitant nor extortionate. A decree was rendered for libellant for the sum contracted for, less \$500, the value of the anchor and chain lost by the salvors, making a net recovery of \$19,500. The claimant of the Thornley has appealed, and assigned as error the action of the court in treating the suit as on contract, and in sustaining the contract, and in decreeing the sum of \$19,500 for the salvors' services.

Wilhelmus Mynderse, for appellant.

Harrington Putnam, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the facts as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

Pickles Reef is a well-known dangerous reef, being exposed to the full force of the sea from northeast and around to the south. The Oxford (D. C.) 66 Fed. 584, 590; Baker v. The Slobodna (D. C.) 35 Fed. 537. When the Thornley was aground on that reef, she was in a position of imminent peril. While the weather was clear she pounded, and from that and her violent grounding she was decidedly strained and set aleak. Such being her condition in ordinary weather, nothing but destruction was before her if she had remained aground to encounter the stormy weather that immediately followed her floating. Her release from this peril was entirely due to the services rendered by the libellant and his colleagues, which were onerous, faithful, continuous, and successful. Considering the consignment of explosives on board, supposed by the master, in accordance with popular opinion, to be very dangerous, there was an element of risk and danger, if not of gallantry and heroism, attendant upon the services. It is true there was no saving of life, but unquestionably, in the opinion of the master, there was great risking of life.

It is true that on the hearing evidence was brought forward tending to show that certain grades of dynamite, properly packed, are not dangerous, under ordinary circumstances, nor liable to be exploded by concussion; but the evidence is not sufficient for us to be able to say that dynamite of a high grade, like that on board the Thornley, is not dangerous, nor liable to be exploded by concussion, nor through decomposition, from which spontaneous explosion is said to sometimes follow. The evidence shows that these explosives require for safety great precaution in preparation, storing, handling, and shipping. They are not allowed to be carried on passenger ves-

sels, nor on all railroads, nor on any railroad except under special regulations. Under these circumstances, the salvage services rendered to the Thornley cannot be classed as a low order of salvage, to be sufficiently compensated on the basis of work and labor meritoriously rendered; and, considering the services and attendant circumstances, in connection with the stipulated value of the property salvaged, we are not able to say that the amount of \$19,500, salvage actually allowed by the district judge, was in violation of any correct principle applicable to salvage services, nor that it was exorbitant to any such extent as of itself to show reversible error.

We have just decided, in *The Trefusis*, 98 Fed. 314, that where the salvage compensation is based upon correct principles, and cannot be said to be exorbitant, this court will not interfere, although the amount actually awarded may be in excess of the sum the judges themselves would have allowed. The contract for salvage was entered into after the salvage services had commenced. It was entered into at the express instance and request of the master of the Thornley. There was no intimidation, oppression, concealment, misrepresentation, nor other misconduct on the part of the salvors. The master, who suggested the contract, was fully advised of the situation. Aside from his position of master, he was personally interested as an owner in the ship. Unless his mind was decidedly unsettled, through fear of danger on account of the explosives on board, he was in full possession of his faculties, able and competent to represent owners. By the contract, the salvors released any lien they might have on the cargo salvaged; limited their demands to \$20,000 in case of success, no matter what their time and expenses for service might be; and, in case of failure to successfully float the ship, they abandoned all claim, even to cargo saved by them.

"We do not say that, to impugn a salvage contract, such duress must be shown as would require a court of law to set aside an ordinary contract; but, where no such circumstances exist as amount to a moral compulsion, the contract should not be held bad simply because the price agreed to be paid turned out to be much greater than the services were actually worth. The presumptions are in favor of the validity of the contract (*The Helen and George*, Swab. 368; *The Medina*, 2 Prob. Div. 5), although, in passing upon the question of compulsion, the fact that the contract was made at sea, or under circumstances demanding immediate action, is an important consideration. If, when the contract is made, the price agreed to be paid appears to be just and reasonable, in view of the value of the property at stake, the danger from which it is to be rescued, the risk to the salvors and the salvaging property, the time and labor probably necessary to effect the salvage, and the contingency of losing all in case of failure, this sum ought not to be reduced by an unexpected success in accomplishing the work, unless the compensation for the work actually done be grossly exorbitant." *The Elfrida*, 172 U. S. 186, 197, 19 Sup. Ct. 146, 43 L. Ed. 413. Taking an excerpt from the same case (page 194, 172 U. S., page 148, 19 Sup. Ct., and page 416, 43 L. Ed.), as follows: "It may be said, in this connection, that the American and English courts are in entire accord in holding

that a contract which the master has been corruptly or recklessly induced to sign will be wholly disregarded,"—the learned proctor for the claimant contends that the reckless proffer of a contract is a better reason for disregarding his engagement than the reckless signing of such contract; and, further, that, from the apprehensions which the master felt in respect to the dynamite on board the Thornley, he was not in a proper frame of mind to make a contract imposing a serious burden upon his vessel, cargo, and owners. As we have already stated, the evidence in the record does not warrant the finding that, under the particular circumstances attendant upon the dynamite on board the Thornley, there was or was not any actual danger to the crew, salvors, or vessel. The apprehensions which the master felt and expressed appear to have been no more than the apprehensions that people not particularly informed as to the manufacture and explosiveness of dynamite feel in regard to the danger of explosion. In respect to such apprehensions, the master differed in no particular respect from the other people who had to deal with the cargo of the Thornley. The evidence in the record shows that in all matters concerning the cargo and preservation and interests of the Thornley, except, perhaps, in running her aground by keeping too far in shore, the master was particularly careful and attentive, and the result, in our minds, is that the master, during the whole time occupied in getting the Thornley afloat, was as fully advised and competent to take care of his own and his owners' interests as could be expected from shipmasters generally.

The suggestion of the proctor for claimants that the salvage contract does not bind the master nor the steamer to the full payment of \$20,000, we take, as he says he makes it, seriously; but, seriously, we see no good reason for his making it.

The proctor's further contention, that, under the terms of the contract, the specified amount was only to be paid upon the vessel's being delivered safely in the port of Key West, and that the word "safely" should be construed to mean intact, without damage or deterioration, is not well founded. At the time the contract was made, the vessel was on a reef, where she had been run with great violence, and was thumping and pounding. To hold, in this state of the case, that the contracting parties had in mind that the ship should be salvaged in such perfectly sound condition as she was before she ran on the reef is to do violence to the common sense of the case. "Safely delivered" meant delivered in a safe place, with no impending dangers, the same as "safely arrived," "safely moored," "safely anchored." "Safely," in such connection, does not mean that the ship is intact, without injury or damage resulting from her voyage.

It is assigned as error in this appeal that the court below erred in treating the libel as though it declared upon a contract, and was seeking recovery for the amount named in the contract. The contract for salvage was made after the salvage services had been commenced, and somewhat proceeded with, and the libel contains a statement of the entire case. The relief prayed for was for payment of the sum of \$20,000, the same sum named in the contract as reasonable and proper salvage. There were no exceptions filed to the libel.

It is not claimed there was any surprise or uncertainty. The answer expressly puts in issue the validity of the contract, asserting that the same was made under duress, and was out of all proportion to the value of the ship and cargo and the skill displayed, and the risk and danger of salvors.

In *Dupont de Nemours v. Vance*, 19 How. 162, 171, 15 L. Ed. 587, it is held:

"The rules of pleading in the admiralty are exceedingly simple and free from technical requirements. It is incumbent on the libellant to propound with distinctness the substantive facts on which he relies; to pray, either specially or generally, for the relief appropriate to them; and to ask for such process of the court as is suited to the action, whether in rem or in personam. It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defense, either in part or in whole, to the case made by the libel. The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance or departure in pleading, like those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel, because that entire case is not distinctly stated in the libel. Thus, in cases of collision, it frequently occurs that the libel alleges fault of the claimant's vessel; the answer denies it, and alleges fault of the libellant's vessel. The court finds, on the proofs, that both were in fault, and apportions the damages."

The rules here declared seem to be particularly applicable to the case in hand. We notice that it is common practice in the admiralty, in suits brought to specifically recover on salvage contracts, and the facts are all brought out, for the court, on setting aside the contract for cause, to at once proceed, without amendment to the pleadings, to award proper compensation for services actually rendered. See *Brooks v. The Adirondack* (D. C.) 2 Fed. 387; *The Young America* (D. C.) 20 Fed. 926; *The Elfrida*, 41 U. S. App. 585, 23 C. C. A. 527, 77 Fed. 754; *The Tornado*, 109 U. S. 110, 3 Sup. Ct. 78, 27 L. Ed. 874. Reversing the rule, where all facts are before the court, can work no hardship.

The learned district judge of the court below, in disposing of this case, said, among other things, as follows:

"The one important question in this case is whether the agreement made by the master of the steamship *Thornley* with the salvor should be recognized as valid and binding upon the owners. The contention that the agreement or contract entered into was but a unilateral contract; that the one party was bound, but the other was not; that the salvors were bound to take the vessel off for \$20,000, but that the master was not bound to pay that amount,—cannot be accepted. By the terms, the contracting parties were mutually bound; the master certainly bound to something, and, if to anything, it must be to a payment of the amount named. The defense that such agreement could not be considered binding, because the master had no opportunity to consult with his owners or underwriters, can have no weight. A master is a representative of the owners, and his contracts bind the property, whether made by their advice or not. The recognition of any other principle in the determination of admiralty liens would overthrow every established rule upon the subject. The supreme court, in the case of *Post v. Jones*, 19 How. 150, 15 L. Ed. 618, squarely declared that 'courts of admiralty will enforce contracts for salvage services and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain'; and in the more recent case of *The Elfrida*, 19 Sup. Ct. 146, 43 L. Ed. 413, reaffirmed the doctrine therein laid down, approving the cases in which it had been recognized, and quoting from numerous of them.

Examining this case in the light of the rule declared in *Post v. Jones*, supra, can it be said that the salvors took any advantage of their power to make an unreasonable bargain? On the contrary, they expressed themselves willing to render any assistance in their power, regardless of any contract. There was no pressure brought to bear upon the master,—neither concealment, fraud, nor deceit of any kind. All the advice, aid, and assistance required was tendered. Nor was the amount so contracted for so exorbitant or extortionate as to demand an ignoring of the agreement. It may be, possibly, slightly larger than I should have given had no contract been made; but not only the supreme court, but the English courts, have frequently declared that, in the matter of a contract for salvage, the mere fact that it was a hard bargain will not justify setting it aside. The vessel was in a position of danger. It was impossible for the master to relieve her. Every hour she remained there was one of peril. The locality was one of the most dangerous on a dangerous reef, where the records of this court show that vessels have gone to pieces more than once, and the service rendered by the salvors the only assistance available. The work was well done, with as good dispatch as possible under the circumstances, and the property relieved without loss or damage, except the small value of the coal jettisoned. The number of men rendered necessary on account of the character of the work, and the importance of its being continued without remission, gives personally no more than an ordinary salvage reward. A comparison with the numerous cases cited in the *Elfrida*, as well as with that case itself, will show that the amount of the contract was not so unreasonable as to demand that it be set aside on that account."

In this we concur, and on the whole case we are clear that the decree of the district court should be affirmed, with costs; and it is so ordered.

THE PENNSYLVANIA.

(District Court, N. D. California. December 28, 1899.)

No. 11,913.

SEAMEN—SUIT FOR WAGES—EFFECT OF STATUTORY RELEASE.

A release signed and attested as required by Rev. St. § 4552, without fraud or coercion, by seamen, on payment to them of wages conceded to be due them for a voyage, is conclusive upon them as a settlement of all claims on account of such wages, and the fact that they greatly needed the money paid them does not amount to legal duress or coercion; nor is the release rendered invalid because the master was not then present, but, after signing it on his part, had gone on another voyage.

In Admiralty. Suit by seamen for wages.

H. W. Hutton and W. G. Holmes, for libelants.

E. S. Pillsbury and H. D. Pillsbury, for respondent.

DE HAVEN, District Judge. This is an action by certain members of the crew of the steamship *Pennsylvania* against her owner to recover wages as seamen from May 1, 1899, to July 30, 1899. One of the libelants also demands the further sum of \$53.17, balance for wages alleged to be due him for services rendered on the steamer prior to May 1, 1899. The libelants signed articles at San Francisco on November 1, 1898, for a voyage described as follows:

"From the port of San Francisco, California, to Manila, P. I.; thence to such other ports and places in any part of the world as the master may direct, and

return to a port of discharge on the Pacific Coast. Voyage not to exceed six calendar months."

The *Pennsylvania* upon the voyage named was engaged as a government transport, and arrived at Manila May 2, 1899, at which time the libelants asked to be paid off and returned to the port of San Francisco. The request was refused, and their demand for a discharge was by the United States consul at that port brought to the attention of Maj. Gen. Otis, in command of the United States forces and military governor at Manila. Gen. Otis thereupon, in a letter addressed to the consul, informed that officer that the *Pennsylvania* was held by the United States under the emergency of war, and would be dispatched to San Francisco as soon as she could be coaled for the voyage, and that the crew must depart with her. He also added:

"Such refractory members of the crew as shall not abide by their instructions will be taken from the vessel and shipped under guard by another transport to the United States. They will not be discharged in Manila, nor will they be permitted liberty of action in the city, but will be held in close confinement before departure. You will make these instructions known."

This order was communicated by the United States consul to the libelants and other members of the crew, but the libelants refused to discharge any further duties as seamen, and on May 6, 1899, were arrested and taken from the ship by order of Gen. Otis. The *Pennsylvania* thereafter proceeded on her return voyage to San Francisco, leaving the libelants in Manila, where they remained until July 1, 1899, at which time they took their departure on a United States transport vessel, and arrived in San Francisco, on July 30, 1899. On the following day they went before the United States shipping commissioner, and were paid all that the master of the *Pennsylvania* conceded was due them. They insisted at the time that they were entitled to more, but accepted the amount tendered, and signed a mutual release which had been previously, on June 15, 1899, executed by the master in the presence of the shipping commissioner. This release conformed in all respects to the requirements of section 4552 of the Revised Statutes, and was signed and attested by the shipping commissioner as provided in that section.

The claim is made in behalf of the libelants that they were entitled to their discharge at the expiration of the six months for which they shipped (that is, upon May 1, 1899); that Gen. Otis had no authority to extend their term of service; that their detention in Manila under the circumstances above stated was wrongful; that the master of the *Pennsylvania* participated in such wrong; and that, under the settled rule relating to the rights of seamen under shipping articles such as were signed by them, they are entitled now to recover from the owner of the *Pennsylvania* wages up to the time of their return to San Francisco. I do not deem it necessary to express any opinion as to what would have been the rights of libelants if they had not signed the release above referred to. This release was not executed by them under circumstances of fraud or coercion. On the contrary, the libelants accepted the money tendered them, and signed the release freely and voluntarily, with full knowledge of its

contents. The effect of a release signed and attested as this was, in the manner required by section 4552 of the Revised Statutes, is thus declared by that section:

"Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement." This provision of the statute was under consideration in the case of *Rosenberg v. Doe*, 146 Mass. 191, 15 N. E. 510, and in speaking of it the court there said, "We are of the opinion that the statute means to make the release conclusive, if it is executed and attested as required, without fraud or coercion." The fact that the libelants were in great need of the money paid to them is not sufficient to show that such release was signed by them under legal duress or coercion; nor is its effect invalidated by the fact that the master of the *Pennsylvania* was not in this state, nor in the presence of the shipping commissioner, at the time it was signed by the libelants. It had been previously signed by the master in the presence of the shipping commissioner, and when subsequently signed by the libelants its execution was complete, and it then became binding upon all the parties thereto. The libel will be dismissed. The defendant to recover costs.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. SCHERMER-
HORN et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 7.

WHARVES—INJURY TO VESSEL.

A boat which came in on Sunday, and, without the knowledge or consent of the wharfinger, occupied a pier which had been closed for repairs, to the knowledge of her owner, and which had not in fact been reopened, did so at her own peril, and cannot recover for injuries received through the incompleteness of the pier.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal from a decree of the district court, Southern district of New York, dismissing a libel. The libelant sued to recover for damages sustained by its floating derrick. The vessel, while lying at pier 14, East river, on a falling tide, had her bottom pierced by two fragments of piles, which, it is contended, were part of a crib work that the owners of the pier had undertaken to remove when making certain changes in the structure.

A. F. Cushman and Le Roy S. Gove, for appellant.

H. A. Forster, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The district judge decided the cause adversely to the libelant upon the theory that the boat was placed where it was without defendants' knowledge, assent, or invitation, and in his opinion we fully concur. That for a considerable time prior to the accident the pier had been closed for repairs, to libelant's knowledge, is

undisputed; and it is a very doubtful question, upon the testimony, whether or not, by the Sunday afternoon when the derrick arrived, the situation had sufficiently changed to warrant any assumption that it had been reopened. Certainly, it was not in fact opened till the Monday morning. Moreover, the boat, without any prior communication with the owner or his agent, or the wharfinger or the harbor master, arrived on a Sunday afternoon, when the wharfinger was known to be absent, and took up a berth, not at the bulkhead, where it expected to unload, but at the pier, and at a part of the pier where, as was well known, vessels carrying such a load were not allowed by the owners of that pier to discharge cargo. With the uncertainty which existed as to whether the pier had been reopened (the bulkhead, be it remembered, had not been closed), we have no doubt that the derrick occupied this particular berth at the pier, instead of the one her captain was ordered to take at the bulkhead, at her peril. The decree of the district court is affirmed, with costs.

TICE v. THE ZOUAVE and THE SEA KING.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 26.

COLLISION—TUGS CROSSING—INJURY TO TOW.

Where one of two tugs approaching each other on crossing courses at night and under difficult conditions of the tide, signaled her intention of crossing the bow of the other tug, when she could with greater safety have slackened speed and passed under her stern, she is chargeable with sole liability for a resulting collision by which one of the barges she had in tow was injured, the other tug being shown to have taken the best course possible to assist the maneuver after receiving the signal.

Appeal from the District Court of the United States for the Eastern District of New York.

Robt. D. Benedict, for the Sea King.

Le Roy S. Gove, for the Zouave.

J. E. Carpenter, for libellant.

Lawrence Kneeland, for barges.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The libellant's barge, while in tow of the steam tug Zouave, was injured by a collision with one of the barges then in tow of the steam tug Sea King. The collision took place in the evening of a clear night, in the East river, off Astoria on the Long Island shore between Hallet's Point and the Astoria Ferry. The libel was filed against both tugs, charging each with contributory fault. The court below condemned both tugs upon the theory that each was in fault for not obeying the inspector's rule (No. 5) which requires the pilot, when his steamer is nearing a short bend in the channel, when, from the height of the banks or other cause, an approaching vessel cannot be seen at a distance of

half a mile, to give a signal by one long blast of his whistle "when he shall have arrived within half a mile" of such bend. The court exonerated each tug for all other fault. The owner of each tug has appealed.

Upon the argument at the bar it was conceded by the counsel for both of the appealing parties that any failure on the part of either tug to give the bend signal was a remote fault, which did not contribute to the collision. Inasmuch as the vessels discovered one another when sufficiently far apart to have avoided the collision if both had performed the obligation imposed upon them by the circumstances of the situation, we agree with counsel that the real question is whether either or both were guilty of subsequent fault. Although the proofs disclose the conflict of testimony usual in collision causes, we have had little difficulty in reaching a conclusion upon the facts which we believe to be correct. We find them to be substantially as set forth in the very careful opinion of the district judge.

The Sea King, towing two barges, was proceeding down the river against a flood tide which was running three or four miles an hour. The barges were lashed together; the one on the port side being on a hawser of about 20 fathoms, and the one on the starboard side having a short bridle from the hawser to her bow. The vessels had experienced great difficulty in rounding Hallet's Point against the tide, but had succeeded in doing so, and, after keeping on near the Astoria shore, in the slacker tide, for a short time, had re-entered the full tide, and headed about southwest, intending to cross the mouth of the east channel, and enter the west channel of the river. The tide sets over from the Astoria shore in a northerly direction towards Flood Rock, and its effect was to carry the tows on a course beyond and to the north of the course of the tug. They were proceeding very slowly, and were about 300 feet off the Astoria shore, when the Sea King heard a signal of two whistles from an approaching vessel, and discovered the green lights and towing lights of a tug and tow appearing from behind the ferry, which proved to be those of the tug Zouave and her tow. The Zouave was at that time about 600 yards away, and near the westerly side of the east channel, and was coming up the river at a speed, with the tide, of about six or seven miles an hour. She had five loaded boats in tow, three lashed on her port side and two on her starboard side; the libellant's boat being the outside starboard boat. The Sea King's red light was showing upon the starboard bow of the Zouave when the latter signaled to the Sea King. When the Zouave signaled, she also changed her course somewhat to port. Upon receiving the signal from the Zouave, the Sea King responded with a signal of two whistles, and promptly changed her course to port. The Zouave came on without slackening speed, and passed on the starboard side of the Sea King at a distance of about 50 or 60 feet. The Sea King in the meantime, under the influence of her starboard wheel, had headed towards the Astoria shore about five points to the port of her former course. Her tows had attempted to follow her, but were prevented from doing so effectually by the tide, and probably had

not altered more than one or two points their previous course. As the Zouave passed the Sea King, she discovered that her starboard tows were likely to collide with the tows of the Sea King, and sounded danger signals, and reversed her engine. The Sea King promptly reversed her engine. It was then, however, too late to avoid collision, and the starboard tow of the Zouave collided with the starboard tow of the Sea King. After the Sea King went to port upon answering the Zouave's signal, the bridle of her starboard barge parted. Whether it was broken by the strain of this movement or by the shock of the collision cannot be satisfactorily determined by the testimony; nor can it be satisfactorily determined whether the accident contributed in any measure to the collision. If it did, so far as appears, the bridle was a suitable and sufficient instrumentality for the purpose to which it was applied.

Upon these facts there is no reason for imputing fault to the Sea King. When she received the signal from the Zouave indicating that the latter intended to pass on the starboard, and thus cross her bow, she was compelled to determine whether to keep on, reverse her engine, or endeavor to assist the Zouave by a movement to port. By keeping on, she would have brought herself more certainly into risk of collision, and it has not been suggested that she ought to have kept on. While reversing, she would have measurably lost control of her tows, and the tide would have carried them further towards Flood Rock and nearer the path of the Zouave than they were carried by her movement to port. Her movement to port was the maneuver best adapted to assist the Zouave, and, indeed, was the only practicable one under the circumstances. There was more sea room for the maneuver proposed by the Zouave at the time of the first signals than there was between the path of the Sea King and her tows and the Astoria shore; and, although the tide complicated the situation, and made the Zouave's attempted maneuver a perilous one, the Sea King could not foresee that it would not be successful, and, if the Sea King had foreseen that it could not succeed, she was under no other obligation than to do all that was in her power to assist the maneuver of the Zouave.

If the Zouave had fulfilled her obligations at the time the vessels discovered one another, there would have been no collision. Seeing on her starboard bow the red light of the Sea King, it was her duty to take the necessary measures for avoiding her incumbent when vessels are approaching on crossing courses. If the master of the Zouave had supposed that the Sea King was intending to go through the westward channel, there is little reason to doubt that he would have taken the proper measures. If he had slowed the speed of the Zouave, and signaled a proposition to pass astern of the Sea King, the latter, by keeping on, would have left sufficient room between herself and the Astoria shore to permit the Zouave and her tows to pass down in the slacker tide with safety. In three minutes the Sea King and her tows could have widened the distance between their path and the Astoria shore 200 or 300 feet. But he acted, as we think, upon the unwarranted supposition that the Sea King would go down by the eastward channel; and this is

the explanation of his attempt to pass on her starboard side,—an attempt which could have been safely accomplished if that had been her intended course. In undertaking to cross the bow of the Sea King, the Zouave adopted the most hazardous method of avoiding her. If it had been made by daylight, on such a tide, incumbered by tows as the Zouave was, it would have required great circumspection in that difficult channel to accomplish it safely. Made, as it was, at night, it involved chances that no prudent master ought to have encountered. Having taken an unnecessary risk, the Zouave did not comply with the requirements of the nineteenth rule of navigation.

We conclude that the collision was caused solely by the fault of the Zouave. Accordingly, the cause should be remanded to the district court, with instructions to dismiss the libel as against the Sea King, with costs, and to decree for the libellant against the Zouave for the whole amount of the loss, with interest and costs. The appellee, and the appellant, owner of the Sea King, are awarded costs of this appeal.

THE ST. LOUIS.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 37.

COLLISION—EVIDENCE CONSIDERED—BURDEN OF PROOF.

Where a steam ferryboat, navigating in a fog at night, on hearing the fog signal of another vessel, apparently forward of her beam, which was recognized by her pilot as that of another ferryboat, whose course was such as to cause danger of collision, failed to stop her engines at once, as required by article 16 of Act June 7, 1897, the burden rests upon her to show that the collision which followed was not due to her neglect.

Appeal from the District Court of the United States for the Eastern District of New York.

H. Galbraith Ward, for appellant.

Geo. B. Adams, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM: We are not satisfied that the collision between the two ferryboats was caused by any fault on the part of the St. Louis, and therefore conclude that the libel should have been dismissed because its allegations were not established by the preponderance of evidence, which must be produced by the party having the onus of proof. *The Grace Girdler*, 7 Wall. 196, 19 L. Ed. 113.

The vessels collided in a dense fog when both had for some little time been feeling their way cautiously, and giving fog signals frequently, while pursuing their customary routes on the river. The Delaware was on a course heading about N. E., going on the first of the flood tide, when her pilot, who was at the wheel, heard the fog signal of a vessel directly ahead, or a little on her starboard bow, which he recognized as that of the St. Louis. Her lookout at

the same time sung out, "Boat ahead." Shortly afterwards her pilot heard the signal again, and immediately stopped and reversed his vessel, and gave alarm signals; but the St. Louis appeared through the fog, a short distance away, and the two vessels came into collision,—the port bow of the St. Louis with the port bow of the Delaware. The St. Louis was going at about the same speed as the Delaware, and sounded her whistle every 30 seconds. Her pilot heard a fog signal, which he recognized as that of the Delaware, so nearly ahead that he immediately stopped and reversed his vessel, at the same time putting his wheel hard a-port. The vessels came together with force enough to carry away some of the railing and stanchions of the Delaware's port bow, and break some of her deck posts, and to turn the bow of the Delaware around several points to port. The deck of the St. Louis was somewhat higher than that of the Delaware, and as the vessels came together she apparently rode upon the bow of the Delaware, turning the Delaware in her own direction until the impact was released. The blow was not strong enough to throw down any of the passengers who were standing at the time on the decks of the two vessels, at their port bows. The St. Louis was not injured, and the injuries to the Delaware were inconsiderable. The facts as stated in respect to the navigation of each vessel appear by the testimony of her own officers and men in charge at the time, there being no other witnesses thereto in behalf of either.

The learned district judge was of the opinion that the evidence would not have warranted a decree against the St. Louis, except for the testimony of a passenger on the Delaware, and the circumstance that the Delaware was carried so far to port by the impact; but giving force to the testimony of the passenger, and the effect of the impact, he concluded that the St. Louis must have been moving too rapidly to be under the due control obligatory upon a vessel navigating in a fog. We are not impressed with the value of the passenger's testimony, although he was an intelligent and candid witness. He was standing at the Delaware's port bow, leaning upon the rail at the point where it was carried away by the collision, and his attention was attracted by the signals and the bells to reverse. He states:

"Just about as she [the Delaware] started to reverse, the other boat came into view, and ran right into her. I knew she [the St. Louis] was going unusually fast for a foggy night. I could tell by the time it took her from the time I saw her until she came on us. I saw her fifty or seventy-five feet, I should think. I knew we were coming very slowly,—at least, I thought so. She [the Delaware] must have lost her headway and gone the other way, because I could feel the jar of the backward motion."

Manifestly, the witness was speaking from impressions rather than from any tangible, evidential facts. The time for observation consisted of the few seconds, fraught with apprehension and excitement, that intervened between the time he saw the St. Louis, 50 or 75 feet away, and the time the vessels came together. He assumed that the vibratory motion of the Delaware, incidental to the reversal of her engine, was caused by the backward motion of the

vessel; and, assuming this, no doubt believed that the St. Louis was coming ahead sufficiently fast to run down the Delaware when she was retreating. The opinion of a nautical man under similar circumstances would be of little probative weight, and that of a nonexpert ought not to be entitled to as much.

The circumstance that the Delaware was swung to port by the collision does not authorize any safe inference that the St. Louis was not stopped as promptly or effectually as possible, or that she was previously going at immoderate speed. She was swung to port because she was in fact pushed or pulled in that direction by the bow of the St. Louis as it rode against her bow; and it would seem that this might have happened if she had been in motion and the St. Louis nearly stopped, as well as if she had been nearly stopped and the St. Louis in motion. There is nothing in the testimony to throw any light upon the matter, and any conclusion rests altogether upon conjecture.

The Delaware did not comply with the rule prescribed by article 16 of the act of June 7, 1897, that:

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

In the present case the pilot of the Delaware was aware, on hearing the first signal of the St. Louis, that the situation was one requiring the greatest caution. He knew the customary course of the St. Louis, knew it was her signal, and knew that there was a strong chance that the vessels might come in contact if both kept on. Under these circumstances, it was imperative upon him, under the rule, to stop until the position of the St. Louis was definitely ascertained. Indisputably, he did not stop, but waited before doing so until he heard the second signal. As the signals of the St. Louis were being sounded, this was an interval of 30 seconds. Of course, if the Delaware was reversed so that she was going backward in the water when the collision took place, and the St. Louis was not going at a moderate rate of speed, it cannot be held that the fault of the Delaware was contributory to the collision. *The Umbria*, 166 U. S. 404-421, 17 Sup. Ct. 404, 41 L. Ed. 1053. But the case is one for the application of the rule in collision, that, whenever it appears that one of the vessels has neglected the usual and proper measures of precaution, the burden is upon her to show that the collision was not owing to her neglect. *The Great Republic*, 23 Wall. 20, 23 L. Ed. 55. The decree is reversed, with instructions to the district court to dismiss the libel, with costs. Costs of this court are awarded to the appellant.

JARVIS et al. v. CROZIER et al.

(Circuit Court, D. West Virginia. December 6, 1899.)

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—REARRANGEMENT OF PARTIES.

A plaintiff in a suit in a state court for the partition of real estate, who is a citizen of a different state from the defendants, where the bill does not disclose any controversy between the parties as to their respective interests in the property, cannot prevent a removal of the cause to a federal court by defendants by joining as plaintiffs with himself infant owners of an interest in the property, who are citizens of the same state as defendants, for whom he assumes to sue as next friend, but without showing any authority therefor. In such case the federal court, for the purposes of a motion to remand, will rearrange the parties by transposing the infants to the side of the defendants, where they properly belong, and will appoint a guardian ad litem to protect their interests.

2. INFANTS—ACTIONS BY OR AGAINST—REPRESENTATION BY NEXT FRIEND.

The next friend of an infant, who is recognized by the courts as authorized to institute or defend suits in his behalf, is supposed to be his nearest relative who has no personal interest in the matter in question; and it is a well-settled principle that one who is personally interested in a suit cannot represent an infant therein as his next friend.

On Motion to Remand to State Court.

Brown, Jackson & Knight, for complainants.

Flournoy, Price & Smith, for defendants.

JACKSON, District Judge. This cause was removed to this court, by the defendant Samuel A. Crozier, from the circuit court of McDowell county, and the record filed on the 14th day of November, 1895. Upon the 5th day of January, 1898, a motion was made by the plaintiffs to remand the cause to the circuit court of McDowell county, which motion (being argued by counsel) the court, upon consideration thereof, overruled. Between the time of filing the record in this court and the motion to remand, there seems to have been little preparation made for the hearing of the cause, except the filing of the joint answer of Samuel A. Crozier in his own right and of the trustees of the Crozier Land Association, and the answer of the Norfolk & Western Railroad Company. Since the motion to remand was overruled, quite a number of depositions have been taken by the defendants in support of their answers. The plaintiffs, failing to take any evidence in the case, have at the present term of the court asked leave to renew their motion to remand, which leave was granted, and the court again heard the argument, and this cause now comes on to be heard upon that motion.

It appears from the bill filed in this cause by B. F. Jarvis in his own right, and as the next friend of Mary Carry Bowen and Bowen Watts, who are infants, against the defendants, that the plaintiffs derived title to a certain tract of land some years ago, known as "Peery Bottoms," containing about 29 acres; that the lands were conveyed by one Andrew Sarver, one half to William T. Moore, and the other half to Peery and Bowen, and that William T. Moore subsequently conveyed his one-half to J. A. Belcher, who afterwards conveyed that one-half interest acquired from Moore to Samuel A. Crozier, and that

Crozier conveyed a portion of his one-half to the Norfolk & Western Railroad Company; and that the remaining portion of his half was conveyed to trustees for the Crozier Land Association. The bill discloses the fact that both Peery and Bowen are dead, and that their one-half interest passed to their heirs, and that all of the heirs except the infant plaintiffs, Mary Carry Bowen and Bowen Watts, have conveyed their respective interests in said parcel of land to the plaintiff Jarvis. The only object and purpose of this bill is a partition of the land described in the bill between the various owners in severalty, except a prayer for general relief. Upon the face of the bill, there is no controversy between the plaintiffs and defendants as to the extent of their respective interests. The bill upon its face shows that the plaintiff Jarvis is only entitled to one-fourth, and that the two infant heirs of Bowen are entitled to one-fourth, making one-half, and that Crozier and those under whom he claims are entitled to the other half. The question of title is not in controversy, as both sides claim under Sarver as a common source of title. It is to be observed that there is no allegation in this bill that Jarvis, who sues as the next friend for the infant plaintiffs, was ever authorized to do so by a court, or by next of kin, or by anybody interested in them. It does not appear that he is in any wise related to them, but that he assumed the right, without any authority whatsoever, of making them plaintiffs in this cause of action. Ordinarily they would properly be defendants to the cause for the purposes of partition, as sought in this bill. There is no dispute between Jarvis and the infant plaintiffs as to their title or the extent of it. He admits upon the face of the bill that they are the owners of one undivided one-fourth of the 29 acres. It seems to the court that the draftsman of this bill had a special object in associating the infants as plaintiffs with Jarvis, and that the object was to prevent, if possible, the removal of this cause by Crozier, the Crozier Land Association, and the Norfolk & Western Railroad Company into the court of the United States, all of which defendants are nonresidents of the district of West Virginia. If this be the case, and the court can properly do so, would it not be a case in which the court would transpose the parties, and place them on the respective sides of the case, so as to retain the case for hearing in this court, if it can be done? The only matter in dispute or controversy, if it can be called a controversy, between the infant plaintiffs and the plaintiff Jarvis, would be the laying off of their respective interests in the said land. It is claimed that by reason of the fact of the infant plaintiffs being citizens of Virginia, and the Norfolk & Western Railroad Company being also a citizen of Virginia, this case is not wholly a case between citizens of different states. This partition can be had just as well by the infant plaintiffs being transposed and made infant defendants in the case, and their rights as fully and amply protected, as if they were plaintiffs to the action. The whole theory of the case, as presented by the bill, shows that they would more properly be defendants than plaintiffs; and in the absence of an allegation in the bill that Jarvis was authorized to bring this suit, and associate these infants as infant plaintiffs, or the exhibition of any

authority sustaining an allegation of that character, it would seem to be right, and properly so, to transpose these parties, and make them defendants in this cause, in order that the rights of all parties could be heard and adjudicated in this tribunal, where the defendants Samuel A. Crozier, the trustees of the Crozier Land Association, and the Norfolk & Western Railroad Company could be heard, as they desired.

In the Removal Cases, 100 U. S. 457, 25 L. Ed. 593, the court held:

"For the purposes of a removal the matter in dispute may be ascertained, and, according to the facts, the parties to the suit arranged on opposite sides of that dispute. If in such an arrangement it appears that those on the one side, being all citizens of different states from those on the other, desire a removal, the suit may be removed."

In the case of *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514, the court held (following the cases just cited) that you may disregard as immaterial the mere form of the pleadings, and place the parties on the opposite side of the real matter in dispute, according to the facts.

In the case of *Hyde v. Ruble*, 104 U. S. 407, 26 L. Ed. 823, following the decisions in the Removal Cases, the court held that where all the parties to the controversy on one side are citizens of different states from those on the other side, and there is in the suit a separable controversy, wholly between the parties who are citizens of different states, which can be fully determined as between them, it may be removed.

It may be contended in this case that the infant plaintiffs have made no application for a removal. They could only make it by a party who was duly authorized to represent them as their next friend, either by an order of court, or by a party who was either an executor or a personal representative who had control of their estate, or who was next of kin, and so nearly related to them that the court would recognize the right to act for them. So far as the present case is concerned, it does not appear that Jarvis was ever authorized to act for them, or that he was ever authorized to institute this suit for them; but he has made use of their names, and subjected them to litigation, and the costs and expenses thereof, without the slightest authority therefor. Is not such action upon the part of Jarvis calculated to awaken the attention of the court in the case, and is it not a mark of inexcusable inattention to make infants plaintiffs in an action by a party as a next friend who is neither next of kin nor has exhibited any authority whatever to justify his action in arranging them as plaintiffs to an action in which he had a personal interest? It is a well-settled principle that any one must have no personal interest, however remote or indirect, who either institutes or defends an action for infants as their next friend. In *re Burgess*, 25 Ch. Div. 243; In *re Corsellis*, 50 Law T. (N. S.) 703. "When an infant claims a right or suffers an injury on account of which it is necessary to resort to a court of chancery to protect his rights, his nearest relation, not concerned in point of interest in the matter in question, is supposed to be the person who will take him under his protection and institute a suit to assert

his rights, or defend an action against him; and it is for this reason that a person who institutes a suit on behalf of an infant is termed 'his next friend.'" 1 Daniell, Ch. Prac. 69. Legal proceedings in favor of an infant should in every respect be strictly guarded, for the reason that an infant on coming of age can repudiate a suit brought in his name, and the court would be compelled to strike out his name as plaintiff and add it as a defendant. Chief Justice Marshall, in the case of *Bank v. Ritchie*, 8 Pet. 128, 8 L. Ed. 890, discusses at some length the rights of parties to appear for infants; and, in a case in which there was an attempt to secure a judgment against infants who were represented by a guardian ad litem, he remarks that "the guardian ad litem was appointed on motion of counsel for the plaintiffs, without bringing the minors into court, or issuing a commission for the purpose of making the appointment. This is contrary to the most approved usage, and is certainly a mark of inexcusable inattention,"—and refers to *Coop. Eq. Pl.* 109, for his position. It is the duty of a court of equity to look after the interests of infant defendants, and to protect them, in the absence of any one to represent them; and it would seem proper in this case that a court of equity should make the infants defendants, and appoint a guardian ad litem to protect their interests as infant defendants, instead of allowing them to remain as plaintiffs to that action, and possibly have their estate more or less absorbed by the costs and expenses of litigation. An order will be entered transposing the position of Mary Carry Bowen and Bowen Watts from plaintiffs to defendants, and making them defendants in this action; also, directing that a guardian ad litem be appointed for the infant defendants, to protect their interests. For the reasons assigned, the motion to remand is overruled.

GREEN v. TURNER et al.

(Circuit Court, N. D. Iowa, C. D. November 20, 1899.)

1. FEDERAL COURTS—EQUITY JURISDICTION.

A legal remedy, to defeat jurisdiction of a federal court in equity, must be one existing when the judiciary act of 1789 was adopted, or thereafter created by act of congress.

2. SAME—REMEDY AT LAW.

Jurisdiction of a federal court of an action to quiet title merely, by a resident of the state where the land is situate, against residents of other states, on whom personal service could not be had in such state, cannot be defeated on the ground of an adequate remedy at law merely because an action for possession could be maintained against tenants in possession.

3. SAME—WAIVER OF OBJECTION.

The provision of the federal statute prohibiting resort to equity when an adequate remedy exists at law, being to preserve to the parties the right to jury trial, may be waived by complainant bringing suit in equity, and defendant answering to the merits.

In Equity.

Wright & Nugent, for complainant.
S. A. Rush, for defendants.

SHIRAS, District Judge. From the record in this case it appears that it was commenced in the district court of Pocahontas county, being in form a suit in equity to quiet the title to certain described lands in Pocahontas county; the suit being based upon the provisions of section 4223 of the Code of Iowa, which provides that an action to determine and quiet the title to realty may be brought by any one claiming an interest therein, whether in or out of possession, against any one claiming title thereto, though not in possession. In the petition of complainant it is averred that the complainant, C. W. Green, is the absolute owner in fee simple of the realty, and that he is advised that the defendants make some claim adverse to the estate of complainant; and therefore he prays that his title and estate be established against the adverse claims of the defendants, and that they be barred and estopped from having or asserting any title or right as against the estate of complainant. It is not averred in the petition that either of the parties complainant or defendant is in the actual possession of the realty; nor is it prayed that the complainant be put in possession, or that he have process in any form for that purpose. It further appears from the record that upon the filing of the petition the complainant filed an affidavit to the effect that personal service of the original notice could not be made upon the defendants within the state of Iowa, and thereupon notice of the pendency of the suit was given by publication in the Pocahontas Herald, requiring the defendants to appear at the September term, 1899, of the district court of Pocahontas county, which convened on the 18th day of that month. The defendants in due season appeared in the state court, and filed a petition for the removal of the suit into this court; averring therein that the controversy involved in amount over \$2,000, exclusive of interest and costs, and was between citizens of different states,—the complainant, Green, being a citizen of Iowa, and the defendants being citizens of Nebraska and Ohio. The state court ordered the case to be removed, and, the transcript having been filed in this court, the defendants on the 17th day of October, 1899, filed an answer denying the allegations of the petition, and averring that the defendants are the absolute owners in fee simple of the realty in question, and that they have been in the sole and undisputed possession thereof for the past 35 years. Thereupon, on the 18th day of October, the complainant filed a plea in abatement of the jurisdiction of this court; averring therein that when the suit was commenced, and ever since, the defendants were and are in the actual possession of the realty through their tenants, J. N. Russell and William Mundon, and that by reason of such possession the complainant had a speedy and adequate remedy at law under section 4183 of the Code of Iowa, and therefore that this court, acting as a court in equity, has no jurisdiction of the subject-matter of the suit, to wit, the quieting of the title to the said premises, and that the suit should be remanded to the state court for trial.

Upon this condition of the record, it is clear that the state court ruled correctly in ordering a removal of the suit into this court.

When the order of removal was made, it appeared that the suit involved a controversy between a citizen of Iowa, as the plaintiff, and citizens of Nebraska and Ohio, as defendants, the amount exceeding \$2,000, exclusive of interest and costs; and the suit therefore was one removable by the defendants, they being nonresidents of Iowa. The plea to the jurisdiction seems to assume that this court, sitting in equity, cannot, under the ruling of the supreme court in *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873, take jurisdiction over suits to quiet title based upon the section of the State Code, already cited; but, if this is the contention sought to be maintained, it finds no support in the ruling of the supreme court in that case. As is pointed out in the opinion the supreme court, in its rulings in *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, *Reynolds v. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733, and *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010, had clearly recognized the doctrine that the circuit courts of the United States could entertain jurisdiction in equity over bills to quiet title when the controversy was between citizens of different states, and involved the requisite amount,—subject, however, to the exception that suits in equity shall not be maintained when there is a plain, adequate, and complete remedy at law. In *Whitehead v. Shattuck* the record shows that it was a suit in equity brought originally in this court; it being averred in the bill that complainant was the owner in fee of the certain lands, which were in the possession of the defendant, who claimed the same under a fraudulent and void title. To this bill the defendant demurred on the ground that the bill on its face showed that there was a complete and adequate remedy at law, in that it appeared that the defendant was in actual possession of the property, and there was nothing in the averments of the bill to show that the aid of a court of equity was needed to fully protect the rights of the plaintiff. The supreme court held that as it appeared that the remedy sought in that case was the possession and enjoyment of the land, and as the bill averred that the defendant was in possession, there was no reason shown why the remedy at law was not complete and adequate, in that an action in ejectment would fully settle both the question of title and the right to possession. Jurisdiction in equity in that case was denied, not because the courts of the United States may not take cognizance of bills to quiet title, but because it appeared that the remedy at law was complete and adequate,—a fact which will defeat jurisdiction in equity in other cases as well as those brought to quiet title. In the case now before the court, when the petition for removal was filed in the state court there was no averment in complainant's bill or in the petition for removal showing that the defendants were in possession of the land, but, on the contrary, the record showed that personal service could not be made upon them, in the state of Iowa; and, therefore, upon the record as it then was, there was nothing to show that the defendants were in the actual possession of the realty, and unless they held possession an action at law would not lie, and relief could be had only by a proceeding in equity. It is therefore clear that, as the record stood in the state court, the order for removal was properly made, in that the record

showed it to be a suit in equity pending between citizens of different states, and involving an amount in excess of \$2,000, the defendants being nonresidents of Iowa; and, upon the filing of the transcript in this court, jurisdiction over the suit became full and complete.

To defeat the jurisdiction thus acquired, it is averred in the plea that the complainant, Green, when the suit was brought, had a plain, speedy, and adequate remedy at law, under the provisions of section 4183 of the Code of Iowa, for the reason that the defendants are in possession of the land in controversy through their tenants, J. N. Russell and William Mundon, against whom an action at law for possession might have been brought. To defeat jurisdiction in equity, the legal remedy must be one which was in existence when the judiciary act of 1789 was adopted, or which has since been created by act of congress. *McConihay v. Wright*, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932. But assuming that the plea, although it refers to the Code of Iowa, is intended to present the question of the existence of a legal remedy under the federal practice, the point for consideration is whether the facts averred in the plea are sufficient to defeat the jurisdiction in equity. All that is pleaded is that Russell and Mundon are tenants of the defendants, and as such are in possession of the realty. Under this state of facts, it was open to the complainant, Green, under the provisions of the Code of Iowa, to have brought an action at law against Russell and Mundon for the possession of the realty, or to have brought a suit in equity to quiet the title and to recover possession, in which suit the defendants and the tenants would have been proper parties. The complainant pursued neither of these courses, but instead thereof he brought the present suit in equity, in which he prays to have his title established and quieted as against the defendants; but he does not ask to be put into possession of the realty, nor has he made parties to the suit the persons that he now avers hold the actual possession of the realty. According to his own showing, he cannot in the present suit, whether it be heard in the state or the federal court, obtain a decree putting him into possession of the realty, because the parties in actual possession are not parties to the suit, and process for possession is not prayed for in the bill. The suit, as brought, is therefore a proceeding in equity, in which the complainant asks a decree establishing his title to the land, and quieting the same as against the adverse claims of the defendants. The purpose of the bill is not to obtain possession of the land, but to quiet the title thereto as against the claims of the defendants. It is evident that the complainant did not wish to contest with the occupants of the land the right of possession until he had established his title by a decree in equity against the claims of the defendants. The record shows that the defendants are not residents of Iowa, nor could personal service of notice be had on them within the state. Had an action at law, in the nature of an action in ejectment, been brought against the defendants, personal service therein could not have been had within the state, and without such service a judgment adjudicating the title would have been of no avail. Therefore it does not appear that as against defendants there existed, under the rules of the common law, a speedy and adequate

remedy at law, in favor of complainant, by which he could establish his title as against the adverse claims of defendants. If the sole purpose had been to obtain possession of the realty, that might have been accomplished by a law action against the parties in actual possession, but the judgment at law in such case would not quiet the title of complainant as against the defendants. Under these circumstances, the complainant, as he had a right to do, resorted to the equitable remedy provided by the statute of Iowa for the establishment of his title; that being the only adequate remedy open to him under the facts of the case. The facts appearing of record do not show, therefore, that when this suit was brought there existed in favor of complainant such a plain, speedy, and adequate remedy at law as will defeat the jurisdiction in equity. Furthermore, the provision of the federal statute prohibiting resort to equity when an adequate remedy exists at law is intended to preserve to the parties the right to a trial by jury; but this right to a jury trial may be waived, and therefore it is the rule that, where the suit is one in which equitable relief may be granted, the objection that there is an adequate remedy at law should be presented before going into the case at large, or it may be held to have been waived. *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005. In this case the complainant, by bringing the suit in equity, clearly indicated that he did not wish a trial by jury; and as is said by the supreme court in *Perego v. Dodge*, 163 U. S. 161, 16 Sup. Ct. 971, 41 L. Ed. 813:

"Plaintiff, having voluntarily invoked the equity jurisdiction of the court, was not in a position to urge on appeal that his complaint should be dismissed because of adequacy of the remedy at law."

And the defendants, by answering to the merits, as they have done, in this court, clearly show that they do not ask a jury trial, nor do they question the jurisdiction in equity over the suit. The purpose of the plea interposed by the complainant is not to secure a jury trial on his own behalf or on that of the defendants, nor to change the jurisdiction in the case from equity to law; for the prayer of the plea is that this court will refuse to take jurisdiction in equity, because of the existence of a legal remedy, and will remand the case to the state court, in order that it may be proceeded with in that court, wherein it would remain a suit in equity. If the complainant wishes to change the jurisdiction from equity to law, he can readily do so by dismissing the bill and commencing an action at law; but instead of so doing, under the pretext that this court ought not to take jurisdiction in equity, he asks that the suit be remanded to the state court, wherein he proposes to continue the case as one of equitable cognizance. Under these circumstances, it is not open to the complainant to insist that this court should refuse to take jurisdiction in equity because, possibly, had he so chosen, he might have brought an action at law against the tenants. The purpose of the suit, as now instituted, is to quiet the title to the realty as between the conflicting claims of the plaintiff and the defendants, and it does not appear that this object could be accomplished by an action at law against the tenants. It cannot be now known, if an action at law for possession

should be brought against Russell and Mundon, whether they would rely on a lease from the defendants, or plead title from some other source, and therefore it does not appear that there is a plain and adequate remedy at law to accomplish the purpose aimed at in the present bill. The plea is therefore overruled, with leave to complainant to reply to the answer by the January rule day.

UNITED STATES LIFE INS. CO. IN CITY OF NEW YORK v. CABLE.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 622.

1. JURISDICTION IN EQUITY—FEDERAL COURTS—ADEQUATE REMEDY AT LAW.

To constitute an adequate remedy at law, which will deprive a federal court of equity of jurisdiction of a suit between citizens of different states, such remedy must be one enforceable in the same court by an action which may be brought by the complainant. A remedy existing only in a state court is not sufficient; nor is the right to plead the matters alleged in the bill in defense to an action brought by the defendant, and which is under the defendant's control.

2. SAME—SUIT FOR CANCELLATION OF INSURANCE POLICY.

A federal court of equity will not refuse to entertain a suit by a life insurance company, which is a citizen of another state, against a citizen of the state where the suit is brought, for the cancellation of a policy of insurance, after the death of the insured, on the ground of the existence of an adequate remedy at law, notwithstanding the commencement of an action on the policy by the defendant in a state court, where the bill alleges facts showing that the delivery of the policy was procured by fraud at a time when the insured was dangerously sick, and that he died before plaintiff had knowledge of the facts, and which also shows that, under the laws of the state relating to foreign insurance companies, if it removes the action from the state to the federal court it will forfeit its license to do business in the state.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The appellant (plaintiff below), a life insurance company, is a corporation organized under the laws of the state of New York, and doing business in the city of New York. It brings this suit in equity against the defendant, Alice A. Cable, a citizen of Chicago, Ill., as administratrix of Herman D. Cable, to cancel a certain policy of insurance issued by the plaintiff upon the life of said Herman D. Cable in January of the present year. There was a general demurrer put in by the defendant to the bill of complaint, and this appeal is from an order and decree of the circuit court sustaining the said demurrer, and dismissing the bill for want of equity.

The facts, as alleged in the bill, are substantially as follows: On the 16th of January, 1899, Herman D. Cable, a resident of Evanston, Ill., made application in writing to the plaintiff for insurance upon his life in the sum of \$50,000. The application was forwarded to the New York office of the plaintiff, and the plaintiff on or about the 17th day of February, 1899, executed its policy numbered 94,082, upon the life of Cable, agreeing, in further consideration of \$848.50 to be paid on delivery thereof, and of a like sum to be paid on the 6th day of February in each and every year thereafter until 10 years' premiums should have been paid, and upon acceptance of satisfactory proofs of the death of Cable within 10 years, ending on the 6th day of February, 1909, that the plaintiff would pay \$50,000 in 30 consecutive annual installments of \$1,666.66, to the estate of Cable,—subject, however, to certain terms and conditions set forth in said policy and in the application therefor, one of which was that

the policy should take effect only in case of delivery of the policy during the sound health and insurable condition of the insured. The policy, after its execution, was sent by the plaintiff to its agent in Chicago, Joseph H. Strong, and on or about the 21st day of February, 1899, was tendered to Cable, who refused to accept it or to pay the first premium thereon, saying that he wanted some further information about the plaintiff. When said Cable made his application for insurance, a like application was made by his friend, George S. Lord, also a resident of Evanston. A similar policy of insurance upon the life of Lord was issued by the plaintiff, and on the 27th day of February, 1899, was delivered; being actually handed to Lord by one James F. McCabe, an attorney and insurance broker of Chicago, through whom Lord and Cable had, by mutual arrangement, made their respective applications for insurance. On the last-mentioned date Lord learned from McCabe that Cable had not accepted his policy, and Lord thereupon requested said McCabe to obtain the policy written for Cable, and to bring it to him (Lord); saying that he (Lord) would take the policy, and would pay the first premium upon it in behalf of Cable. Thereupon, on the same day, McCabe obtained from the plaintiff, and delivered to Lord, the policy upon the life of Cable, and received from Lord the premium due thereon, and said premium was duly received by the plaintiff. On Friday evening, the 24th day of February, 1899, Cable became ill. During the following night or next day his illness was diagnosed as pneumonia, and his condition was then regarded as serious; and on Sunday, the 26th, his life was despaired of by the physicians. On Thursday, March 2d, he died, as the result of acute pneumonia. Lord was well aware of the serious physical condition of Cable on Sunday, February 26th, and knew that he was believed by his physicians to be suffering from pneumonia. On the morning of Monday, February 27th, and before Lord had seen McCabe on that day, Lord visited or communicated with the family of Cable, and on the afternoon of that day procured the delivery to him of the policy upon the life of Cable, with full knowledge of the dangerous illness of Cable, and of the stipulation in the policy and in the application that the policy should take effect only upon payment of the first premium, and upon its delivery during the sound health and insurable condition of Cable, and with the wrongful intent and purpose of having the policy become immediately effectual for the benefit of the estate of Cable in case his illness should terminate fatally. The plaintiff had no knowledge of Cable's illness until his death. That said illness was not made known to the plaintiff, but was purposely and willfully concealed from it, and, had the plaintiff known of his condition, it would not have delivered to said Cable the policy, and the plaintiff never authorized the delivery of the policy through Lord under the conditions existing when Lord obtained it. The premium which Lord paid was paid with the funds of Lord, and not those of Cable. Cable never authorized Lord to accept the policy and pay for the same, and did not during his lifetime ratify what was done. Lord was not an agent of Cable for the purpose of receiving the policy and paying the premium. The procuring of the policy by Lord was not a delivery to Cable, and the procuring of the policy and its delivery by him to Cable individually did not create an effectual contract. In the forenoon of the same day, and an hour or more before the filing of the original bill in this case, the defendant began in the superior court of Cook county an action at law against the plaintiff for the computed amount of said policy of insurance, laying the damages at \$55,000, and caused a summons to be issued, which was served upon the agent of the plaintiff on the 15th day of May, 1899. The summons in this action was served upon the defendant on the day on which the bill was filed; to wit, on the 11th day of May, 1899. The bill further alleges, by way of showing that the plaintiff has not an adequate and complete remedy at law, that the state of Illinois, by legislative enactment, has sought to prevent the removal into this court by insurance companies of actions similar to this, and has destroyed such right, or made its exercise impracticable, by providing that insurance companies shall forfeit and lose their right to do business in the state of Illinois upon removing any such action into this court; that by removing the action to this court the plaintiff might lose its right to transact business in the state of Illinois, and would certainly become involved in a serious controversy with the state respecting the transaction of any subsequent business by the plaintiff therein; that the

laws of the state upon certain questions of general insurance law, as interpreted by its highest legal tribunal, and applicable to the facts in this case, are somewhat different from the law as interpreted by the federal courts upon the same questions, and, from the standpoint of the federal courts, are unduly and erroneously adverse to insurance companies; that the plaintiff is entitled to an application of the law according to the decisions of the federal court, and that under the facts set forth in the bill the plaintiff is without a due and proper remedy at law in respect to the claim of the defendant under said insurance policy, and is without any remedy at law whatever in the United States court; that prior to the filing of the original bill the amount of the premium paid by Lord, with lawful interest thereon, was offered and tendered by the plaintiff to Lord and to the defendant in lawful money of the United States, which was refused by them. Other facts and circumstances are alleged, but these are sufficient for the purpose of determining the question before the court.

Gilbert E. Porter, for appellant.

W. S. Oppenheim, for appellee.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

BUNN, District Judge, after making the foregoing statement, delivered the opinion of the court.

It must, we think, be conceded that the bill in this case alleges facts constituting a good cause of action in equity for the cancellation of the policy, unless the plaintiff has a full and adequate remedy at law for the same cause. A suit at law has been commenced in the state court of Illinois to recover upon the policy, and, if it be an adequate remedy at law to turn the plaintiff over for litigation of its rights in the state court under the circumstances set out in the bill, then the United States circuit court in equity should disclaim jurisdiction. But there are two reasons why we think the remedy thus open to the plaintiff, of having its rights determined in an action at law, does not meet the requirements of the rule: The first is that the plaintiff being a citizen of New York, and the defendant a citizen of Illinois, the plaintiff, under the constitution, has the right to come to the federal court for an adjudication. For a person entitled to litigate in the federal court, it is not an adequate remedy at law to be invited into a state court by his antagonist to adjudicate his rights. Second, the remedy open to the plaintiff is one not under its own control, but in the control and discretion of the opposite party. These two principles, we think, are sufficient to confer a legal discretion upon the federal court, which it ought to exercise, in favor of its own jurisdiction, in behalf of any person or corporation which, from its citizenship, has the undoubted privilege of having its rights adjudicated in the federal court. The remedy at law, in order to defeat the right to proceed in equity, should be full and adequate. It should be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce v. Grundy*, 3 Pet. 210, 7 L. Ed. 655; *Sullivan v. Railroad Co.*, 94 U. S. 806, 24 L. Ed. 324. And the application of the rule depends upon the circumstances of each case. *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580.

In the federal courts it is well settled that the court will not turn a suitor in equity over to a remedy at law in the state courts, but only

to the law side of the federal court. This was adjudicated as early as 1823, in *Mayer v. Foulkrod*, 4 Wash. C. C. 349, Fed. Cas. No. 9,341. That was a case in equity for the recovery of a legacy, and it was suggested that the complainant had a remedy at law in the state court; but the court, by Washington, J., said:

"If the counsel for the defendant meant to argue that, because the plaintiff might have maintained an action in the state court for the recovery of the legacy, therefore the equity jurisdiction of this court is ousted, we must protest against the doctrine. This case is clearly within the jurisdiction of this court. No objection can be made to the jurisdiction of the equity side of it, but that there is complete and adequate remedy on the other side of this court. It is no argument to say that the plaintiff may have such a remedy (could it even be truly said) in the state court. The conclusive answer is that the plaintiff is under no obligation to resort to that jurisdiction."

Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1,174, is a still earlier case,—decided in 1821; opinion by Mr. Justice Story. This was an action in equity to set aside conveyances for fraud. The court, in its opinion, says:

"The other objection is not so much to the competency of the court, as in the nature of a demurrer to the bill for want of equity. Much stress has been laid upon that clause of the judiciary act of 1789 (chapter 20, § 16) which declares 'that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.' I take this clause to be merely affirmative of the general doctrine of courts of equity, and in no sense intended to narrow the jurisdiction of such courts. It has been repeatedly held by the supreme court that the equity jurisdiction of the courts of the United States does not depend upon what is exercised by courts of equity or courts of law in the several states, but depends upon what is a proper subject of equitable relief in courts of equity in England, the great reservoir from which we have extracted our principles of jurisprudence. If, therefore, a bill of this sort states a case properly within the cognizance of courts of equity, according to the general doctrines of their jurisprudence, I should have no difficulty in overruling this objection, although the state courts of Rhode Island might afford some sort of remedy at law to aid the plaintiff. There are many cases in which courts of law and equity exercise a concurrent jurisdiction, and the judiciary act never intended to disturb that jurisdiction. In such cases it is supposed that the remedy at law is not adequate and complete for all the purposes for which the plaintiff may claim relief."

In the leading case of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, it is said in the very able opinion by Mr. Justice Harlan that:

"The adequacy or inadequacy of a remedy at law for the protection of one entitled upon any ground to invoke the powers of a federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity wherever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the circuit courts of the United States. Case of *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; *Dick v. Foraker*, 155 U. S. 404, 415, 15 Sup. Ct. 124, 39 L. Ed. 201; *Bardon v. Improvement Co.*, 157 U. S. 327, 330, 15 Sup. Ct. 650, 39 L. Ed. 719; *Rich v. Braxton*, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022. But if the case, in its essence, be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States wherever juris-

diction attaches by reason of diverse citizenship, or upon any other ground of federal jurisdiction."

Coler v. Board (C. C.) 89 Fed. 257, was a bill by the holders of county bonds to prevent the county officials from applying certain funds to any purpose except to pay the interest coupons. The defendants questioned the jurisdiction of the court on the same ground relied upon here. The court, by Simonton, C. J., in disposing of the question, says:

"Such a remedy might, perhaps, be found in the practice under the Code of North Carolina, but this will not affect the ancient and well-established jurisdiction of the court of equity. The adequacy or inadequacy of a remedy at law for the protection of one entitled on any ground to invoke the powers of a federal court is not to be conclusively determined by the statute of the particular state in which suit may be brought. *Smyth v. Ames*, 169 U. S. 516, 18 Sup. Ct. 418, 42 L. Ed. 819. The test is, has he a remedy at law in this court? If he has not, then a court of equity has jurisdiction."

In *Stanton v. Embry*, 46 Conn. 595, a bill was filed to enjoin an action at law upon a judgment rendered in the District of Columbia.

In the opinion, by Pardee, J., it is said:

"It is claimed by the counsel for the respondent that this right to go into the court which rendered the judgment and ask for a new trial,—a remedy which, it is claimed, is open to the petitioners under the laws of the District of Columbia,—is an adequate legal remedy, and that this court cannot assume equitable jurisdiction over the matter while the petitioners have this remedy. But no legal remedy can be considered adequate which a party is compelled to go into a foreign jurisdiction to avail himself of. It must be a remedy which our own courts can apply."

Suits for the cancellation and delivery up of conveyances, insurance policies, and other contracts, obtained by fraud, constitute an immemorial head of equity jurisdiction. Joyce, in his elaborate work on Insurance (section 1674), says:

"If the contract is obtained by fraud or deception, or by false and fraudulent misrepresentations, * * * equity will take cognizance and grant relief. So, also, will jurisdiction be entertained if the party has no adequate remedy at law. But the fact that the party has an adequate remedy at law does not of necessity preclude a resort to equity, nor does it follow that for such reason a court of equity will refuse to entertain jurisdiction. If the special circumstances would render it inequitable, unjust, or a hardship to compel the plaintiff to await a suit at the instance of the other party, the court will exercise its power."

This, no doubt, is now the reasonable and well-established rule.

The case of *British Equitable Assur. Co. v. Great Western Ry. Co.*, 20 Law T. 422, was a case of the procurement of a policy of life insurance by a gross fraud, similar to the one practiced in this case, if the allegations of the bill be true. It was brought, also, as in this case, after the death of the insured. The same objection was made to the jurisdiction as is made in the case at bar. Lord Justice Giffard, in his opinion concurring in the main opinion, says:

"I was surprised, I must say, to hear the question of jurisdiction argued in this case. If there is any one thing clearer than another, it is that in such a case as this this court has jurisdiction."

In that case the policy had been assigned before suit brought, but equity took jurisdiction to decree a cancellation; and Lord Justice

Selwyn, after stating the circumstances of the fraud, concludes his opinion in these words:

"Under these circumstances, therefore, I think it quite clear that the policy is a void policy, and one which the office was entitled to file a bill to have canceled and delivered up; and, considering the very serious consequences to insurance companies of disputing upon any other than very clear ground, in this case, as I have formed a very clear opinion that in my judgment they were fully justified in resisting this claim, that there was no foundation for this appeal, and that it must be dismissed with costs."

The fraud in the case at bar does not rest upon proof. It stands admitted by the answer. The deceased applies for an insurance upon his own life for \$50,000. He answers all the questions in regard to his physical condition in a satisfactory manner. He is physically sound when the application is made and the policy tendered. But he declines to receive it, because he wants to know something more of the company before investing. Afterwards, and before anything more is done, he is taken down with acute pneumonia, and his chances for life are desperate. His friend now steps in, knowing all the facts in regard to the changed condition of the assured, pays the premium, and takes a delivery of the policy to himself; the company knowing nothing of assured's sickness. That day, or the day but one after, the assured dies, as it was expected he would. The fraud perpetrated is something quite appalling, in the baldness and boldness of its outlines. Upon the allegations of fact in the bill which are admitted to be true, it stands out "gross as a mountain, open, palpable." Under the circumstances, it seems hardly incumbent on the court to make excuses for taking jurisdiction in equity to cancel the policy, without subjecting the company to the uncertainty and delay attending a litigation in the state court, over which it can exercise no essential control, but the jurisdiction of which rests substantially in the will and discretion of another party. Upon the hearing on the merits, if the evidence should present the case in any other light, and it should appear that the remedy at law would be adequate, the bill could then be dismissed.

Mr. Joyce (Joyce, Ins. §§ 1674, 1680) sums up the authorities on this subject in the following words:

"The result of the cases seems to be this: That, if equitable interposition is sought before loss or death, the right of the plaintiff to the aid of the court is better than it would be were he to wait until after loss or death, when the question might arise whether his remedy by way of defense to an action at law on the policy would not be adequate, and when it would be necessary to show that some obstacle prevented making the defense at law. In other words, having no remedy at law before loss, the case presented by a bill brought after loss would have to show, notwithstanding a then existing adequate remedy at law, that resort to equity was necessitated by some particular circumstance of equitable cognizance warranting equitable relief; and it would seem reasonable to state as a rule that the fact that the loss has occurred is not conclusive, and upon a proper averment of facts showing that a resort to equity is either necessary, expedient, or proper, or that some obstacle prevents a complete defense at law, the court may, in a reasonable and proper exercise of that discretion which is generally exercised in matters of cancellation, take cognizance and grant relief."

The case of *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501, is relied upon to show that a suit in equity cannot be maintained to can-

cel a policy after the death of the insured. But the case does not go quite so far as that. The case was heard in the circuit court upon the merits, and the bill dismissed because it appeared that an action at law was then pending in the same court upon the law side, and that the remedy which the complainant could avail himself of there would be adequate; and the supreme court affirmed the decree. What the court held was that, although equity had power to order the delivery up and cancellation of a policy of insurance obtained on fraudulent representations and suppressions of facts, yet it will not generally do so, when these representations and suppressions can be perfectly well used as a defense at law in a suit upon the policy. Here the suit at law was pending in the same court. There was no invitation to the plaintiff to go into another jurisdiction to seek an adjudication of his rights. The point was not raised nor adjudicated as to whether a remedy at law could be adequate, and as effectual as the remedy in equity, where the complainant had not the remedy under his own control. In the recent case of *Bank v. Stone* (C. C.) 88 Fed. 383, heard before Mr. Justice Harlan, sitting with the two circuit judges, this question seems to have been adjudicated. A bill was filed to restrain collection of taxes under an act of the legislature of Kentucky, upon the ground that the act was unconstitutional, in that it impaired the obligation of the contract contained in the bank's charter from the state. The case, like this, was heard upon demurrer to the bill. In answer to the same contention that is made here,—that an adequate remedy at law existed,—the court, by Mr. Justice Harlan, says:

"It would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary choose to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

And this rule seems perfectly reasonable and sound. A similar rule is applied in cases where a claim to real estate is set up against a party in possession, though in that case other considerations concur. The party in possession need not wait for an action of ejectment by his adversary, but may file his bill in equity to quiet the title and have the claimant's title adjudicated. It is, no doubt, true that the plaintiff, if it was willing to incur the loads and forfeitures imposed by the Illinois statutes upon foreign corporations doing business in that state, and who attempt to remove actions from the state to the federal court, might go into the state court and have the action at law removed to the federal court. *Insurance Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365; *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 377. But when it came there it would not have control of it. The plaintiff in that cause would control the action. She could bring it to trial, or she could delay as long as possible, and then discontinue it; wait for the plaintiff's witnesses to die or go beyond the jurisdiction of the court, and then commence again in the

same or some other state court. It would be in her discretion to say when and where the defendant should have his remedy. A remedy so much in the discretion and control of the adversary party can hardly be said to be as efficient practically as the one in equity to cancel the policy. Very likely the plaintiff would choose to try the case in the state court, rather than subject itself to the penalty of losing its business in the state. But should the plaintiff be put to such an election, under the circumstances of the case? It is quite evident the plaintiff has had no opportunity to bring this action before the death of the assured, because that death took place immediately after the delivery of the policy to Lord.

We are therefore of opinion, under the allegations of the bill,—the federal court having, by the commencement of the suit, obtained jurisdiction both of the subject-matter and of the parties, and the only objection being that the plaintiff has an adequate remedy at law,—that the court should have entertained the cause and overruled the demurrer to the bill. The decree of the circuit court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

JACKSON v. SIMMONS et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 566.

1. QUIETING TITLE—RIGHT TO MAINTAIN SUIT—EVIDENCE OF POSSESSION.

Under the Illinois statute which permits the bringing of a suit to quiet title only by one in possession, or one claiming title to land which is vacant and unoccupied, the construction on a tract of land, by a claimant, of a structure of rough boards, 8 or 10 feet square, with a flat roof, having no foundation, chimney, or windows, and a door with no lock, not intended for a dwelling, or for any other use, as far as shown, and which was in fact never used, does not constitute such possession and occupation of the land as will support a suit to quiet title; nor can the complainant, having alleged in his bill actual occupancy of the land, on the failure of the proof to sustain such allegation, claim that the land was vacant and unoccupied, for the purpose of bringing the case within the other provision of the statute.

2. EQUITY—CROSS BILL FOR AFFIRMATIVE RELIEF.

A cross bill seeking affirmative relief is in the nature of an original bill. It does not fall with a dismissal of the original bill in the suit, whether such dismissal is by the act of the complainant or the court; and hence, although relating to a subject germane to the matter of the original bill, it must rest upon some independent and recognized ground of equitable jurisdiction.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The bill was filed by Charles E. Simmons, as complainant, in the circuit court of the state of Illinois for the county of Lake, on the 19th day of June, 1891, against the appellant, Lewis B. Jackson, to quiet the title to the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the fractional N. E. $\frac{1}{4}$ of section No. 15, in township No. 45 N., of range No. 12 E. of the third P. M., and the fraction lying east thereof, situated in the county of Lake. The complainant claimed to derive title to the premises through mesne conveyances from the government of the United States, his immediate grantors being, as to the undivided one-half

of the premises, William A. Butters, who conveyed February 19, 1891, and as to the other undivided one-half, Reuel E. Darling, who conveyed April 21, 1891. The complainant asserted in his bill that he was in actual possession of the premises, and that Jackson, the defendant below, claimed title thereto under a certain tax deed issued by the proper authorities to Oliver S. Lincoln, December 4, 1872, under a tax sale on the 16th day of August, 1870, to one Josiah N. Truesdale, grantor of Lincoln, for the taxes levied thereupon for the year 1869; that such tax deed was invalid for the reasons specified in the bill (not necessary to be here stated, it being conceded that the tax deed of itself was insufficient to give perfect title); that such tax deed constituted a cloud upon the complainant's title; and prayed that it might be set aside, declared null and void, and delivered up to be canceled. On the 2d day of November, 1891, on the petition of the defendant, and upon the ground of diverse citizenship, the cause was removed into the circuit court of the United States for the Northern district of Illinois, in which court the defendant below filed his answer to the bill on the 5th day of January, 1892, wherein he denied that the complainant at any time had possession of the premises, asserted the validity of the tax and tax sale and of the deed to Lincoln; that none of the grantors of the complainant, immediate or remote, had ever been in possession of the premises; that at the time of the sale to Lincoln the premises were unoccupied, and so remained for seven years thereafter; that Lincoln paid the taxes upon the premises levied in each year subsequent to the year 1869 for over seven years, and afterwards entered into possession of the premises, and so remained until his death on the 25th of May, 1889, whereupon his heirs conveyed the premises to the defendant Jackson, on the 11th day of July, 1889; and that he, or those under whom he claimed, have paid all the taxes upon the land from and including the year 1869 down to the year 1892; and he prayed the benefit of the statute of the state of Illinois (2 Starr & C. Ann. Ill. St. 1896, p. 2618, c. 83, § 7), which is as follows: "Whenever a person having color of title made in good faith to vacant and unoccupied land, shall pay the taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such tax payer by purchase, devise or descent before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, shall be entitled to the benefit of this section." On January 5, 1892, the defendant below exhibited his cross bill, stating substantially the same facts as appeared by the bill and answer, and prayed affirmative relief to quiet the title to the premises in him.

The facts in regard to the character of the premises and their possession are these: They were situated upon the western shore of Lake Michigan, within the limits of the city of Waukegan. They were sand lots, and at times partially or wholly overflowed by water. They were incapable of cultivation, and were unoccupied for any purpose except, perhaps, by strolling fishermen, until about 1879 or 1880. At about that date—the precise time being left uncertain by the evidence—Lincoln gave license to one James Gamash, a fisherman, to drive piles in the lake from the shore, and to store these piles when the fishing season was over, upon the premises. He had racks for his boats, and the implements by which the piles were driven in the bed of the lake. These piles were 35 feet in length, and the fish nets were extended upon them. This paraphernalia was stored on the premises extending back from the water for a distance of 160 to 200 feet. At one time (the date being left uncertain by the evidence) there was a fence on the west line of the premises, but when and by whom erected (whether by Lincoln or by the owner of the premises adjoining on the west) does not appear. In March, 1891, and intermediate the deed from Butters and the deed from Darling, the complainant below erected upon the northeast quarter a small structure 8 or 10 feet square. No foundation was built, but scantling were laid upon a few small stones placed upon the surface of the ground, which was of pure sand, and some upright pieces at the corners, upon which boards were nailed, and a board roof was placed upon the top. It had a door without a lock, but no windows, and was not lathed or plastered. It had no chimney, nor was a place provided for one. The structure was never occupied, and Simmons, the complainant, stated that

he never saw it, and that it was not intended for human habitation. There is no evidence that it was ever occupied for any purpose. It remained upon the premises, so far as the record shows, not later than the autumn of the same year. It was not there in the year 1892, and there is no evidence of what became of it. On June 17, 1898, a decree was passed setting aside the tax deed, and holding it void, and requiring that it should be delivered up to be canceled, and requiring the complainant to pay all taxes which had been paid by Jackson or his grantors, and quieting the title to the premises in the complainant; from which decree this appeal is taken. Subsequent to the appeal, Charles E. Simmons departed this life, and by order of this court his representatives were substituted in his stead.

William Meade Fletcher, for appellant.

Homer Cooke and Edwin C. Crawford, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

The question which first confronts us has respect to the right of the complainant below to maintain his bill. Originally, the jurisdiction in equity to entertain suits to quiet title was, as stated by Mr. Pomeroy (Eq. Jur. p. 2142):

"The equity jurisprudence to quiet title, independent of statute, was only invoked by a plaintiff in possession holding the legal title, when successive actions at law, all of which had failed, were brought against him by a single person out of possession, or when many persons asserted equitable titles against the plaintiff in possession holding the legal or an equitable title."

This limited jurisdiction has been much enlarged in many of the states of this country, and the federal courts sitting respectively within the respective states will exercise the enlarged jurisdiction which the statute of the particular state has tacked upon the ancient jurisdiction. Such legislation, as Mr. Pomeroy observes, may be divided into two classes,—the one requiring the complainant to be in actual possession; the other permitting such suit by one claiming title irrespective of possession. The statute of Illinois (1 Starr & C. Ann. Ill. St. 1896, p. 604, c. 22, § 50) falls within the former class, except that the suit is also allowed where the land is unimproved and unoccupied. This statute has received construction by the supreme court of Illinois in *Gage v. Abbott*, 99 Ill. 366, where this language is used:

"Under the old chancery practice, to maintain a bill to remove a cloud from a title it was essential that the complainant should be in, and the party against whom the bill was filed out of, possession. * * * But this is changed by the act of 1869, which allows such a bill to be filed 'whether the lands in controversy are improved or occupied, or unimproved or unoccupied.' Since that enactment we have held that there are only two cases under our law in which a party may file a bill to quiet title or to remove a cloud from the title to real property: First, where he is in possession of the lands; and, second, where he claims to be the owner, and the lands in controversy are unimproved and unoccupied. * * * In cases, therefore, where the lands are improved, and occupied by the adverse party, this remedy does not apply. In such a case the remedy would be by ejectment."

It was, therefore, obviously necessary for the complainant below to show to the court by his bill and proofs either that he was in

the actual possession of the premises claimed, or that they were unoccupied. This was essential to entitle him to invoke the equitable jurisdiction of the court, and so it is charged in the bill that, ever since receiving the deed from Darling,—April 21, 1891,—the complainant “has been, and is now, in the actual possession thereof.” What shall constitute possession depends largely upon the character of the land claimed to be occupied, and the use to which it may be devoted, and the circumstances are as varying as are the different natures of property. The possession, however, must be actual and bona fide. It must evidence the exercise of dominion over the property, clearly referable to him who asserts the dominion, and which declares to the world the act and fact of dominion and the claimant of that dominion. It must not be pretentious or sham; it must be real, exhibiting a purpose to possess and to hold possession. Does the occupancy asserted by the complainant below fill the measure of these requirements? At the time of the deed from Darling, he knew of the tax deed to Lincoln, and that the appellant, Jackson, claimed title thereunder adversely to him. He also knew that both Lincoln and Jackson claimed that actual possession had been taken of the premises by Lincoln under color of title founded on the tax deed, and after payment by him of taxes for seven consecutive years. This is evidenced by the stipulation of the complainant below of even date with the deed of Darling, by which he agrees to bring suit against Jackson within 60 days to test the question of the claimed possession by Lincoln and Jackson. In March, 1891, intermediate the deed from Butters and the deed from Darling, and when he fully understood the claims of Jackson as to title and possession, he caused a structure to be placed upon the easterly portion of this land, and upon the part subject to be overflowed by the waters of the lake. The act was unique, as well with respect to the character of the structure as to the utter absence of use to which it could be devoted. The structure was made by men who were not carpenters. It was made of rough boards and scantling, and was 8 or 10 feet square, and presumably of the same height, with a flat roof of light material. The record does not inform us whether the building had a floor. The scantling were laid upon small stones at the four corners resting upon the sand of the beach. The structure had no window and no chimney, nor provision for any. It had a door, but, with Arcadian simplicity and unbounded confidence in the honesty of the good people of Waukegan, no means of fastening it was supplied. The structure was neither lathed nor plastered. For what use this structure was designed we are not informed by the record. The complainant could not or would not tell, but with charming naiveté he, perhaps rashly, conceded that it was not intended for human habitation. It could not have been intended as a refuge for stock, or the door would not have been provided; and the complainant was the land commissioner of a railway company, and not a stock raiser, or the owner, so far as the record discloses, of the small number of animals that could be accommodated within the precincts of the hut. The complainant never saw it during or after its construction, and upon his examination

could only say that it cost under \$100; which sum manifestly would be an extravagant price. We can conceive of no use to which this structure could be devoted, unless possibly a fanciful benevolent use. It may be that, touched by the inspired flights of poetic genius, the complainant erected the structure that a sight of it might revive the drooping heart of Mr. Longfellow's "forlorn and shipwrecked brother." Whatever its purpose, he builded not wisely or well. Like the foolish man in the Scriptures, he builded his house upon the sand, "and the rain descended, and the floods came, and the winds blew, and beat upon that house, and it fell; and great was the fall of it." The structure remained until the early days of the autumn following its erection, a lonely hut upon a dreary waste. It was then lost to view, and the place that once knew it shall know it no more forever. Either the autumn storms and the angry waves of Lake Michigan carried it out to sea, where it floats a hopeless derelict, or the fierce blasts of winter beat upon it, broke it down, and scattered the fragments to the four winds of heaven, without a scantling left to tell the tale. We cannot regard the construction of this hut, under the circumstances, as evidence of actual occupation. It never was occupied. It manifestly was not intended to be occupied. It was abandoned so soon as completed. The real intention clearly was at trifling cost to place upon this beach something that a court of equity might receive as sufficient evidence of actual possession to sustain a bill to quiet the title. But equity deals with the real, not the fanciful; with actual rights in property, not with pretensions to right. It looks through form to find the substance. It penetrates disguise to discover the real intention. It does not protect long-abandoned claims to property upon late, sham, and pretentious acts asserted as evidence of ownership, and made solely in anticipation and for the purpose of litigation. Equity is here invoked to exercise its jurisdiction in protection of the title asserted by the complainant, and upon the ground of actual possession of the premises by him. There was no such actual possession by him, nor was any intended. There was no public assertion of ownership. The act done was false and sham, and with knowledge of the prior possession claimed by Lincoln and Jackson. The building of the structure was a mere device upon which it was hoped the jurisdiction of a court of equity could be upheld. No real or actual occupancy was contemplated, and equity will not assume jurisdiction in the absence of actual possession evidencing designed and present dominion of the land. We are supported in our conclusion by a somewhat similar case decided in the supreme court of California, which meets with our hearty approval. *De Frieze v. Quint*, 94 Cal. 653, 664, 30 Pac. 3. There the court, speaking of a like act of occupancy, observes:

"The little shed, sufficient 'to afford shelter to three valuable domestic animals,' ten feet square and seven feet high, is the only thing relied upon to indicate to defendant that plaintiff or Miller was in possession of the land; and no doubt it was intended to be used as evidence of such possession, and for no other purpose. So important was it considered by the complainant that the only visit that he made to the land during the term of the lease was for the purpose of ascertaining whether Miller had built it according to the cove-

nants in the lease. Why was this shed required to be sufficient to shelter only three valuable animals? Why is there no evidence that it was ever used for any purpose? It was obviously a mere sham, which should be allowed no effect whatever as evidence of possession."

Nor can the complainant below, his actual occupancy failing, be heard to say that his bill can be sustained within the statute upon the ground that the premises were "vacant and unoccupied." Having asserted, by his bill, actual occupancy by himself, he must sustain that allegation, or fail in his suit. He cannot now shift his position. *Glos v. Bouton*, 170 Ill. 249, 48 N. E. 949. We are the less inclined to give weight to the supposed act of occupancy from consideration of the circumstances under which the complainant below appeals to a court of equity. The owners of the land for a period of 22 years paid no heed or attention to the property, and discharged none of the duties which they owed to the government which protected them and their rights in the property. They knew—as all men know—that an annual tax is laid upon all property for the support of the government. They allowed strangers to the title to pay the taxes during 22 consecutive years, and to acquire a tax title to the premises. They doubtless deemed the property worthless,—as probably it was,—except for purposes of a fishery, until about the year 1891, when, within common knowledge, a considerable demand arose for sand, and property along the beach of the lake sprang into value. Then the complainant acquired from former owners the title to these 70 acres of land, placed this structure upon the premises, and forthwith filed his bill to avoid the tax deed under color of title of which Lincoln and Jackson claimed to have taken possession. The facts, although not conclusive, are somewhat strong to show an abandonment by the complainant's grantors of their rights in the property. *Holtzman v. Douglas*, 168 U. S. 278, 284, 18 Sup. Ct. 65, 42 L. Ed. 466. And we are not inclined to dispense with the actual occupancy which the law requires in favor of those who for so long a period of time have lost sight of their duty to the government which protects them in their rights of property. We conclude, therefore, upon this branch of the case, that no actual occupancy by the complainant was shown, and that his bill should have been dismissed.

It remains to consider the rights of the appellant under his cross bill. Undoubtedly, where a cross bill is filed for the purposes of a discovery, or to bring before the court matters of defense occurring since the commencement of the suit,—equivalent at law to a plea puis darrein continuance,—it is not essential to show equitable grounds for the interposition of the court. The cross bill in such case, being purely in aid of the defense asserted to the original bill, is dependent upon, and probably falls with the dismissal of the original bill. But a cross bill which seeks affirmative relief is in the nature of an original bill wherein the cross complainant is the actor. Such a cross bill is not dependent upon the original bill, is not subject to the control of the complainant in the original bill, and does not fall with the dismissal of the original bill, whether that dismissal be the act of the complainant or the act of the court. Therefore the cross complainant appealing to a court of equity for equitable relief

touching a subject germane to the matter of the original bill must present to the court the grounds for the affirmative relief with the same care and particularity as are required in an original bill, and must make a case by his bill of which the equitable jurisdiction will take cognizance. Thus it has been held that a cross complainant charging usury with respect to securities which are the subject-matter of the original bill, and seeking to have them delivered up and canceled, must, in order to bring himself within equitable cognizance, offer to pay what is legally due upon them. *Mason v. Gardiner*, 4 Brown, Ch. 437. See, also, Story, Eq. Pl. (10th Ed.) § 398; 2 Barb. Ch. Prac. c. 9. Has the appellant (the cross complainant) presented by his cross bill a case for equitable cognizance? We have shown in the discussion of the complainant's case that, under the enlarged jurisdiction which courts of equity will exercise since the passage of the statute by the state of Illinois, courts of equity will entertain jurisdiction to remove a cloud upon a title in two cases only,—where the complainant is in possession of the land, or where the premises are vacant and unoccupied,—and that one of these two conditions must obtain, and be shown by the bill, before the interference of equity can be successfully invoked. In this respect the cross bill stands upon the same footing, and is to be judged by the same considerations, which govern an original bill. The cross bill in this case charges that Lincoln obtained his tax deed in 1872, the land being then vacant and unoccupied; that for 18 consecutive years thereafter Lincoln paid the taxes upon the land, and that, subsequent to the year 1879, Lincoln, under color of title, "took possession of said premises, and was in possession of the same from said last-mentioned date to the time of his death, to wit, on the 25th day of May, 1889, or thereabout; and that at the time of the taking of the possession of the said premises by the said Oliver S. Lincoln, deceased, the same were vacant and unoccupied." The bill may possibly be defective in the omission to state whether during the period from 1872 to the taking possession by Lincoln the lands were vacant and unoccupied, and in the omission to state with particularity the character of the possession taken. These defects, however, if they be defects, we pass by, because they do not go to the question of equitable cognizance. The bill, however, wholly fails to declare whether possession was continued after the death of Lincoln, and whether the lands at the time of the suit were possessed, and by whom, or were vacant and unoccupied; and wholly fails in any assertion that the appellant was in possession. Without apt allegations in this respect, equity will not, as we have shown above, entertain a suit to remove a cloud upon title. The cross complainant appealing for equitable interference must, by his cross bill, bring himself within the recognized principles upon which courts of equity act. Thus, in *Calverley v. Williams*, 1 Ves. Jr. 210, the complainant asserted that a certain parcel of copyhold land was included within a larger parcel of lands sold to him by the defendant, and the complainant had in some manner been let into the possession of the parcel in dispute, which it was claimed by the defendant was not included in the sale. Thereupon Calverley filed his bill to compel a conveyance to him by the defend-

ant of the land in dispute. The defendant, having answered denying the sale, filed his cross bill seeking to recover from Calverley the possession of the land in question. The original bill at the hearing was dismissed upon the merits, and with reference to the cross bill Lord Thurlow observes: "As to the cross bill to be let into possession, I cannot decree; that it is merely a legal title, and the object of ejectment, therefore it must be dismissed, with costs." The cross bill failed to show a case within the equitable jurisdiction of the high court of chancery of England, then obtaining. It was, therefore, dismissed, although its subject was germane to the subject-matter of the original bill, and although the jurisdiction of a court of equity over the original bill was incontestable and undisputed. It is thus clear, to our thinking, that whoever appeals to a court of equity for affirmative relief—whether he be complainant or cross complainant—must, by his bill, exhibit a case that falls within recognized principles of equitable cognizance, and that as here the appellant does not show by his cross bill that at the time of the suit he was in possession of the land, or that the land was at that time vacant and unoccupied, he has not, by his bill, exhibited a case upon which a court of equity can afford him affirmative relief. But, were this otherwise, the evidence is so loose and fragmentary with respect to the occupancy of the land covered by the tax deed that we should hesitate to decree the relief demanded. It is claimed that east of the premises embraced within the tax deed there is a parcel of land described in the original bill as "a fraction lying east of the above-described premises." The width of this fraction of land, if any such there be, is not given, and the eastern boundary of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the section is nowhere stated with precision. Although the premises would appear to have been surveyed upon several occasions, the parties seemed not to have deemed it necessary to call as witnesses those who made the survey, but to have contented themselves with loose and disconnected statements which the surveyors are said to have made. It is, therefore, impossible for us to ascertain whether, assuming the occupancy of Gamash, the fisherman, under the license of Lincoln, to be such possession as the law required, it in fact extended westerly from the shore of the lake to and upon the land actually included within the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the section, or whether it was confined within the limits of the parcel described as the fraction lying easterly thereof. We should therefore hesitate to say that the possession by Lincoln was shown with that accuracy which we deem to be necessary.

Neither party having brought himself within equitable cognizance each must be remanded to his remedy at law. The decree will be reversed, and the cause remanded, with directions to the court below to enter decrees dismissing both the original and the cross bills.

PHINIZY et al. v. AUGUSTA & K. R. CO. et al. CENTRAL TRUST CO. v.
PORT ROYAL & W. C. RY. CO. GREENVILLE COUNTY
et al. v. PORT ROYAL & W. C. RY. CO. et al.

(Circuit Court, D. South Carolina. March 26, 1896.)

1. RAILROADS—FORECLOSURE OF MORTGAGE—ALLOWANCE TO TRUSTEES.

The allowance made by a court to trustees in a railroad mortgage for their services in relation to its foreclosure will be proportioned to the amount of service actually required and rendered; and where they do not take possession of the property, and no duties are required of them in its administration or in the distribution of the proceeds, and no contest is made to their recovery, their services being confined to the employment of counsel, a comparatively small allowance will be made them, although they realize the full amount of the mortgage debt.

2. SAME—ALLOWANCE OF COUNSEL FEES.

Where the question of the fees to be allowed counsel for their services in the foreclosure of a railroad mortgage in a federal court is submitted to the court, it is not bound by any contract made by the trustees, or by any state law or practice, but is governed entirely by the rules of federal courts of equity, which require that the allowance shall be a reasonable one, in view of all the circumstances of the case, and the usages and practice of the bar to which they belong.

3. SAME—ALLOWANCE TO OPPOSING COUNSEL.

Allowance may properly be made from the fund realized on the foreclosure of a railroad mortgage to compensate all counsel who contributed to its recovery, but counsel who appear for parties who intervene and unsuccessfully contest the validity of the mortgage do not come within this rule.

In Equity. On applications for allowances to the trustees and counsel from the fund produced by the sale of the property of the defendant railroad companies under the decrees of foreclosure.

W. K. Miller, W. G. Charlton, and Leonard Phinizy, for trustees and others.

Lawton & Cunningham, for defendants.

N. B. Dial and C. C. Featherstone, for cross-complainant counties.

SIMONTON, Circuit Judge. Among the matters to be settled in these cases is the question of compensation of the trustees of the Augusta & Knoxville Railroad Company, including the compensation for their counsel. Perhaps no more embarrassing question can be presented to a court. Were it governed by fixed rules, this embarrassment would be measurably removed. But in a matter of this sort, regard being had to the amount of compensation, each case is a rule unto itself. A suit was brought originally by the trustees of the first mortgage of the Augusta & Knoxville Railroad Company, seeking foreclosure of their mortgage. The Augusta & Knoxville Railroad owned a line of road from Augusta, Ga., to Greenwood, S. C. It there met other lines of railroad, and by an agreement between it and these concurring roads a combination was formed, and a new corporation created, embracing all the contracting roads, and known as the Port Royal & Western Carolina Railroad. Each of the combining roads had upon it a mortgage securing certain coupon bonds. By the combination agreement, all these mortgages, except that of the Augusta & Knoxville, were taken up and satisfied with a

new issue of bonds by the new corporation, secured by a mortgage of the entire system. The mortgage creditors of the Augusta & Knoxville Railroad Company did not go into this agreement, but retained their lien, so that the Port Royal & Western Carolina Railroad had upon it two mortgages,—the one covering that part of it once known as the Augusta & Knoxville Railroad, and being a first lien thereon; the other covering the whole system, and having a second lien on the part once known as the Augusta & Knoxville Railroad, and a first lien on all the rest of the system. The principal of the bonds of the Augusta & Knoxville Railroad was \$——. The bill for foreclosure made the Augusta & Knoxville Railroad Company and the Port Royal & Western Carolina Railroad Company parties defendant. Subsequently the Central Trust Company of New York, trustee of the mortgage made by this last-named company, was made a party defendant. On the day preceding the filing of the amendment the Central Trust Company of New York filed its bill for foreclosure of the mortgage of the Port Royal & Western Carolina Railroad Company, and by an order of the court the two cases, although not consolidated, were treated always together. Into these proceedings came the counties of Greenville, Spartanburg, and Laurens, of South Carolina, and the towns of Anderson and Greenville, and filed an answer, and afterwards a cross bill, resisting the prayer of the bill by the Central Trust Company of New York, and attacking the validity and lien of many of the bonds held by it. The proceedings finally terminated in an order for sale. The priority of lien of the bonds of Augusta & Knoxville Railroad Company was never disputed over that part of the system originally known by that name. The stress of the controversy in the case was between the contention of the counties and the holders and owners of the bonds secured by the mortgage of the whole system. The result of the sale had under the order has been to secure for the bonds of the Augusta & Knoxville Railroad Company payment in full of everything due on each of them.

This is not a suit like that in *Trustees v. Greenough*, 105 U. S. 532, 26 L. Ed. 1157; *Railroad Co. v. Pettus*, 113 U. S. 124, 5 Sup. Ct. 387, 28 L. Ed. 915, and *Hobbs v. McLean*, 117 U. S. 581, 6 Sup. Ct. 870, 29 L. Ed. 940, in which a person interested in a fund, but charged with no special duty with regard to it, undertook the risk, labor, and expense of recovering, restoring, or securing the fund, as well for himself as for all others interested. The trustees in the present case, when they accepted the trusts of the mortgage deed, assumed the duty which they subsequently performed. And, having the alternative of taking possession of the property or asking the aid of the court, they wisely pursued the latter course. They selected able counsel, committed to them the interests in their charge, and were fully represented in the subsequent litigation. No special duties were required of them. No labor was thrown on them. As no litigation or dispute over the special interests they represented arose in the progress of the case, they could not have been called upon to advise their counsel on difficult or embarrassing questions. They have no part in the receipt or distribution of the proceeds of the sale. In *Williams v. Morgan*, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559, trustees of a

railroad mortgage exercised the right to enter upon the property, and afterwards sought the aid of the court in its administration. They remained in actual possession for over five years, and operated, administered, and restored the property, bringing it to an efficient condition. They subsequently sold it for the sum of \$5,000,000, and distributed the proceeds. The supreme court allowed the two trustees the gross sum of \$75,000 between them for their services as trustees and receivers for a little more than five years. If the analogy of this case is pursued, a liberal allowance to these trustees, who performed no part of the duties of receivers, will be \$5,000 between them, and it is so ordered. *Colston v. Railroad Co.*¹

As a matter of course, the counsel whom they employed must be compensated. With great force, counsel seek to measure their compensation by a percentage on the amount of the recovery, or rather of the sum which the bondholders will receive; and they press upon the court the rule of compensation in Georgia, and the contract which they could have made with the trustees, exhibiting the approval of the trustees of a charge of 5 per cent. on the recovery. It is unnecessary to say that no contract or understanding of the trustees can bind this court. They have come in, and have submitted their case to it, and have craved its aid. Nor is the court bound by any state rule or law on this subject. As it would not be bound by a state law or practice expressly prohibiting courts of equity from making allowances to trustees or their counsel (*Dodge v. Tulleys*, 144 U. S. 457, 12 Sup. Ct. 728, 36 L. Ed. 501), it is not in any way regulated by them in the amount of the allowance, or the mode in which it is reached. There is no such rule in this court as the one contended for. The rule here is that a reasonable allowance be made (*Dodge v. Tulleys*, *supra*), or, as it is expressed in *Trustees v. Greenough*, 105 U. S. 536, 26 L. Ed. 1157:

"Allowances of this kind, if made with moderation, and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice."

The testimony contains estimates of experienced and able witnesses, some of whom have filled judicial positions. It has received the careful and respectful consideration it so well deserves. But it is impossible to concur in the large estimate which has been made. Indeed, allowances of the character they suggest are inconsistent with the uniform practice of this circuit, and are against the current of authorities from the supreme court of the United States. In *Williams v. Morgan*, quoted above, Messrs. John E. Parsons, of New York, and Hon. John A. Campbell, formerly Mr. Justice Campbell, were of counsel. They were allowed, the one \$15,000, the other \$20,000. That case was full of litigated points, and counsel were called upon to advise as to the administration and management of the railroad system for over five years. In the case before the court there were three counsel representing the trustees. Their management of their case, shown as well by the tact and discretion as by the learning which they displayed, deserved and has the com-

¹ No opinion filed.

mentation of the court. Although no grave issues or marked resistance were encountered, they deserve liberal compensation. In deference to the testimony which they have adduced, and recognizing that, in putting an estimate upon the value of their services, consideration must be shown to the usage and practice of the bar to which they belong, an allowance will be made beyond that usually given in this circuit. This allowance is fixed at \$20,000 in the aggregate, to be apportioned among them as they determine.

The counsel who represent the counties and towns have submitted to the court a claim for compensation out of the general fund. This fund belongs primarily to the bondholders. It is, no doubt, true that the fund must be used to compensate all who contributed to its recovery. When the services of counsel were rendered, not in aid of the bondholders in securing their rights, but in interposing obstacles and obstructions in their enforcement,—when these counsel acted in hostility to the bondholders,—they do not come within this rule. *Hobbs v. McLean*, 117 U. S., at page 581, 6 Sup. Ct. 870, 29 L. Ed. 940. The rule and exception to it are fully stated in this case, at page 582, 117 U. S., page 877, 6 Sup. Ct., and page 946, 29 L. Ed.:

“When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all, and at his own cost and expense, brings a suit for its preservation or administration, the court of equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. See *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, where the subject is discussed by Mr. Justice Bradley, and the cases cited, and *Railroad Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915. But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.”

The counties and towns intervened and came into this case of their own motion. They resisted the foreclosure of the general mortgage, and denied the validity of the bonds and the rights claimed by complainant. Their contention was not successful. They surely did not contribute to the protection, security, or recovery of the fund which the bondholders will get. They are not entitled to fees out of this fund, or as against the purchasers of the property.

UNION MORTGAGE, BANKING & TRUST CO., Limited, v. HAGOOD et al.

(Circuit Court, D. South Carolina. January 5, 1900.)

USURY—EFFECT ON CONTRACT—PROVISION FOR ATTORNEY'S FEES.

A statute which forfeits the interest on a contract in case of usury, but does not make the contract void, does not affect a provision for attorney's fees in case of suit, and such provision is enforceable although the contract is held to be usurious.

In Equity.

This was a suit for the foreclosure of a mortgage, in which the notes secured were held usurious. The present hearing was on the question of the right of complainant to recover the attorney's fees provided for in the contract.

Allen J. Green, for complainant.

Wm. H. Townsend, for defendant.

SIMONTON, Circuit Judge. The question now submitted in this case is whether the plaintiff can recover the counsel fees, provision for which is made in the contract. It has been heretofore decided in this case that the notes, evidence of the loan, are affected with usury. The transaction leading up to this loan began before March 1, 1890. The testimony did now show, however, that the agreement or arrangement for the loan by plaintiff was made anterior to March 1, 1890, and it did show that the papers were not executed until after that date. It was deemed the duty of the plaintiff to prove that the agreement or the arrangement for the loan was made prior to March 1, 1890, in order to bring it within the exception to the statute. No evidence on that point appeared in the record. No doubt the whole transaction was completed without knowledge of the statute on the part of the plaintiff. The defendant now contends that, inasmuch as the loan has been decided to be usurious, the plaintiff cannot recover anything more than the principal of his loan, and that the contract to pay counsel fees in case of suit falls to the ground. The act of the general assembly of force at the date of this loan is directed against the receipt of a greater rate of interest upon verbal contracts than 7 per cent., and a greater rate of interest than 10 per cent. on written contracts. The infringement of the statute forfeits the interest *eo nomine*. The contract is not void or voidable. The promise to pay the principal is good, and is enforced. The lender loses interest. Now, the counsel fee, in case of suit, is no part of the interest. It is a collateral contract, applying only to the sum recovered, the amount of which is only ascertainable after the recovery is fixed by judgment. It is contingent upon the action of the debtor, and cannot come into effect except by the debtor's volition. It is not usurious in itself, and its connection with the contract does not make it usurious. *Montague v. Stelts*, 37 S. C. 212, 15 S. E. 968; *Spain v. Hamilton*, 1 Wall. 626, 17 L. Ed. 619. The defendant relies upon the case of *Agency Co. v. Gillam*, 49 S. C. 350, 26 S. E. 990, and 29 S. E. 203, in which counsel fees were not allowed on a usurious contract. This is but a single decision of the state court, and does not control this court. The learned justice assigns reasons for his conclusion which do not commend themselves. It is the judgment of this court that the counsel fee can lawfully be charged, and it is so ordered.

HACKLEY v. OAKFORD.

(Circuit Court of Appeals, Third Circuit. December 2, 1899.)

No. 22.

1. SPECIFIC PERFORMANCE—REQUISITES OF ENFORCEABLE CONTRACT.

There can be no decree for specific performance in the absence of a specific contract, and, until all essential points have been mutually and finally assented to, there is no such contract.

2. SAME.

Plaintiff submitted to the attorney for defendant a written proposition to lease from defendant certain coal lands for mining purposes. The proposal stated the royalties to be paid, but contained the condition, "Lease to contain usual mining privileges, and a reasonable minimum." After consulting with defendant, the attorney wrote plaintiff that she accepted the proposal; further stating that "the acceptance is predicated upon the signing of such a lease as I shall advise and prepare." *Held*, that it was open to either party to refuse to sign the lease so prepared, and that its execution by plaintiff after being advised of the refusal of defendant to sign it did not create a contract which plaintiff could specifically enforce.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion of circuit court, see 92 Fed. 38.

H. W. Palmer and Richard C. Dale, for appellant.

Samuel B. Price, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. In the absence of a specific contract there cannot be a decree for specific performance. A proposal unaccepted, or an acceptance which departs from the terms of the proposal, does not constitute a contract. Until all essential points have been mutually and finally assented to the negotiations remain open, and no contract arises until the negotiations are closed. These principles were not overlooked by the court below, but we think that, with reference to the facts of this case, they were not rightly applied. Mr. Jessup, an attorney at law, was also the defendant's attorney in fact, under a letter of attorney which conferred upon him very general powers, modified and limited, however, by a provision "that in all matters of importance my said attorney is to consult with me before transacting the same." On the day of its date a letter was written and sent by the plaintiff to Mr. Jessup, as follows:

"Scranton, Pa., Oct. 27th, 1894.

"To Hon. Wm. H. Jessup, Attorney for Frances A. Hackley: I hereby offer to lease from you all the merchantable and minable coal in, under, and upon the Thomas Bell tract of land, in Lackawanna county, Pennsylvania, at the following rents or royalties, viz.: For the first two (2) years, forty-two (42) cents for prepared sizes, one-half ($\frac{1}{2}$) of the price of prepared sizes for pea, and one-fourth ($\frac{1}{4}$) of the price of prepared sizes for buckwheat, and one-eighth ($\frac{1}{8}$) of the price of prepared sizes for bird's-eye and culm, if sold and removed from the demised premises. After two years from date of leases, the royalty on prepared coal to increase at the rate of one (1) cent per annum up to a maximum of fifty (50) cents, and the smaller sizes proportionately. Lease to contain usual mining privileges, and a reasonable minimum.

"J. W. Oakford."

This letter embodies the offer in which the contract asserted by the plaintiff is alleged by him to have had its inception. It was, November 8, 1894, submitted by Mr. Jessup to the defendant; and, after consultation with her, he wrote upon it, and she signed, the following:

"I accept the above offer, and direct W. H. Jessup to draw up a proper lease for the coal mentioned.

Frances A. Hackley.

"Nov. 8, 1894."

This writing does not appear to have been itself communicated to the plaintiff, but, on the day of its date, Mr. Jessup wrote him as follows:

"Dear Sir: I write to inform you that your proposal to lease the coal on a part of the Thomas Bell tract, owned by Mrs. Hackley, is accepted by her, and I am directed to prepare a proper lease for the same. The acceptance is predicated upon the signing of such a lease as I shall advise and prepare.

"Very truly yours,

W. H. Jessup,

"Attorney for Mrs. F. A. Hackley."

To this letter of November 8, 1894, the plaintiff made no reply, either written or oral; and that at this point no complete meeting of the minds of the parties had taken place seems to us to be perfectly clear. The proposal, though it contemplated a formal lease, was, save as to rents or royalties, absolutely silent respecting the contents of that instrument, excepting only that the proposer stipulated that it should "contain usual mining privileges, and a reasonable minimum." But no method was indicated for ascertainment of what would be "usual" in the one particular, or "reasonable" in the other; and, beyond the specification of the rates of royalties, no suggestion whatever was made concerning any other of the provisions to be inserted in the lease. Such being the offer which was accepted, conditioned upon the signing of such a lease as Mr. Jessup should advise and prepare, it must have been quite well understood that if such a lease should not be signed, the transaction, in the absence of further negotiations, would be nugatory.

Mr. Jessup afterwards prepared a quite lengthy and elaborate lease, and on November 22, 1894, sent one copy thereof to the defendant, inclosed with a letter in which he informed her that the plaintiff was going to New York on the same day, and would call upon her, and that he (the plaintiff) had the other copy of the lease with him. In this letter Mr. Jessup told the defendant that both copies should be executed by her, and that she and the plaintiff should each retain one of them. The plaintiff went to New York, accordingly, but, for reasons which we do not regard as material, he did not see her. On November 26, 1894, Mr. Jessup received a letter from the defendant, in which she stated, in substance, that she would not sign the lease; and on the same day the plaintiff executed the copy of it which had been given to him, and gave it to Mr. Jessup, with a letter signed by the plaintiff, and addressed to Mr. Jessup, as attorney for the defendant, from which it plainly appears that he had executed the instrument with knowledge of the defendant's refusal to accept or sign it. In this letter the plaintiff's position was stated in this language:

"My execution of this lease, taken in connection with my proposition for a lease, Mrs. Hackley's acceptance thereof, your notice to me of such acceptance, and, finally, your drawing and submitting of this lease, which I have executed

without change, closes the matter, so far as I am concerned; and I hereby notify you, as attorney for Mrs. Hackley, that I hold her to her agreement, and expect her at once to return to me her copy properly executed and acknowledged, and I notify you further that I shall at once go into possession of the land described."

It is evident from this that, as we have said, the signing of the lease by the plaintiff was done with knowledge of Mrs. Hackley's declination to be bound; and as we have already seen that the plaintiff's offer, and the defendant's qualified acceptance thereof, did not constitute a contract, the only question which remains is as to whether the execution by the plaintiff of the lease drawn by Mr. Jessup effected a complete meeting of the minds of the parties. Before he took it with him to New York, he, of course, knew that the acceptance of his offer had been predicated upon the signing of a lease; and his taking this one to the defendant for the very purpose of procuring her signature to it indicates that he understood that unless it should be signed by her, as well as by himself, Mr. Jessup's qualified acceptance of his proposal would not become absolute. At all events, the plaintiff's offer, and Mr. Jessup's response to it, had left unsettled many important points which the lease definitively dealt with. Consequently the assent of both parties to the terms of that instrument was requisite to the formation of a complete contract, and the plaintiff could not, by alone signing it, in disregard of the defendant's dissent, render it mutually obligatory. Mr. Jessup had not undertaken on behalf of the defendant that she would sign this lease, or any other which he might prepare. By his letter to the plaintiff of November 8, 1894, he expressly limited his own part in the transaction to advising his client and preparing the lease. He was to advise, not to control her. Accordingly he did prepare a lease, which he submitted to her, with his advice respecting it; and, inasmuch as it contained provisions which had not been agreed upon, her rejection of it left the matter as if no offer had ever been made. We have reached the conclusion that no such contract as the defendant has been ordered to specifically perform actually existed; and therefore the decree of the circuit court is reversed, and the cause will be remanded to that court, with directions to enter a decree dismissing the bill, with costs.

CHAMBERS et ux. v. McCREERY.

(Circuit Court, D. West Virginia. December 14, 1899.)

GIFTS—SUFFICIENCY OF DELIVERY.

A gift of bonds by a husband to his wife is not established by evidence that the bonds were deposited by the husband in a box in a safety-deposit vault, to which the husband and wife each held a key, where they remained until the husband's death; that the wife went with her husband at various times, and assisted him in cutting coupons from the bonds; and that the husband had declared in the presence of third persons his intention to give the bonds to his wife. Such facts do not constitute a completed gift, under the rule that there must have been such a delivery as to divest the donor of dominion and control of the property.

This was a suit to establish a gift alleged to have been made by defendant's intestate. On final hearing.

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Brown, Jackson & Knight, for complainants.
Watts & Ashby and John W. McCreery, for defendant.

JACKSON, District Judge. This case was heard some time since, and submitted to the court for its action; and while the same was under consideration one of the parties died, making it necessary to revive the case. At this term of the court the case was revived, and it now comes on to be heard upon the papers for a final decree.

The only question that arises in this case is whether certain bonds that belonged to Edwin Prince in his lifetime were disposed of by him by gift to his wife. It is claimed by the plaintiffs in this action, T. W. Chambers and Lockey T. Chambers, his wife (who was the wife of Edwin Prince, and after his death intermarried with T. W. Chambers), that during the lifetime of Edwin Prince he gave to her certain bonds, set out in the bill, in a safe deposit at Cincinnati. The executors and heirs of Edwin Prince contest this claim, and deny that the bonds were ever disposed of by Edwin Prince, in any manner or form, in his lifetime, and claim that they belong to the estate of Edwin Prince, to be disposed of by his executor. This is a question of a gift *inter vivos*. A gift of this character has been defined to be "an immediate, voluntary, and gratuitous transfer of personal property by one to another." To make this gift valid, it is essential that the transfer of the property be duly executed, for the reason that, there being no consideration passing between the donor and donee, no action will lie to enforce it. A gift of this character must go into immediate and absolute effect. To make it complete, there must be an actual delivery of the subject-matter of the gift, so far as the same is capable of delivery; and, in the absence of a delivery of that character, the title to the property does not pass from the donor to the donee. Chancellor Kent says in his work (2 Comm. p. 438) that the "necessity of delivery has been maintained in every period of the English law. * * * The donor must part, not only with possession, but with the dominion and control, of the property." An intention to give it is not a gift, and, so long as a gift is incomplete, a court of equity will not enforce and give effect to it. This position of Chancellor Kent is sustained by a long list of authorities in this country. Our courts seem to hold that gifts both *inter vivos* and *causa mortis* should be so complete as to deprive the donor of the future control and dominion of the property, and that in order to make same valid it is necessary for the donee to take and retain possession until the donor's death; for, if the donor once regains possession of the gift, it becomes nugatory.

I have given this case much thought and reflection, and, applying the principles of law just announced, I cannot reach the conclusion that the plaintiffs in this action are entitled to relief. The evidence of various witnesses that Edwin Prince intended to give the bonds in question is not in itself sufficient. There must have been upon his part an actual delivery of the bonds to his wife in his lifetime, and she must have reduced them to possession. The evidence shows that these bonds were in a safe deposit at Cincinnati; and while she had one of the keys to the box, and went there at various times with

Prince, her deceased husband, in his lifetime, to clip the coupons, and aided and assisted him in doing so, yet there is no evidence which tends to establish the fact that she ever had supreme control over them, or exercised dominion over them independent of her husband. He placed these bonds in the same place that they were found after his death, and it must be inferred from all the evidence in this case that he, being somewhat advanced in life, took her with him on his various trips to Cincinnati for the purpose of having her take care of him and assist him in his business. Declarations upon his part, in the presence of various persons, that he intended to do something for her or to give the bonds to her, are of themselves insufficient. A promise or a declaration unexecuted in the lifetime of the donor is insufficient to pass title to any property concerning which a decedent may have made an actual promise. I deem it unnecessary to go into an analysis of all the evidence in this case, but, looking at it in the light of what it tends to prove, I am forced to the conclusion that there is no evidence that justifies the court in decreeing the title and the possession of the bonds to the plaintiffs in this cause. For the reasons assigned, I am of opinion that the bill should be dismissed.

TROENDLE v. VAN NORTWICK et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 581.

1. REVIEW ON APPEAL—QUESTIONS NOT RAISED BELOW.

A complainant cannot assign as error on appeal the action of the court in permitting the filing of a cross bill, and making an order that the original bill should stand as an answer thereto, although no process had issued thereon, where he appeared and took part in the hearing on the issues joined without objection.

2. EQUITY PLEADING—CROSS BILL—NECESSITY OF ALLEGING DEMAND.

The failure of a cross bill for the recovery of a debt, and the enforcement of a pledge to secure the same, to allege a demand, is not ground for the reversal of a decree based thereon, where the original bill denied the indebtedness and the pledge.

3. SAME—VARIANCE—FAILURE OF PROOF.

An allegation in a cross bill that defendant advanced to complainant a certain sum is not supported by evidence that defendant sold complainant shares of stock in a corporation equal at their par value to such sum, where there is no proof of the price agreed to be paid therefor; and that such price was the par value of the stock cannot be presumed from the fact that the corporation was newly organized under a statute prohibiting the issuance of stock except on full payment of par value therefor in money or property, where there was evidence which tended to show that the assets of the company were not in fact equal to the par value of its stock, and that defendant sold other stock for much less.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This suit was brought by the appellant, Theodore R. Troendle, against John S. Van Nortwick and others, who were merely nominal parties. It was alleged in the bill that Van Nortwick had possession of 1,120 shares of the capital stock of the Western Paper-Bag Company of Illinois, belonging to and standing in the name of Troendle, and was about to sell the stock to satisfy an in-

debtedness for the security of which he claimed to hold the shares as collateral; that there was in fact no indebtedness, and had been no pledge. The relief prayed was an injunction against the contemplated sale, an order for the delivery of the shares by Van Nortwick to Troendle, or that, in the event of a finding by the court that an indebtedness existed for which the shares had been pledged, an accounting should be had, the amount of the indebtedness determined, and a time fixed within which Troendle might redeem. In his answer Van Nortwick alleged three several indebtednesses, for which the shares had been pledged,—the largest for \$44,800, alleged to have been “advanced by William M. Van Nortwick for and on behalf of the complainant and at his request,” at the time the 1,120 shares of stock were issued in his name, “so that the stock of the complainant might be fully paid up stock”; the remainder of the price being the complainant’s interest in the stock of the Western Paper-Bag Company of Wisconsin, which was merged in the first-named company, then organized. Issue was joined upon that answer, and on November 10, 1898, the case was heard and taken under advisement. On the ensuing 28th, Van Nortwick was allowed to file a cross bill alleging the facts averred in his answer, and praying that in default of payment of whatever sum should be found due upon his demands against Troendle by a short day, to be fixed by the court, the shares of stock held as collateral be ordered sold; and at the same time the court ordered that the original bill of the appellant stand as an answer to the cross bill. And Van Nortwick having replied thereto, and all parties being present, the court proceeded to hear the cause upon the bill, answers, and replication, and on the cross bill and the answer and replication, and, having heard the evidence offered, both oral and documentary, and the arguments of counsel, entered a final decree establishing an aggregate indebtedness of Troendle to Van Nortwick of \$65,880.75, which it was ordered should be paid within sixty days, and in default thereof the pledged shares should be sold. The original bill was dismissed for want of equity.

The errors assigned and relied upon are: (1) The dismissal of the bill for want of equity. (2) The entry of a decree on the cross bill, the court having no jurisdiction for that purpose over the appellant. (3) The insufficiency of the cross bill, a demand for payment not having been alleged. (4) Variance between the allegation and proof in regard to the alleged indebtedness of \$44,800. (5) The finding of an indebtedness of \$44,800 not supported by the evidence. (6) The evidence does not sustain the finding that before the filing of the bill William M. Van Nortwick assigned to John S. Van Nortwick all the indebtedness of the appellant to the former, and the five certificates for the 1,120 shares of stock. (7) The levy upon the stock of the execution in favor of Van Nortwick upon a judgment for a part of the indebtedness secured by the pledge of the stock waived the lien of the pledge.

Lewis W. Parker, for appellant.

A. J. Hopkins and F. H. Thatcher, for appellees.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

It is urged that the original bill should not have been dismissed, because the appellant was at least entitled to a decree thereon determining the amount of his indebtedness for which the shares of stock were pledged, and fixing a time within which he might redeem. The question is not one of substance. On the cross bill the court entered a decree determining the debt, and fixing a time for redemption, and in addition authorized, in case of default of payment, a sale of the pledged shares in discharge of the debt. It was, of course, within the discretionary power of the court to permit the filing of the cross bill. The objection that the cross bill

did not pray process, and that process was not issued and served, might be important, if the record did not show the presence and participation of the appellant in the hearing, which was upon both the original and the cross bill. While in the equity practice it is not necessary to state an exception or objection in order to preserve a question for consideration on appeal, still, "there is a large class of cases in which it has been held that objections not taken in the court below will not be allowed to be taken in this court." It was so said in *Railroad Co. v. Bradleys*, 10 Wall. 299, 19 L. Ed. 894; and there is not in this case, as there was in that, "such a combination of errors, and errors of so grave a character," as to make the principle inapplicable. The cross bill in this case was put at issue by the order, made plainly for the convenience, and, it is not unfair to assume, with the silent acquiescence, of the appellant, that the original bill should stand as an answer thereto. The recital of the appearance of the parties at the hearing implies the voluntary act of the appellant; and, if he desired to object that a hearing upon the cross bill could not be had until process had been issued and served, it was his duty then to make his position plain. The objection pointed out in the assignment of errors is, not that process had not issued, but that the court did not allow the appellant "any time * * * nor enter any rule upon him to answer the said cross bill," but without his consent ordered that his original bill stand as the answer. No other or different answer, except in matter of form, was possible, and manifestly no injury resulted from the peremptory action of the court. The objection that the cross bill contains no allegation of demand, at best, has only technical merit; and, in view of the denial of the debt and pledge contained in the original bill, an averment of demand was probably unnecessary.

The suggestions of variance between allegation and proof, and that the evidence does not sustain the finding in respect to the \$44,800 alleged to have been advanced by William M. Van Nortwick to Troendle, are better founded. The allegation "that the said sum of \$44,800 was, at the time the 1,120 shares of stock were so issued to the said Troendle in his name, advanced by the said William M. Van Nortwick to the said Troendle at his request, so that the stock of said Troendle might be fully paid up stock," means an advancement of cash, and of that there was no evidence whatever. That, however, is as much a matter of form as of substance, and of less importance than the lack of evidence that upon any consideration Troendle became indebted to William M. Van Nortwick in a sum so large as that stated. The facts in brief are these: In the spring of 1895 there were two corporations,—the Western Paper-Bag Company of Wisconsin, and the Kaukauna Paper Company of Wisconsin. The Van Nortwicks were interested in both companies, but Troendle only in the first-named company, of whose capital stock, amounting to \$50,000, 112 of the entire 500 shares stood in his name, but were pledged to secure the payment of his notes, then held by William M. Van Nortwick, for \$2,800 and \$4,600, given in part payment for the stock. Troendle then proposed, and William M. Van Nortwick consented to join him in, the organization of a new cor-

poration, called the Western Paper-Bag Company of Illinois, to which the assets of the two companies named should be transferred; and to that end William M. Van Nortwick purchased the interest of John S. Van Nortwick in the Kaukauna Paper Company, thereby becoming the sole owner of that property. For the purposes of the transfer the assets of the existing paper-bag company were estimated at \$300,000, and the Kaukauna property at \$200,000, making \$500,000, the amount of the capital stock of the new company, which was divided into 5,000 shares, of \$100 each. The capital stock of the original paper company being but \$50,000, each share of stock therein entitled the holder to six shares of the new stock, and Troendle's 112 shares entitled him to 672 shares; but, in order to make his relative interest in the new company the same as in the old, William M. Van Nortwick consented to sell and to cause to be issued to him 448 additional shares, which, however, with the other 672 shares, with a blank indorsement by Troendle, he stipulated should remain in his possession as a collateral for Troendle's indebtedness to him. There can be no question on these facts that there was a sale by Van Nortwick to Troendle of the 448 shares, but, aside from the variance from the allegation of money advanced, the question is at what price was the sale made. The corporation having been just then organized, and the stock newly issued, under a statute which forbade the issue of stock by any corporation "except in consideration of money, or labor, or property estimated at its true money value, actually received by it, equal to the par value thereof" (Rev. St. Wis. § 1753), there might arise a presumption, in the absence of contrary evidence, that the stock was worth, and therefore was sold at, its par value; but on the evidence in this record it is impossible to believe that the assets of the two companies, which were turned over to the new company as the consideration for the issue of its stock, were estimated at their true money value. The estimated values, agreed upon in palpable evasion of the statute, were vastly exaggerated. There is in the record no direct evidence of those values, or, if there is such evidence, it has not been pointed out. There was no express agreement to pay the par value. Van Nortwick himself testified that no mention was made of the amount to be paid for the stock, and did not in direct terms assert even an understanding on his own part that par value was to be paid. He sold to his attorney about that time one hundred shares at sixty cents on the dollar, and that purchase the attorney testified Troendle induced him to make by fraudulent representations. In order to make the property of the original paper-bag company worth \$300,000, "we had," said a witness, "to value the patents, trade-marks, and privileges, as we called them, at \$150,000"; and there has been no suggestion or evidence that the \$50,000 of stock which represented the property of that company was ever worth more than par in the market, or in any transaction other than the organization of the new company. The only ground disclosed on which it is possible to believe that Troendle intended to promise to pay for the stock its nominal or par value is the patent fact that he was totally irresponsible, and, never intending to perform, may

have been ready to buy at any price whatever could be obtained upon a promise to pay. But the case cannot be disposed of in that way, and the lack of proof in support of the cross bill cannot be supplied or compensated by the frequent references made to the very convincing proofs that Troendle, as a witness, was unworthy of belief. He is bound by no estoppel, and the decree on the cross bill must stand on its own merits, or must fall.

In so far as it was found and decreed that Troendle became indebted in the sum of \$44,800 for the 448 additional shares of stock issued in his name, we deem the decree erroneous, and, there being in the record no satisfactory evidence of the value of that stock, the decree to that extent will be reversed, and the cause remanded, with directions to grant a reference to determine that value: provided, that within ten days the appellee may remit \$20,000, and file with the clerk of this court proof of the remittitur, and thereupon the decree below shall stand affirmed. The costs of the appeal shall be paid by the appellant.

BENEDICT v. CITY OF NEW YORK et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 47.

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—CONFIRMATION OF REPORT OF COMMISSIONERS.

In proceedings to condemn property for public use on an application to confirm the award of commissioners of appraisal, the court will not ordinarily weigh conflicting evidence of value, but will refuse to confirm only when it appears that the commissioners have proceeded upon a wrong principle.

2. SAME—COMPENSATION FOR PROPERTY TAKEN—TIME AT WHICH VALUE IS TO BE ESTIMATED.

The fundamental doctrine that private property cannot be taken for public use without just compensation does not require that the compensation be made in all cases concurrently in point of time with the actual exercise of the right of eminent domain, but, at whatever time it is to be made under the statute, just compensation entitles the owner to the full market value of his property at the time of the taking, and that time is to be determined by the terms of the particular statute under which the proceedings are had.

3. SAME—TIME WHEN PROPERTY IS TAKEN.

Laws N. Y. 1883, c. 490, authorizing the city of New York to construct a new aqueduct for the purpose of a water supply, and to condemn lands necessary therefor, provides for the adoption by the aqueduct commissioners of maps showing the lands to be acquired in sections, which maps are to be filed in the county in which the lands are situated, after which it is made the duty of the counsel of the corporation to apply to the court for the appointment of commissioners of appraisal, who are to make and file in the office of the clerk or register of each county in which such lands are situated an oath of office, and then proceed to appraise the property. The act further declares (section 10) that upon the filing of the oath of said commissioners the city shall "become seized in fee of, and may immediately enter into possession of and occupy in perpetuity," all the lands shown on the maps filed as those to be acquired, and provides that in making compensation to the owner interest shall be allowed from that

time. *Held*, that in appraising the property its value should be taken as of that time, and not as of the time when the map was filed, which did not divest the owner of any of his rights therein.

Appeal from the Circuit Court of the United States for the Southern District of New York.

R. L. Sweezy, for appellant.

H. T. Dykman, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The city of New York, under chapter 490 of the Laws of New York of 1888,—being the act to authorize the construction of a new aqueduct for the purposes of a water supply for the city,—instituted proceedings in the supreme court of the state for the appointment of commissioners of appraisal to acquire for public use certain lands in the county of Westchester. The appellant, owner of some of the lands sought to be acquired, and a citizen of New Jersey, removed the proceedings, so far as they related to his lands, to the circuit court of the United States for the Southern district of New York. Commissioners of appraisal were appointed by the court, and, after viewing the premises, and hearing the evidence produced before them, they duly made and filed their report, and it was thereafter confirmed by an order of the court. From the order of confirmation this appeal has been brought.

In proceedings to acquire property for public use, the court, on an application to confirm the award of the commissioners of appraisal, will not ordinarily weigh conflicting evidence in considering whether it is adequate or excessive; but, if the commissioners have proceeded upon a wrong principle, the court will refuse to confirm.

It is insisted for the appellant that the commissioners did proceed upon a wrong principle, and that the court therefore erred in confirming the award. The contention is that the commissioners did not allow him the value of his lands at the time they were taken, and confined their inquiries to ascertaining the value at a later date when the property had considerably depreciated in value.

The fundamental doctrine that private property cannot be taken for public uses without just compensation does not require that the compensation be made in all cases concurrently in point of time with the actual exercise of the right of eminent domain; and it is competent for the legislature, in the absence of any constitutional interdiction, to prescribe whether the compensation be made at the time of the projection of the work, at the inception of the condemnation proceeding, at any subsequent stage of the proceeding, or at the time of taking actual possession of the property for the construction of the work. But, at whatever time the compensation is to be made or paid, just compensation entitles the owner to the full market or pecuniary value of his property at the time of the taking; and the authorities are so generally in accord upon this proposition that it may be accepted as the settled rule. There is much diversity, however, in the adjudications in applying this rule, owing to the diversity in the statutes authorizing condemnation. See 10 Am. & Eng. Enc. Law

(2d Ed.) 1147, where the citations are collected. By some of the statutes the owner is divested of his title or possession, actually or potentially, at the time of the enactment; while by others this does not occur until the proceeding has arrived at some advanced stage of progress, or been finally consummated, or until his damages have been paid. In every case, therefore, the application of the rule depends upon the provisions of the particular statute in terminating the dominion of the owner and segregating the property for the public use.

The present act provides for the appointment of commissioners to be known as "aqueduct commissioners," who are to adopt plans and maps, and have the general supervision of the entire work contemplated. It authorizes them from time to time to change or modify such plans and maps. The real estate to be acquired is to be denoted on the maps, and the maps are to be filed in the office of the clerk or register of each county in which any real estate is located. The maps are to be made and filed in sections. Proceedings to acquire the lands of one or more sections may be taken before the maps of all sections are filed, and the work upon one or more sections may be begun before the maps of the remaining sections are filed. After the maps are filed and transmitted by the commissioners with a certificate of their approval by the counsel of the corporation, it is his duty to apply to the supreme court for the appointment of commissioners of appraisal, and these commissioners, when appointed by the court, are to make and file in the office of the clerk or register of each county in which any of the real estate sought to be acquired is situated an oath of office, and then proceed to the appraisal of the property. The act declares (section 10) that upon the filing of the oath of said commissioners the city of New York shall be and become seised in fee of, and may immediately enter into possession of, and occupy in perpetuity, all the lands shown on any map filed by the aqueduct commissioners which they have determined should be acquired. The commissioners of appraisal, after hearing the parties, are to make a report specifying the amount to be allowed to the owner as compensation for the property taken. After confirmation of the report by the court, the city of New York is required within four months to pay the amount of the awards, with interest from the date of the filing of the oaths of the commissioners of appraisal.

Pursuant to the powers conferred upon them by this act, the aqueduct commissioners adopted plans and maps. Among the maps filed was one describing the lands of the appellant. This map was filed in the office of the register of Westchester county August 10, 1896. The commissioners of appraisal in the condemnation proceeding filed their oaths of office May 4, 1898. In their award of compensation to the appellant they allowed him the value of his lands at the date of the filing of their oaths, refusing to allow him its value at the date of the filing of the map in the register's office of Westchester county.

The appellant insists that the lands were taken at the time of the filing of the map. If that contention is correct, the commissioners

of appraisal erred, and the court below ought not to have confirmed the award.

We are of the opinion that the filing of the map was not a definite appropriation of the lands denoted on it, and did not interfere in any way with the use or enjoyment by the owners. *Bauman v. Ross*, 167 U. S. 548-596, 17 Sup. Ct. 966, 42 L. Ed. 270. The owners were at liberty, after it had been filed, to use the lands as before, and until the institution of condemnation proceedings to make any improvements they might see fit. *Wagner v. Perry*, 47 Hun, 518; *Forster v. Scott* (Super. N. Y.) 17 N. Y. Supp. 479; *Shoemaker v. U. S.*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.

There is no language in the act to preclude the aqueduct commissioners from changing the plan of the work after the filing of the maps, if, in their judgment, it should seem expedient, or the city, with their co-operation, from proceeding to acquire lands denoted upon new maps filed in substitution. Even the condemnation proceeding could have been discontinued and abandoned after it was commenced. The power usually resides in municipal corporations at any time before taking possession of the property under completed proceedings, or the final act of confirmation, to recede and discontinue the proceedings they have instituted. *Dill. Mun. Corp.* 473. Such is the law in New York as declared by its highest court. "A public body, or public officers, to whom the right of eminent domain has been delegated by the legislature for public purposes exclusively, may be permitted to discontinue proceedings instituted by them pursuant to the act delegating power to acquire title to lands at any time before the title is acquired and the rights resulting therefrom have become vested in the proprietor." *In re Commissioners of Washington Park*, 56 N. Y. 144. *In Re Military Parade Ground*, 60 N. Y. 319, the court of appeals, reaffirming this doctrine, applied it to a case where the proceeding was pursuant to a statute authorizing the proper officers to lay out a parade ground, which declared that upon the filing of a map showing its location and extent it should "become and be one of the public squares or places" of the city.

The lands were taken when the commissioners of appraisal filed their oaths of office. They were taken at that time because by the terms of section 10 the city then acquired the right to occupy them in perpetuity, subject, of course, to a condemnation proceeding. Until then the purpose to appropriate them was merely a tentative one, and the proceeding might never culminate in an actual appropriation. Until then there was no statutory act indicative of a final intention by the city to acquire lands. It was the contemplation of the legislature that they should be deemed taken at that time, and compensation awarded with reference to it, because the act provides that from that time the city shall pay interest upon the amount.

The adjudications in which it has been held that the date of the filing of a map is to be deemed the time of the appropriation were in cases where the statute by terms or implication made the act a virtual taking of the property. Thus the Massachusetts decisions are founded upon a statute authorizing the corporation, upon filing

the location, to take possession of the land defined within the boundaries, unless an application for estimating damages is made to the county commissioners before the actual appropriation. In *Re Munson*, 29 Hun, 325,—much relied upon by appellant's counsel,—the statute provided that, when the map was filed, the property designated upon the map "should become and be one of the public squares or places" of the city. In *Re Public Parks*, 53 Hun, 280, 6 N. Y. Supp. 750, the statute located the lands to be taken by metes and bounds. In both cases the property was set apart for public use by the filing of the map, and the proceeding for condemnation was only necessary to perfect the title to the lands appropriated. These decisions are of little value in the present case, where the statute does not purport to give any final and determinative effect to the filing of the map.

We conclude that there was no error in the award of the commissioners of appraisal, and that the court below properly affirmed their report.

The order is affirmed, with costs.

SMITH v. PACKARD.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 576.

1. ATTACHMENT—FORTHCOMING BOND—ILLINOIS STATUTE.

Under the attachment law of Illinois, the fact that a forthcoming bond is taken after the return day of the writ, or that it is not returned into court by the sheriff on the first day of the term at which the writ is returnable, as directed by the statute, does not affect its character as a statutory bond.

2. FEDERAL COURTS—JURISDICTION—SUIT ON FORTHCOMING BOND.

The Illinois statute giving a plaintiff in attachment the right to bring an action on a forthcoming bond taken by the sheriff, "the same as if such bond had been assigned to him," does not render him, in fact or constructively, an assignee, within the meaning of the federal judiciary act, so as to preclude a circuit court of the United States from taking cognizance of such action, where the plaintiff is a citizen of another state, although the sheriff could not have sued therein.

3. ATTACHMENT—FORTHCOMING BOND—VALIDITY.

The validity of a forthcoming bond is not affected by an indorsement by the sheriff on the writ of attachment reciting that on the giving of such bond he "released the levy," the purpose and effect of the bond itself being to continue his legal custody of the property.

4. SAME—ACTION ON BOND—PROOF OF EXECUTION.

In an action on a forthcoming bond given in attachment proceedings, which under the statute is joint and several, where all of the obligors were joined as defendants, but a dismissal was entered before trial as to all but one, the case stands as though originally brought against such defendant alone, and proof of the execution of the bond by the other obligors is not required.

5. SAME—ESTOPPEL TO DENY EXECUTION OF BOND.

Where, in an action by attachment against a partnership, one of the defendants signs his partner's name to a forthcoming bond, the latter cannot, after having voluntarily received its benefits, deny that his signature to the bond was authorized.

6. SAME—EVIDENCE—DIMINISHED VALUE OF PROPERTY.

In an action on a forthcoming bond given in attachment proceedings, it was not available error to exclude evidence on behalf of the defendants to show the diminished value of the property since the giving of the bond; no offer being made to show that the depreciation was not caused by any act or negligence of the principals in the bond, who had its custody.

7. SAME—RECITALS AS TO VALUE IN BOND.

A recital in a forthcoming bond that the value of the property "does not exceed" a sum named, while conclusive against the assertion of a larger value, establishes no particular value.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This action is upon a forthcoming bond in attachment executed on July 21, 1892, to the sheriff of Cook county, Ill. The action in attachment was begun on July 16, 1892, in the circuit court of Cook county, by the defendant in error, Andrew J. Packard, against Frank A. White and Charles F. Ballard, as co-partners. The writ of attachment, issued on the 16th and made returnable on the 18th of the month, was levied on the day of its date upon four car loads of machinery and other articles constituting a plant for the manufacture of shoes, property of the partnership, at West Pullman, Ill., whither it had just been transported from Washington C. H., Ohio. On the same day a return, showing the levy upon the property, which was particularly described, was indorsed upon the writ and signed by the sheriff. The forthcoming bond, to which the names of both partners had been signed by White, and which the plaintiff in error and William R. Kerr had signed as sureties, was dated and was delivered to the sheriff on July 21, 1892; and thereupon the sheriff took of the attachment defendants a receipt, indorsed on the writ, for the attached property, and, under the receipt, indorsed on the writ the following further memorandum or return: "The parties in whose possession I found the above property giving security as per bond hereto annexed, I have released said levy this 21st day of July, 1892. I have also served the within-named West Pullman Land Association, as garnishee, by delivering a copy thereof to William R. Kerr, secretary of said association, this 16th day of July, 1892; the president of said association not found in my county. The defendants in the within writ not found in my county." This was signed in the name of the sheriff by a deputy. The writ was held by the sheriff until January 5, 1893, when he filed it with the clerk of the court, indorsed as stated. Process was not served on either defendant in the attachment, but an appearance by attorney was entered for both, and joint pleas filed in their behalf, on August 25, 1892, and later further joint pleas were filed; but on December 9, 1895, on motion of Ballard, the court found that the appearance entered for him was unauthorized, and ordered that it be set aside and held for naught. Thereupon, without further showing or affidavit than that originally filed, notice to Ballard was published; and on January 25, 1896, upon a recital of "due proof of publication of notice," he was called and defaulted. Final judgment was entered on the ensuing May 21st, the preliminary recital in the entry being: "This cause being called for trial, come the parties to this suit, by their attorneys, respectively. Thereupon, on the agreement of the said parties here made in open court, this cause is submitted to the court for trial without a jury." And, according to the entry, the court proceeded to hear the evidence, found the issues for the plaintiff, assessed his damages at \$3,625, and, after overruling a motion of White for a new trial, entered personal judgment against both defendants for the amount of the finding. On July 20th following, a special execution was issued against the property described in the writ of attachment; and two days later the sheriff made return to the effect that, White and Ballard not being found, he demanded, but failed to obtain, of Smith and the other surety on the bond, the attached property, and, finding no property on which to levy, he made return accordingly. Thereupon Packard brought this action in the court below against White and Ballard, the principals, and William R. Kerr and Jacob P. Smith, the sureties, on the forthcoming bond, but later dismissed out of the

case all of the defendants but Smith, and against him obtained judgment for \$15,000, to be satisfied upon payment of \$4,128.25.

The following provisions of the attachment law of Illinois in force when the suit was brought are cited in the briefs:

"Possession—Forthcoming Bond. Sec. 14. The officer serving the writ shall take and retain the custody and possession of the property attached, to answer and abide by the judgment of the court, unless the person in whose possession the same is found shall enter into bond and security to the officer, to be approved by him, in double the value of the property so attached, with condition that the said estate shall be forthcoming to answer the judgment of the court in said suit. The sheriff, or other officer, shall return such bond to the court in which the suit is brought on the first day of the term to which such attachment is returnable."

"16. Neglect of Officer to Take Bond—Proceedings. Sec. 16. If the sheriff should fail to return a bond taken by virtue of the provisions of this act, or shall have neglected to take one when he ought to have done so, in any attachment issued under any provisions of this act, the plaintiff in the attachment may cause a rule to be entered at any time during the first ten days of the term to which it is returnable, requiring the said sheriff to return the said bond; in case no bond has been taken, to show cause why such bond was not taken. If the said sheriff shall not return the said bond within one day thereafter, or show legal or sufficient cause why the said bond had not been taken, judgment shall be entered up against him for the amount of the plaintiff's demand, with costs of suit. Execution may thereupon issue for the same whenever judgment shall have been entered against the defendant in the attachment.

"17. Insufficient Bond—Proceedings. Sec. 17. The plaintiff may, at the first term after the return of such bond, except to the sufficiency thereof, reasonable notice of such exception having been given to the sheriff or other officer who took the same, and if, upon hearing, the court shall adjudge such security insufficient, such sheriff shall be subject to the same judgment and recovery and have the same liberty of defense as if he had been made defendant in the attachment, unless good and sufficient security shall be given within such time as may be directed by the court, and execution may issue thereupon as in other cases of judgment. And whenever the judgment of the plaintiff, or any part thereof, shall be paid or satisfied by any such sheriff, he shall have the same remedy against the defendant for the amount so paid by him as is now provided by law for bail against their principal, where a judgment is paid or satisfied by them.

"18. Suit on Bond. Sec. 18. If the plaintiff shall not except to the bond taken by the sheriff, as aforesaid, or the exceptions are not sustained, and such bond shall be forfeited, the plaintiff in the attachment may bring suit thereon in his own name, the same as if such bond had been assigned to him, and judgment shall be given for the plaintiff against the obligors in the bond for the value of the property, or if the property is greater than the amount due upon the execution, then for the amount due and costs of suit."

George A. Sanders, for plaintiff in error.

Samuel Wheeler, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The first contention of the plaintiff in error is that the circuit judge did not acquire jurisdiction of the case. The argument consists of three propositions: First, that the bond is valid only as a common-law obligation, and not as a statutory bond, because the sheriff took it after the return day of the writ, released the levy, and failed to file the bond with the clerk until after the term of court at

which it should have been filed; second, that in Illinois the common-law rule prevails, that only the obligee of a sealed instrument can sustain an action thereon, and, this not being a statutory bond, the statute which authorized a suit in the name of the plaintiff in the attachment does not apply; and, third, that if the statutory character of the bond, and Packard's right under the statute to sue thereon in his own name, be conceded, there was nevertheless no jurisdiction, because the right given him by the statute is to sue "the same as if such bond had been assigned to him," and, the sheriff not having had the right to sue in the federal court, the defendant in error, as assignee of the sheriff, could not prosecute the action in that court.

The first section of the statute quoted, it is evident, was intended to authorize a forthcoming bond at any time before final judgment, and perhaps even after that, in case of appeal or stay of execution for any valid reason. The statute is remedial, and should be construed liberally. It must often have happened, as in this case, that the writ was issued but a short while before the first day of the next term of court; and it has never been held, and probably never will be, that the right to give the bond expires with the return day of the writ. The provision that the officer taking the bond shall return it "on the first day of the term" is directory only. *State v. Blair*, 32 Ind. 313. If mandatory, and taken literally, it does not permit a return on either an earlier or a later day. The next section, however, provides for compelling a return on a later day; and is it to be said that a return so made in obedience to an order of court would be statutory, but if made voluntarily, or under a threat of the plaintiff to invoke the action of the court, it would deprive the bond of its statutory character, and convert it into a common-law obligation? Again, by section 16 of the statutes quoted, the sheriff may be required to show cause why a bond "had not been taken"; and, if he does not show sufficient cause, judgment shall be entered against him. If, in such a case, he should show that a bond had been taken and lost, or that after taking it had been found to be defective in form or substance, or the security insufficient, and should produce a new bond, executed after the return day, and in all respects satisfactory to the court and to the plaintiff in the action, would it be held that such a bond, if accepted, would not be a statutory bond? All we need say (and of that we have no doubt) is that the bond in suit, when given, was a statutory obligation, and that no delay of the sheriff in making a return could give it a different character.

The other proposition, that the plaintiff sues as assignee of the sheriff, and, though a citizen of another state, cannot maintain the action, because the sheriff, being a citizen of the same state as the defendant, could not maintain it, is not sound. The plaintiff derived no right from the sheriff. The bond, from the beginning, was for his benefit, and by the statute, and not by virtue of any assignment, real or constructive, he has a right to sue in his own name; and it does not affect the proposition that the bond, besides being given to the sheriff, was also for the sheriff's benefit, and might be the basis of an action in his name. It is true that the statute says that the plaintiff in the attachment may bring suit on the bond in

his own name, "the same as if such bond had been assigned to him"; but it does not follow that he must, in such an action, be regarded as having only the rights of an assignee,—certainly not in the sense of the federal statute, which says that the circuit and district courts of the United States shall not take cognizance of a suit to "recover the contents of a promissory note or any other chose in action in favor of any assignee, * * * unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." The plaintiff in this case was not in fact an assignee of the sheriff, and there is nothing in the reason or policy of the federal statute which can be deemed to require that he should be brought constructively into that relation. There is no reason to believe that the statute of the state was intended to have that effect. Indeed, the change made in the law in that respect indicates a contrary purpose. The act of 1845 expressly provided that after forfeiture the sheriff might assign the bond to the plaintiff in the attachment, and that after such assignment the plaintiff might "bring a suit in his own name thereupon"; but the present act makes an assignment, as in reason it ought to be, unnecessary, because the condition of the bond is that the property shall be forthcoming to answer the judgment of the court in the suit. That means a judgment in favor of the plaintiff. The bond so conditioned was from the beginning a bond in favor of the plaintiff in the attachment, and under the statute his right to enforce it by suit in his own name is an underived, independent right. The following authorities which have been cited support our conclusion: *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108; *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159; *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; *Ruan v. Gardner*, 1 Wash. C. C. 145, Fed. Cas. No. 12,100; *Machine Co. v. Wicks*, 3 Dill. 261, Fed. Cas. No. 17,348; *Missouri v. Bowles Milling Co.* (C. C.) 80 Fed. 161; *Mineral Co. v. Vaughan* (C. C.) 88 Fed. 566. The plaintiff in error has cited *Parker v. Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654; *Sere v. Pitot*, 6 Cranch, 332, 3 L. Ed. 240; *Bank v. McNair* (C. C.) 56 Fed. 323; *Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 152 U. S. 71, 14 Sup. Ct. 483, 38 L. Ed. 358; *New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; *Bradford v. Jenks*, 2 McLean, 130, Fed. Cas. No. 1,769; *Simons v. Paper Co.* (C. C.) 33 Fed. 193; *Coler v. Grainger Co.*, 43 U. S. App. 252, 20 C. C. A. 267, 74 Fed. 16; *Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672.

The proposition, that there was a release of the levy of the attachment, and that thereby the sureties on the bond were released, we deem untenable. The pertinent part of the indorsement upon the writ is this: "The parties in whose possession I found the above property giving security as per bond hereto annexed, I have released said levy," etc. If that be taken literally, and be given effect as a release of the levy, it does not follow that there was a release of what is commonly, but somewhat inaccurately, called the "lien of the attachment." *Ex parte Foster*, 2 Story, 131, Fed. Cas. No. 4,960;

May v. Lumber Co., 70 Md. 448, 17 Atl. 274. The levy of a writ of attachment consists in the seizure, actual or constructive, of the property attached; and it is essential to the lien created by the attachment of personal property—at least, as against subsequent purchasers or attaching creditors—"that the property should be removed, and held in the custody of the law." 3 Am. & Eng. Enc. Law (2d Ed.) 216, and cases cited. The lien, so called, arises upon the making of the levy (that is, the seizure), and continues so long as the property remains in the custody of the law. For that purpose a forthcoming bond takes the place of the possession of the officer; and in this case, the forthcoming bond having been taken, it is of no significance that the officer wrote upon the writ a release of the levy. The levy had served its purpose of bringing the property into legal custody,—which is the whole essence of the lien,—and the bond operated to continue that custody, as any one reading the entire return was bound to know; and the covenant of the plaintiff in error was that the property should be so held by the attachment defendants, to whose possession the sheriff, by reason of the execution of the bond should redeliver it. Indeed, it has been held that the taking of the bond is equivalent to a seizure (*Jayne v. Dillon*, 28 Miss. 283; *Walker v. Shotwell*, 13 Smedes & M. 549; *Pugh v. Callo-way*, 10 Ohio St. 488; *Roebuck v. Thornton*, 19 Ga. 149), and will preclude the officer, in an action of trespass, from denying the fact of seizure (*Portis v. Parker*, 8 Tex. 23). We find nothing inconsistent with our view of this question in *Sherraden v. Parker*, 24 Iowa, 28, or *Lumsden v. Leonard*, 55 Ga. 374. Had there been a release of a lien, to the benefit of which the surety, after being compelled to pay the bond, might have been subrogated, the question would have been essentially different. If, however, there was in this case a loss of the lien of the attachment, it was not by reason of any indorsement upon the writ, but because of the disposition of the property made by the attachment defendants, for whose conduct in the premises the plaintiff in error, as one of the sureties upon the bond, was responsible.

It results from what has been said on the question of jurisdiction that the forthcoming bond was not improperly admitted in evidence. But on that point it is urged further that, although judgment was sought against the plaintiff in error alone, it was necessary to establish the joint liability of the other obligors on the bond. Reference is made to *Cassady v. Trustees*, 105 Ill. 560, *Morrow v. People*, 25 Ill. 292, and *Green v. Shaw*, 66 Ill. App. 76; and it is insisted that there was a lack of proof of the execution of the bond by Ballard. The doctrine of the cases cited, that a cause of action must be made out against all makers of a joint and several bond who have been jointly sued, though some of them were not served with process, is not applicable here, because, other defendants having been dismissed out of the case, the action became one against the plaintiff in error alone, and no more proof was necessary than if in the first instance he had been named as the sole defendant. As one of the co-partners, White had unquestioned authority to sign the bond in the firm name. *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. 135; *Peine v. Weber*, 47 Ill.

41. And, if that did not include the power to sign the individual name of Ballard, the latter could not, after voluntarily receiving the benefit of the bond, deny its execution. *Holbrook v. Chamberlin*, 116 Mass. 155; *Grove v. Hodges*, 55 Pa. St. 504; *Fouch v. Wilson*, 59 Ind. 93; *Hyatt v. Clark*, 118 N. Y. 561, 23 N. E. 891. There was sufficient evidence to go to the jury, under the verified plea which denied the execution of the bond by Ballard, to show from him both parol authority to White to execute the bond, and subsequent ratification when informed of its execution; and, no question in that respect arising on the court's instruction to the jury, the verdict is conclusive of the fact of proper execution. Indeed, the liability of Ballard on the bond seems to be concluded by the judgment of the circuit court of Cook county. While it is true that the appearance for Ballard in the suit in that court was set aside, and the only notice served upon him was by the publication on proof of which he was defaulted, yet neither in his motion to have the appearance for him set aside did he pretend, nor does he appear elsewhere to have asserted, that his signature to the bond was unauthorized; and when, four months after that default, the court proceeded to final judgment, the recital shows a full appearance of the parties to the suit, and an agreement of "said parties" to waive a jury and submit the case to the court for trial, and following that a finding and personal judgment against both defendants,—a judgment which, without the recital of appearance, could not lawfully have been entered, and which with that recital needed no proof of process to make it everywhere and always collaterally unassailable. Though defaulted, Ballard had the right to appear and contest the amount of the recovery.

It is contended, on cases cited, that the plaintiff in error would be liable on the bond if Ballard's name were conceded to have been signed without authority. *Veach v. Rice*, 131 U. S. 293, 9 Sup. Ct. 730, 33 L. Ed. 163; *Stern v. People*, 102 Ill. 540; *Sullivan v. Williams*, 43 S. C. 489, 21 S. E. 642; *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027; *Lumber Co. v. Murphy*, 49 Neb. 674, 68 N. W. 1030; *Jacobs v. Curtiss*, 67 Conn. 497, 35 Atl. 501; *State v. Blair*, supra. But we need not enter upon that question.

There was no error in the admission of evidence of the value of the attached goods at the time of the execution of the forthcoming bond. It seems to have been the opinion of the court below that no evidence of diminished value at a later date was competent, but while we do not assent to that view, and are of opinion that evidence of a diminished value for which the attachment defendants were not responsible would have been competent, no offer of such proof was made. The plaintiff in error offered evidence of the value of the property, or of parts of it, at later dates, and claimed to be able to show a value not exceeding \$500 or \$600, but made no offer to account for the depreciation, or to show that it was not caused by the act or negligence of the principals in the bond, who had the custody. The authorities cited by the plaintiff in error on this point are *French v. Snyder*, 30 Ill. 339; *Slueter v. Wallbaum*, 45 Ill. 43; *Dehler v. Held*, 50 Ill. 491; *Roberts v. Dunn*, 71 Ill. 46; *Summers v. Hibbard*, 153 Ill. 102, 38 N. E. 899; *Gilbert v. Gallup*, 76 Ill. App.

526; *Collin v. Mitchell*, 3 Fla. 4; *Trotter v. White*, 26 Miss. 88; *Shinn, Attachm.* § 301; *Wade, Attachm.* § 197. Cited by the defendant in error, the following: *Drake, Attachm.* § 344; *Pearce v. Maguire*, 17 R. I. 61, 20 Atl. 98; *Creswell v. Woodside*, 8 Colo. App. 514, 46 Pac. 842; *Yelton v. Slinkard*, 85 Ind. 190; *Suppiger v. Gruaz*, 137 Ill. 216, 27 N. E. 22. The recital in the bond that the value of the property "does not exceed seven thousand five hundred dollars," while conclusive against the assertion of a larger worth, establishes no particular value. The judgment below is affirmed.

PETIT et al. v. GERMAN INS. CO.

(Circuit Court, D. West Virginia. September 27, 1898.)

1. INSURANCE—ACTION ON POLICY—PLEADING.

Under Code W. Va. c. 125, §§ 62, 65, which provides that in an action on an insurance policy the defendant may file a statement setting up any special matter of defense, and that, if the plaintiff intends to rely on a waiver, estoppel, or confession and avoidance as to the matter so stated, he must file a statement in reply, setting out such grounds in general terms, such statements are in the nature of pleadings, and are subject to demurrer.

2. SAME—NOTICE OF LOSS—WAIVER.

A provision of an insurance policy requiring a written notice to be given of a loss thereunder is waived by the company where it receives a verbal notice and acts thereon.

3. SAME—CONDITIONS OF POLICY—WAIVER.

A provision of an insurance policy, by which the insured warrants that a clear space of 100 feet shall be maintained around the insured property, and which states that a violation of such requirement shall render the policy void, constitutes an express promissory warranty, a compliance with which is a condition precedent to a recovery on the policy, and the fact that the insurer has knowledge that it is not complied with, and makes no objection, does not constitute a waiver of the condition.¹

On Demurrer by Defendant to a Reply Statement Filed by Plaintiff.

W. P. Hubbard, for plaintiffs.

Caldwell & Caldwell, for defendant.

JACKSON, District Judge. This is an action brought by the plaintiffs against the defendant insurance company to recover from the defendant \$2,500, being the amount of insurance of the plaintiffs' property by defendant, which was lost by fire. The defendant pleads the general issue, and also files a statement in writing, under the statute of West Virginia, setting up grounds of defense. Code W. Va. c. 125, §§ 62-64. To this defense the plaintiffs reply by a statement in writing, as provided for by the sixty-fifth section of the same chapter of the Code, whereby the pleadings in insurance cases have been greatly simplified, it evidently being the intention of the legislature to do away with the technical pleadings of the common law in such cases. This section of the Code, as ap-

¹ As to waiver of condition in policy, see note to *Insurance Co. v. Thomas*, 27 C. C. A. 46.

plies to the question under consideration, is quoted, which provides that:

"If the plaintiff intends to rely upon any matter in waiver, estoppel or in confession and avoidance of any matter which may have been stated by the defendant as aforesaid, the plaintiff must file a statement in writing, specifying in general terms the matter on which he intends to rely."

The first question presented to the court for consideration arises upon the demurrer filed by the defendant to the statement of the plaintiffs in reply to defendant's pleadings and statement. It is contended by the plaintiffs that this statement is not a pleading, and that, therefore, a demurrer does not lie. Upon this question there is some conflict in the decisions of the courts, but I am inclined to think, under the decisions and rulings of our courts in West Virginia, that a demurrer will lie to the statements filed under the statute in cases of this character. It clearly was not the intention of the legislature to do away entirely with all pleadings in these cases, but to so simplify them as to render it unnecessary to resort to the intricate pleadings known to the common law. It must be apparent that whatever is necessary to constitute a demand on the one side or a defense on the other must appear in the pleadings, and, if the plaintiff's declaration is defective, or the defendant's pleadings are defective, or the statement filed under the statute by either party is defective, then either party, as the case may be, may avail himself of a demurrer. It is obvious, however, that if the plaintiff in his declaration and in his statement cannot maintain his action, then the expense of a trial can be and should be avoided by interposing a demurrer. I do not propose to discuss this question at length, but merely to state, in a short way, what appears to me to be the legal aspect of this question. The case of *Bently v. Insurance Co.*, 40 W. Va. 729, 23 S. E. 584, which was elaborately argued, and very fully considered, sustains this view of the case, and I think it is better that there should be only one rule of action upon questions of this character in both federal and state courts. I reach the conclusion, therefore, that the demurrer of the defendant to the plaintiffs' statement of facts should be entertained, and as to this objection the demurrer is overruled.

The next question for consideration is, "Is the demurrer of the defendant sufficient?" Every question arising upon the demurrer in this case, in my judgment, would be more properly considered upon the trial of the case before a jury. The question as to whether the plaintiffs gave notice, as required by the contract of insurance, is a question of fact for the jury, under the instructions of the court. The statement of the plaintiffs is that notice was immediately given, and after the notice was given the defendant sent its adjusters to investigate the fire, and that within the 60 days prescribed the plaintiffs rendered a statement of loss to the defendant, to which the defendant made no objection. This statement of the plaintiffs is possibly not as full as it might be. It does not state why written notice was not given. The presumption is that the plaintiffs deemed it unnecessary, for the reason that the defendant acted promptly, upon the verbal notice given it,

by directing its adjusters to go and investigate the fire at once. If the defendant, as is alleged, had verbal notice of the loss, further notice would seem to be useless and unnecessary, if the defendant company acted upon it. It is true that the policy requires that the notice should be in writing, but the defendant company must be held to have waived that stipulation of the contract when it acted promptly upon the verbal notice, and sent its adjusters to the place where the fire occurred to examine into the loss occasioned by the fire. It was, therefore, estopped in requiring a notice of the loss as provided for in the policy of insurance, and as to this objection the demurrer is overruled.

The next question that arises upon the demurrer to the statement of the plaintiffs is that the statement does not affirm that the insured maintained a clear space of 100 feet, as required by the policy, from which omission in the statement it is inferred that the provision requiring a 100-foot space to be kept clear was not complied with by the insured; the plaintiffs alleging as an excuse for noncompliance with this provision that it was within the knowledge of the defendant company that this provision was not complied with, and that it never gave any notice with respect to its violation, but quietly acquiesced therein. The provision in the policy relating to this space is in the following written language:

"Warranted by the assured that a continuous clear space of 100 feet shall hereafter be maintained between the property hereby insured and any wood-working or manufacturing establishment, and that said space shall not be used for the handling or piling of lumber thereon for temporary purposes,—tramways, upon which lumber is not piled, alone being excepted; but this shall not be construed to prohibit loading or unloading within, or the transportation of lumber and timber products across, such clear space, it being specially understood and agreed by the assured that any violation of this warranty shall render this policy null and void."

It is claimed that this provision of the policy is an express warranty. An express warranty is a stipulation inserted in writing on the face of the policy on the literal truth or fulfillment of which the validity of the entire contract depends. Arn. Ins. (1st Ed.) 577. This definition is adopted by May, and sustained by several adjudications in this country. May, Ins. (2d Ed.) p. 179, § 156. Accepting this definition of a warranty as correct, can it be said that the statement of the plaintiffs as to this provision of the policy of insurance shows that it has been fully complied with? I think not, for the apparent reason that the plaintiffs fail to affirm that the space of 100 feet has been maintained as required by the terms of the policy. This provision is a condition precedent, and must be complied with by the insured. A failure upon their part to do so is a breach of their contract. A warranty is an agreement in the nature of a condition precedent, and must be strictly complied with. May, in his work, states this proposition to be the law, and cites numerous authorities in support of the position. May, Ins. (2d Ed.) p. 179, § 156. But it is claimed that the defendant waived this provision of the policy, because it was fully advised of the state of facts, and made no protest against the violation of this clause of the policy. It is true that this is not an affirmative, but a promissory, warranty,

requiring something to be done in this case during the continuance of the contract of insurance. I am not aware that the law makes any difference between an affirmative and a promissory warranty, where the warranty is expressed upon the face of the instrument. This is not a parol promise, but a written promise, and there is no stipulation in writing, executed between the parties, as required by the policy, that waives this stipulation in the policy of insurance. The effort upon the part of plaintiffs to avoid this condition of the policy by stating that "at all times up to the happening of said fire the defendant knew that the space was occupied, and that the defendant never in any manner objected to its occupation, or gave the plaintiffs any notice in respect to the same, but apparently acquiesced therein," is not, in my judgment, a sufficient reason why the plaintiffs, under the circumstances, should be excused from complying with the provisions of the contract of insurance. The knowledge of the defendant of the existence of these facts, and the manner in which the insured was using the space, does not, in any respect, control the written stipulation of the policy. It was not a stipulation that required the defendant to perform any act, but by its provisions the only requirement was one to be performed by the plaintiffs. There is no provision in the policy of insurance which required the defendant, in the event of a violation of any of its provisions, to give notice of any such violation. It is true that the statement alleges that the defendant knew of this violation. Admitting that to be so, the defendant had a right to rely upon the terms of its written contract, and no knowledge that it might acquire as to the violation of this stipulation would, of itself, constitute a waiver of the written terms. If the promissory warranty had been a verbal one, the doctrine might be different; but I do not understand, under the rulings of the courts, that, where there is a written and express stipulation upon the face of the policy of insurance, it can be waived by silence, though the insurer knew of its violation. The knowledge of the defendant of the existence of these facts, and the manner in which the insured was using this space, does not, in any respect, control the written stipulation of the policy. It is neither a waiver nor an estoppel, and could not have been waived, by the terms of the policy, without written consent having been indorsed upon it. To support the view I take of this case I rely upon the case of Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 461, 14 Sup. Ct. 379, 38 L. Ed. 231. In that case the terms and conditions of the policy were that:

"This policy shall be void and of no effect if, without notice to the company, and permission therefor indorsed hereon, the premises shall be used or occupied so as to increase the risk, or if mechanics are employed in building, altering, or repairing the premises named herein, except in dwelling houses, where not exceeding five days in one year are allowed for repairs."

This provision of the contract of insurance was violated, in this: that the plaintiff, without the written consent of the defendant, and without its knowledge, employed mechanics to reconstruct portions of a building and a vault contained therein. The time in which the mechanics were engaged in their work occupied some four or five weeks, which was before the fire, and it does not appear that the fire

was the result of any work done or repairs made by the mechanics. In that case the court held that:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration, the insurer undertakes to guaranty the insured against loss and damage upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer therefore may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the assured must show himself within these terms; and, if it appears that the contract has been terminated by a violation on the part of the assured of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms and conditions on which their contract shall continue or terminate."

This decision evidently proceeds upon the ground that a written contract, solemnly entered into and executed by the parties to it, must bind the parties. Courts do not make contracts, but interpret and construe them whenever any question arises between the parties to them as to what are their terms and conditions. The case cited would seem to settle the questions arising upon the demurrer in the case under consideration. For the reasons assigned, the demurrer to this part of the statement must be sustained.

WESSON v. TOWN OF MT. VERNON.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 596.

MUNICIPAL BONDS—DEFENSES—ESTOPPEL BY RECITALS.

Where a township, being authorized by a statute of the state to issue and sell bonds for the purpose of refunding its legal outstanding indebtedness, issues a series of negotiable bonds containing recitals that they are issued under the provisions of such statute, in accordance with a vote of the electors of the township "for the purpose of funding and retiring certain binding, subsisting, legal obligations of said township, which remain outstanding and unpaid," it is bound by such recitals, and, after having sold the bonds, and with the proceeds paid off prior obligations, on which it had for many years paid a higher rate of interest, it is estopped, as against a bona fide purchaser, to repudiate the obligation of such bonds on the ground that the recitals therein were false, and the obligations which the bonds were issued to refund were illegal.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

The facts in this case are these: The town of Mt. Vernon, in Jefferson county, Ill., on July 1, 1887, issued 25 \$1,000 funding bonds, for the purpose, as recited on the face of each bond, of "funding and retiring certain binding, subsisting, legal obligations of said township, which remain outstanding and unpaid." The bond is in the usual form of a negotiable bond payable to

bearer, and contains this recital: "This bond is one of a series of twenty-five of like tenor and date issued for the purpose of funding and retiring certain binding, subsisting, legal obligations of said township which remain outstanding and unpaid, under the provisions of an act of the general assembly of the state of Illinois entitled 'An act to enable counties, cities, towns, townships, school districts and other municipal corporations to fund, retire and purchase their outstanding bonds and other evidences of indebtedness, and to provide for the registration of new bonds or other evidences of indebtedness in the office of the auditor of public accounts,' approved February 13, 1865, and acts amendatory thereto, approved April 27, 1877, and June 4, 1879, and in pursuance of the vote of a majority of the legal voters of said township voting at an election duly called and held under said act on the second day of June, A. D. 1887. We hereby certify that all the requirements of said acts have been fully complied with in the issue hereof." The first section of the funding act provides, in substance, "that where any county, city, town, township * * * has issued bonds or other evidences of indebtedness for money, or has contracted debts, which are the binding, subsisting, legal obligations of such * * * township, * * * and the same, or any portion thereof, remain outstanding and unpaid, it shall be lawful for the proper corporate authorities of such * * * township, upon the surrender of any such bonds or other evidence of indebtedness, or any portion thereof, to issue in lieu or place thereof, to the owners or holders of the same, new bonds prepared as hereinafter directed. And it shall also be lawful for the proper corporate authorities of any such * * * township to cause to be thus issued such new bonds, and sell the same to raise money to purchase or retire any or all of such outstanding bonds or other evidences of indebtedness, and the proceeds of the sales of such new bonds to be expended under the direction of the corporate authorities aforesaid, in the purchase or retiring of the outstanding bonds, or other evidences of indebtedness of such * * * township, * * * and for no other purpose whatever. All bonds * * * issued under the provisions of this act shall show upon their face that they are issued under this act, and the purpose for which they are issued, and shall be uniform of design and style throughout the state, to be prescribed by the state auditor, whose imperative duty it shall be to devise and prepare such uniform style and draft adapted to the classes of bonds herein provided for. * * * And when such new bonds * * * shall have been issued in order to be placed on the market and sold to obtain proceeds with which to retire outstanding bonds, * * * it shall be the duty of the auditor, on the request of the corporate authorities issuing them, * * * to negotiate them at not less than par and on the best terms he can: provided the corporate authorities may negotiate, sell and dispose of these at not less than par without the intervention of the auditor: and provided, further, that no new bonds * * * shall be issued under this act unless the same shall be first authorized, as herein provided, by a vote of a majority of the legal voters of such * * * township * * * voting at some general election or special election held for that purpose." The second section provides for the auditor certifying on the back of all such bonds the assessed valuation of the real and personal property of the municipality issuing the bonds. Section 3 provides for the election notice. Section 4 provides for registering the new bonds in the state auditor's office upon the affidavit of the proper municipal officer. Section 11 provides what municipal officers shall execute funding bonds so issued, designating the supervisors and town clerks of towns organized under the township organization law of this state to sign those issued by townships. A jury was waived, and the case tried before the court without a jury. According to the special findings of facts, on the 29th day of July, 1886, a petition signed by more than 10 legal voters of Mt. Vernon township was presented to and acted upon by the corporate authorities of the town in calling a special election for the 2d day of June, 1887. The petition and election notice both submitted to the voters the proposition of voting 25 new bonds of \$1,000 each, to bear 6 per cent. interest, and be payable after five years, at the option of the town, to be sold for the purpose of redeeming the outstanding 8 per cent. bonds of the town, which the election notice designates as a subsisting legal indebtedness of said town. After the election, the supervisors caused new bonds to be issued and put on the market, and sold at

par, and with the proceeds redeemed the old 8 per cent. bonds, had the auditor cancel them, and then caused them to be burned. The plaintiff in error bought this entire issue of 25 new bonds of Clutter & Le Crone, and paid for them par and 3 per cent. commission, at the First National Bank of Springfield, Mass., about the 18th day of November, 1887, and has ever since been the owner of them all; and it is further found that he was not a dealer in bonds, but purchased them as an investment for himself; that he never owned any other bonds of this town, and knew nothing of these 25, except, when he purchased them, he learned from Clutter & Le Crone that the proceeds were to go to pay off other bonds of the town which had always been considered valid, and on which the interest had always been paid; that when plaintiff in error purchased these 25 funding bonds they had all the coupons on, and that the town paid these regularly on all the bonds until January 1, 1891, when it quit paying the coupons on Nos. 11 to 25, on which numbers maturing January and July 1, 1891, 1892, 1893, 1894, and 1895, making 150 in all, of \$30 each, this suit is brought. Upon these special findings, among other things, which are not material to the consideration of the case, the plaintiff in error asked the court at the close of the hearing to hold: "That plaintiff is a bona fide purchaser of bonds numbered 11 to 25 of said funded issue, and of their coupons in suit in this case, and is entitled to judgment for the amount of said coupons sued on, with lawful interest thereon since default," which proposition the court refused to hold, and to which refusal to so hold plaintiff then and there duly excepted, and judgment was given for the defendant. The provision of the present Illinois constitution, passed July 2, 1870, and upon which the defendant relies for its defense, is as follows: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation. Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipality prior to such adoption." Rev. St. p. 74. The 15 of the old bonds so refunded, and which the defendant in error claims were void, were issued in July, 1870, shortly after the above constitutional provision was adopted, pursuant to a vote of the electors of the town had on July 16, 1870.

John C. Mathis, for plaintiff in error.

Samuel P. Wheeler and C. H. Burton, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

BUNN, District Judge, after making the above statement of the case, delivered the opinion of the court.

The sole question in the case is whether the court erred in giving judgment for the defendant upon the findings of fact, and our opinion is that the defense is as faulty in law as it is in *foro conscientiae*, and that judgment should have been given for the plaintiff upon the findings. The language of the supreme court first delivered through Mr. Justice Campbell in *Zabriskie v. Railroad Co.*, 23 How. 381, 16 L. Ed. 488, repeated through Mr. Justice Clifford in *Bissell v. City of Jeffersonville*, 24 How. 287, 16 L. Ed. 664, and lastly through Mr. Justice Harlan in *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363, is quite as applicable to this case as to either of those, that:

"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representations, or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced."

The town issued these bonds to refund an existing indebtedness on which for many years it had been paying 8 per cent. interest. It had a laudable desire, which the law encouraged, to reduce the rate of interest it had been paying. Eight per cent. was too much. It could get the money for 6. The refunding law gave ample power to the town to issue new bonds, and refund its indebtedness at a lower rate of interest. In order to secure this result, and render the bonds marketable, it recited in each of its bonds that it was issued for the purpose of funding and retiring certain binding, subsisting, legal obligations of the town which remained outstanding and unpaid, and that all the requirements of the refunding act had been fully complied with in the issue. With these representations the bonds are placed on the market and purchased at full face value in cash by an innocent purchaser, having no notice or intimation of any defect in the issue, or that the recitals in the bonds were false, and placed there to deceive and defraud the public. The money is paid over to the town, and used for the purpose of taking up and refunding certain outstanding bonds on which the town had been paying for many years a high rate of interest. The town pays interest for many years on these new bonds, but finally the discovery is made, or supposed to be made, that a portion of the old bonds so taken up were not valid and binding obligations against the town, as was certified to as a fact upon the face of each bond. Without offering to return the money, the town seeks arbitrarily and against all conscience to repudiate and defeat 15 of the new bonds. It admits that 10 of the bonds, numbered from 1 to 10, are valid, but claims that the other 15, numbered from 11 to 25, inclusive, are void. Being a part of the same issue, and all issued for the same purpose, and containing the same recitals, why it should be determinable by the town to say that the last 15 of the series are void, while the first 10 of the same series are admitted to be valid, is not very clear. The claim, however, seems to be based upon some very far-fetched idea of a willful conversion of goods at common law. But this is the attitude the town occupies, and the character of the claim the town is now making, and we think the case comes squarely within several well-adjudicated cases by the supreme court. Whose business was it to know whether the recitals contained in the bonds were true or false, the purchaser, residing a thousand miles away, who knew nothing about it, and had not the means of knowing, or the town authorities, who were right on the ground, and had the knowledge or the means of knowledge in their own hands? These recitals were recitals of facts, and presumably, and no doubt in fact, were within the knowledge of the town authorities. In order to render the bonds salable at a low rate of interest, they were made payable to bearer, and negotiable, and those recitals put into them. The town authorities knew very well that in no other way could they be sold on the market. Having put these recitals in the bonds, whereby they were enabled to sell them, and having sold them, and used the proceeds to pay off the previous indebtedness of the town on which they had been paying 8 per cent. interest for many years, the injustice of this defense

to the new bonds, purchased in the open market by a bona fide holder, in repudiating and falsifying its own representations of fact contained in the recitals, is quite apparent, and can receive but little countenance in a court of justice.

In *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363, as in this case, the defendant insisted that there was a total want of authority to issue the bonds, because they were not issued for municipal purposes; just as here the defendant below contends that some of the bonds were not issued for the authorized purpose of refunding its lawful indebtedness, but for the purpose of funding a debt contracted by the town contrary to the provisions of the constitution of Illinois, which forbade towns from voting aid in the construction of a railroad. The cases are upon the same footing. Bonds voted contrary to law to aid in the construction of a public improvement are just as illegal and void, and no more so, than bonds issued for a purpose not municipal in character, and the language of the opinion in that case is quite as applicable to the case at bar. The court says:

"The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a bona fide holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empowered the council to borrow money upon the credit of the city, and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556. It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents, and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case the city, both upon principle and authority, is cut off from any such defense."

In *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404, the same principles are asserted. In that case the court says:

"The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category. *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857. This court has uniformly held, when the question has

been presented, that, where a corporation has lawful power to issue such securities, and does so, the bona fide holder has the right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital. *Mercer Co. v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816; *Moultrie Co. v. Rockingham Ten Cent Sav. Bank*, 92 U. S. 631, 23 L. Ed. 631; *Moran v. Commissioners*, 2 Black, 722, 17 L. Ed. 342; *Commissioners v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Bank v. Turquand*, 6 El. & Bl. 327."

There was a familiar principle applied by the supreme court in that case, which has a much stronger application in this, because the town on account of the recitals in the bonds can hardly be considered an innocent party; that, where one of two innocent persons must suffer a loss, and one of them has contributed to produce it, the law throws the burden upon him, and not upon the other party. *Hern v. Nichols*, 1 Salk. 289; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. Ed. 1008. The rule is also well stated by Mr. Justice Strong in the previous case of *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579, as follows:

"And the bonds themselves recite that they are issued under and by virtue of the act incorporating the railroad company, approved March 24, 1869, 'and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 25, 1869, in accordance with said law.' After all this, it is not an open question, as between a bona fide holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed, have decided, and certified their decision. They have declared the contingency to have happened on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision, and beyond those a bona fide purchaser is not bound to look for evidence of the existence of things in pais. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by law confided to others,—to those most competent to decide it,—and which the purchaser is, in general, in no condition to decide for himself."

These adjudications have never been overruled or qualified, but have often been reaffirmed and followed in subsequent cases by the supreme and other federal courts. See *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. Ed. 138; *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124, 30 L. Ed. 323; *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040; *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 10 C. C. A. 637, 62 Fed. 778; *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272. In this last case it was held by the United States circuit court of appeals for the Eighth circuit that a municipal corporation is estopped from defending an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purpose of funding the bonds, warrants, or floating debt of the corporation, either on the ground that the warrants or bonds which they were issued to satisfy were void, or that the apparent debt which they were issued to pay was fictitious. See, also, *Evans*:

ville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; Rolins & Sons v. Board of Com'rs of Gunnison Co., 26 C. C. A. 91, 80 Fed. 692; Board of Com'rs of Haskell Co. v. National Life Ins. Co. of Montpelier, 32 C. C. A. 591, 90 Fed. 228. In this last case it was held by the United States circuit court of appeals for the Eighth circuit:

"That the recital in county bonds that they were issued in accordance with the provisions of a statute authorizing counties to refund their indebtedness imports that they were issued in pursuance of a lawful and proper resolution, and of honest and just action on the part of the county board under that statute; and also that the obligations refunded were such as could lawfully be refunded thereunder; and that it relieves the innocent purchaser of all inquiry, notice, or knowledge of the actual action and record of the board, and estops the county from denying that proper action was taken, and that a lawful resolution was passed."

It was held by the United States circuit court of appeals for the Sixth circuit in Risley v. Village of Howell, 12 C. C. A. 218, 64 Fed. 453, that if, in municipal bonds, the recital of facts, taken collectively, are such as naturally and reasonably would inspire the confidence and belief of purchasers in the existence of the conditions which would make their issue lawful, and that was the intended and expected consequence of incorporating those recitals in the bonds, a bona fide purchaser would not be chargeable with notice, and defeated in his right of recovery as such, by the fact that an ordinance recited in the bonds by its date only misappropriated the bonds to an unlawful purpose.

In Sherman Co. v. Simons, 109 U. S. 735, 3 Sup. Ct. 502, 27 L. Ed. 1093, it was held that, when a statute directs an officer to examine and determine the amount of the indebtedness of a county for the purpose of further determining the amount of bonds to be issued by the county for a given purpose, and the officer performs the duty, the county cannot, in a suit by a holder of a bond issued as a result of the exercise of the power by the officer, set up that the finding was not true. So, in the case at bar, it was the duty of the town officers to ascertain and know the amount of the lawful indebtedness of the town, in order to know how many refunding bonds to issue; and, having recited in the bonds that the entire issue of \$25,000 was made to take the place of a lawful, subsisting indebtedness of the town, it cannot be heard to say that these recitals are false as against an innocent purchaser of the bonds. The town officers had it in their power to know, and it was their business in issuing the refunding bonds to know, how much the lawful indebtedness of the town was, and, having certified that it was \$25,000, and having issued refunding bonds to that amount, it cannot be heard to say that the indebtedness was not so much by \$15,000. The case of Waite v. City of Santa Cruz (C. C.) 89 Fed. 619, recently decided by the circuit court for the Northern district of California, is very similar in its facts to the case at bar, and the court held:

"That, where there was a statute authorizing cities to issue bonds to refund their bonded indebtedness, and bonds issued by a city contain recitals that they were issued in conformity with such statute for the purpose of refunding

the city's bonded debt, and that every act required by the statute as a condition precedent to their issuance was performed, the city cannot defeat a recovery on such bonds as against an innocent purchaser on the ground that such recitals were false, and that a portion of the debt refunded was that of a private corporation."

The last reported declaration of the supreme court on this subject reaffirms its previous rulings, and in the judgment of this court is quite conclusive of the case at bar. In *Board of Com'rs of Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689, decided during the present year, it was held that:

"The recitals in the bonds of Gunnison county that they were issued by the board of county commissioners for said Gunnison county in exchange at par for a valid floating indebtedness of the said county outstanding prior to September 2, 1882, under and by virtue of and in full conformity with the provisions of an act of the general assembly of the state of Colorado entitled 'An act to enable the several counties of the state to fund their floating indebtedness,' approved February 21, 1881; that all the requirements of law have been fully complied with by the proper officers in the issuing of this bond; that the total amount of the issue does not exceed the limit prescribed by the constitution of the state of Colorado; and that this issue of bonds has been authorized by a vote of a majority of the duly-qualified electors of the said county of Gunnison voting on the question at a general election duly held in said county on the 7th day of November, A. D. 1882, estopped the county from asserting, against a bona fide holder for value, that the bonds so issued created an indebtedness in excess of the limit prescribed by the constitution of Colorado."

The judgment of the circuit court is reversed, and the cause remanded, with instructions to enter judgment in favor of the plaintiff in error.

PATTING v. SPRING VALLEY COAL CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 619.

1. APPEAL—MATTERS REVIEWABLE—NECESSITY OF EXCEPTIONS.

Under the Illinois practice a ruling on a motion to vacate a judgment and verdict is reviewable, although not excepted to.

2. SAME.

Error cannot be predicated of an opinion or reason given by the court for a ruling, but must be of the ruling itself.

3. DISMISSAL—FAILURE OF PLAINTIFF TO APPEAR—PRACTICE IN FEDERAL COURTS.

Where the plaintiff fails to appear by himself or counsel at the time set for the trial of his action, the proper practice in the federal courts is to dismiss the action for want of prosecution, and it is error in such case to impanel a jury, direct a verdict, and enter a judgment thereon for defendant on the merits.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This is an action for personal injury, alleged to have been caused by the negligence of the defendant. A judgment in favor of the plaintiff was reversed by this court. *Coal Co. v. Patting*, 58 U. S. App. 575, 30 C. C. A. 168, 86 Fed. 433. When the case was reached for trial again in the circuit court, the plaintiff, who is now the plaintiff in error, was absent, and, on "being called," did not appear in person or by an attorney, and thereupon, as the entry shows, the court, on motion of the defendant, impaneled a jury, directed

the return of a verdict of not guilty, and gave judgment accordingly. On a later day of the term the plaintiff moved the court to set aside and vacate the judgment and verdict. At a still later day of the term the court overruled the motion, and handed down an opinion which is reported in *Patting v. Coal Co.* (C. C.) 93 Fed. 98. It is assigned for error that the court erred: (1) In trying the case on its merits in the absence of the plaintiff; (2) in calling and impaneling a jury; (3) in directing a verdict of not guilty; (4) in rendering judgment of not guilty; (5) in denying the motion to set aside the verdict and judgment; (6) in holding and adjudging that, upon the failure of the plaintiff to appear when the case was called for trial, it was discretionary with the court to dismiss the action or to impanel a jury to try the case; and (7) in holding and adjudging that, upon the failure of the plaintiff to appear and prosecute the action, the court had no power to dismiss the action for want of prosecution.

D. J. Springer, for plaintiff in error.

Henry S. Robbins, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

There is no bill of exceptions in the record. It seems that none was necessary. The plaintiff, being absent and unrepresented, could not have excepted to the impaneling of the jury, directing a verdict, and entering judgment on the merits; and the ruling upon the motion to vacate the judgment and verdict, involving no different question, seems to be reviewable, under the Illinois practice, though not excepted to. *Nichols v. People*, 40 Ill. 395; *Wiggins Ferry Co. v. People*, 101 Ill. 446; *Baker v. People*, 105 Ill. 452. The sixth and seventh specifications of error have no foundation outside of the opinion of the court, and it has been repeatedly declared by this court that error cannot be predicated of an opinion or reason given by the court for a ruling, but must be of the ruling itself. *Caverly's Adm'r v. Deere & Co.*, 24 U. S. App. 617, 13 C. C. A. 452, 66 Fed. 305; *Russell v. Kern*, 34 U. S. App. 90, 16 C. C. A. 154, 69 Fed. 94; *Deposit Co. v. Burke*, 60 U. S. App. 253, 32 C. C. A. 67, 88 Fed. 630. See, also, *Association v. Curtis' Adm'r*, 56 U. S. App. 586, 29 C. C. A. 354, 85 Fed. 586. Assuming that under the other specifications of error the question is properly before us, we are of the opinion that the court erred in taking a verdict and giving judgment on the merits. The plaintiff not appearing, and there being no reason for delay or indulgence, the proper course was to dismiss the action for want of prosecution. The authorities cited for that course are numerous and consistent, and we know of no decision or practice to the contrary. The reasons urged upon us for declaring a different practice, even if the question were a new one, are not convincing. In the cases cited below to the proposition that in the federal courts "peremptory or involuntary nonsuits cannot be allowed" the plaintiffs were present and insisting upon the right of trial. The decisions, therefore, have no relevancy to the present question. The same is true of the case of *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539, where, upon the statement of counsel for the plaintiff of what proof it was proposed to offer, the court

directed a verdict for the defendant. In *Hodgson v. Forster*, 1 Barn. & C. 110, the application to set aside such a verdict was refused unless the plaintiff would "consent to a nonsuit being entered," but that doubtless was upon the theory that the plaintiff should not be allowed to have his case reinstated upon the docket of the court, and so be able to prosecute it to final judgment as if he had not made default. The nonsuit to which he was required to consent was the same in form, and presumably in effect, as that which ought first to have been entered. It was not for the court below, nor is it for this court, to consider whether, if, instead of the judgment on the merits, there had been a nonsuit or dismissal for failure to prosecute, the plaintiff could bring another action notwithstanding the running of the statute of limitations. While that is an important consideration for the parties, and explains their motives for contesting the point, it affords no aid to a right decision of the question, and certainly was no justification for compelling the plaintiff, in order to obtain a correction of the judgment entered, to consent to another form of judgment which would be equally conclusive of his rights. Following what seems to us the clear significance of what was done in *Hodgson v. Forster*, the circuit court, without asking the consent of the plaintiff in error, might well have sustained the motion to set aside the judgment and verdict, and then have proceeded to enter instead thereof a judgment in presenti, or nunc pro tunc, dismissing the action for want of prosecution. To require of the plaintiff consent to a dismissal as if upon his own motion was to repeat and make irremediable the error first committed. The judgment below is reversed, and the cause remanded with instruction to enter a judgment setting aside the original judgment and verdict, leaving standing the recital of "the plaintiff failing to appear when called, either in person or by attorney," and dismissing the action for want of prosecution.

Judge ALLEN sat at the hearing, but took no part in the decision of this case.

SNOW v. LAIRD et al.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

10. 624.

1. COPYRIGHT—ACTION FOR INFRINGEMENT—EVIDENCE.

In an action to recover the statutory penalty for infringement of a copyright, an allegation that plaintiff is the author, designer, and proprietor of a copyrighted photograph, which was copied by defendant, is not sustained by proof that plaintiff caused an alteration to be made by etching in a negative from which photographs had previously been printed and sold, and had thus become public property, and then caused the picture printed from the altered negative to be copyrighted. If the altered picture was subject to copyright, it was rendered so solely by the change made therein, which was not the product of photography, but of the etching, which is a different art.

2. SAME—VALIDITY—COLORABLE ALTERATION IN PHOTOGRAPH.

Where a photograph has become public property by being placed in the market and sold, the proprietor cannot obtain a valid copyright thereon

by making a slight and merely colorable change therein by an alteration of the negative from which it is printed.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought by the plaintiff in error, Blanche L. Snow, "for her own benefit and the benefit of the United States," against Fred C. Laird and William C. Lee, co-partners under the firm name of Laird & Lee, but, Laird having left the firm and the country, the action is practically against Lee alone. The substance of the declaration is that the plaintiff, being on the 20th day of January, 1894, a citizen of the United States, and a resident of Chicago, "was the author, inventor, designer, and proprietor of a photograph and negative thereof called 'Javanese Bride and Groom, B. L. Snow, Chicago, Ill., 1894,'" and obtained a copyright thereon, of which she gave notice by inscribing on the face or front of every copy of the photograph published by her the following words: "Copyright, 1894, by B. L. Snow"; that the defendants, "well knowing the premises, and not having obtained her consent in writing, signed in the presence of two or more witnesses," did, on the 19th day of March, 1894, and at various times since, "print and publish and offer for sale, and have now in their possession, printed, and published, and offered for sale, a large number, to wit, thirty thousand copies of said copyrighted photograph so printed, published, and offered for sale, without the consent of the plaintiff, contrary to the form of the statute in such cases made and provided; whereby, and by force of said statute of the United States (chapter 565, § 4965, Supp. Rev. St. U. S. p. 953), an action has accrued to the plaintiff to demand the sum of one dollar for each of said thirty thousand copies of said copyrighted photograph, yet," etc. The defendants pleaded not guilty. On the evidence adduced the court directed a verdict for the defendants, and gave judgment accordingly. The assignment of error contains seven specifications, of which the last only, that the court erred in directing a verdict for the defendants, presents any question. See *Patting v. Coal Co.* (this term) 98 Fed. 811.

The evidence shows that the plaintiff is a photographer; that late in the fall of 1893 she posed, draped, and photographed a number of subjects on the Midway Plaisance of the World's Fair, and down to February 1, 1894, exposed copies thereof for sale without copyright. This she did through a canvasser. Inez C. Philbeck, upon whom she imposed no restriction, except that she should not sell to publishers; but of that restriction the defendants had no notice, and on January 24, 1894, the defendant Lee bought of a woman who came to his office and claimed to be B. L. Snow a photograph, which is in the record as Exhibit 1, on the back of which is written, "Javanese Bride and Groom." The plaintiff testified that she never saw either of the defendants. The photograph shows a Javanese youth in fanciful dress, prone upon cushions on the floor, with head resting upon his right hand, and left arm extended down his body, a gentleman's umbrella in front of him, and a young Javanese woman kneeling behind and leaning over him in apparent admiration, to which the young man, with face averted, responds with a half amused look, shading into a scowl. Shortly before January 20, 1894, the plaintiff caused to be etched into the negative "of this photograph" "a cane in the left hand of the reclining male figure," in a position nearly, but not quite, parallel with the umbrella below; but what artistic or utilitarian propriety there could have been in supplying the young man with a cane, in addition to the umbrella is not explained. On pictures printed from the negative so etched, and upon other pictures produced in like manner from negatives slightly changed by etching, the plaintiff proceeded on the date last named to obtain copyrights, and having obtained the proper certificate from the librarian of congress, caused to be etched in the negative of each, so as to show on the face of the pictures produced therefrom, the words, "Copyright, 1894, by B. L. Snow." The right to produce the picture now in question seems to have been transferred by the plaintiff to the Werner Company, though upon what terms or conditions does not appear, and that company employed A. Zeese & Co., engravers, to make half-tone plates thereof. The defendant Lee, having placed in the hands of one of his employes the photograph which he had purchased as stated on Jan-

uary 24, 1894, went a few days later to California, whence he did not return until near the end of April. After he had gone, the photograph was sent to Zeese & Co. for the purpose of having a half-tone plate thereof made, but, instead of making a plate of that photograph as directed, they sent to Laird & Lee a half-tone negative of the etched picture, first erasing therefrom the words indicating the copyright. The erasure was so complete as to leave the words illegible except under a microscope, and unnoticeable unless attention was directed to them. The defendants had no knowledge of the copyright, and used the plate so obtained without having observed that it was not an accurate representation of the photograph which they had purchased. Between January 20 and July 20, 1894, Isaac N. Snow, the husband and representative of the plaintiff, called upon the defendant Lee, and, in response to inquiry on the subject, was told that the firm had between 11,000 and 12,000 copies of Art Portfolio Series, Part 6 (each of which contained a copy of the copyrighted picture), and would furnish them at four and one-half cents per copy,—would furnish 10,000 copies at once. A sample copy, which appears as an exhibit in the record, was then delivered to Snow.

W. Clyde Jones, for plaintiff in error.

Amos C. Miller, for defendants in error.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The evidence does not show that the plaintiff purposely entrapped the defendants into the use of the copyrighted picture, instead of the purchased photograph which they had acquired an unrestricted right to reproduce. That they were entrapped, and were innocent of intentional wrong, is clear, and, while the chief blame seems to belong to the engravers, Zeese & Co., yet the plaintiff contributed to the result—made it possible—by taking a copyright on the photograph so slightly changed that the difference was likely to be overlooked; and her attempt, under the circumstances, to exact of the defendants the statutory penalty of one dollar for each copy of the picture printed by them, or found in their possession, is apparently unconscionable, and should be allowed to succeed only upon strict proof. That the statute is a penal one does not admit of discussion. *Thornton v. Schreiber*, 124 U. S. 612, 8 Sup. Ct. 618, 31 L. Ed. 577. The court below seems to have considered that the defendants, "being entirely innocent of any intention to appropriate a copyrighted article, but, on the contrary, acting upon a photograph which was furnished them by the plaintiff or her agent, and put out and announced for the public," were not, under the circumstances, responsible. Whether that is a proper construction of the statute we need not determine, but the declaration, it is to be observed, was drawn on that theory, it being alleged in effect that the defendants knowingly infringed the copyright. Of that averment there is not only no evidence; the contrary is demonstrated. In another and more important particular there seems to be a lack of evidence, or rather a material variance between the averment and the proof. Copyright upon a photograph is alleged; but the picture in evidence, in so far as it differs from the photograph first produced and made public property, is an etching, and not a photograph. The original picture was a photograph, and represented an

actual subject, of which the plaintiff was the designer or author. The copyrighted picture represents nothing that ever had an objective existence. If the cane represented ever existed, it was no part of the scene or group represented by the other parts of the picture. It was not in the hand of the young man when, with the other parts of the design, he was photographed. So far as the evidence shows, it is an ideal cane, which was made objective and capable of being photographed by being etched upon or into the negative plate of the original photograph; but the photographs produced by the use of a negative are not photographs of the negative, but of the original objects, the images of which by means of the negative are made reproducible. Photographic negatives are produced by processes totally unlike etching. Knight, Am. Mech. Dict. titles "Etching" and "Photography." Etching is a distinct art, much older than photography, and, if etching upon a negative has become a recognized part of the photographic art, the proof does not show it, and the fact is not one of which the court will take judicial cognizance. If, under section 4952, it was competent for the plaintiff to have taken a copyright upon the etched plate as a negative, the infringement thereof must have consisted in duplicating the plate; but she obtained a copyright upon the picture, calling it a "photograph," and not upon the negative; and in so far as the picture differs from the original photograph it is not, strictly speaking, a photograph; and if, in any sense, it is a work of art, the skill was in the etching of the cane into the negative. That done, the subsequent printing of the picture was mechanical or manual merely, and the result not copyrightable. See *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349. The averment that the plaintiff was the author, designer, and proprietor of the picture is not proven. She was the designer or author, and presumably the proprietor, of the original photograph, but in respect to the copyrighted picture the evidence is that, "after producing the photograph, * * * she caused to be etched into the negative * * * a cane in the left hand of the reclining male figure," and that "the only two prints made from said negative" she forwarded to the librarian of congress for the purpose of obtaining the copyright. This may mean that she directed the cane to be put in the left hand of the reclining figure, but of what style and size it should be, in what position it should appear to be held, and whether it should represent an actual or an ideal object, or, in other words, all that could be deemed to be of artistic merit in the work, so far as appears, the etcher was left to determine. See, in the case last cited above, comments on *Nottage v. Jackson*, 11 Q. B. Div. 627. Other than as stated, there is no evidence that the plaintiff was ever the proprietor of the etched plate, or of the pictures produced therefrom. The evidence is more direct that the Werner Company in some way had become the proprietor.

The final consideration, however, on which the decision below was based is perhaps the most satisfactory, namely, that, having given the original photograph to the public, it was beyond the power of the plaintiff to obtain a valid copyright by so slight an alter-

ation as that which was made. The change was colorable merely, was not made in good faith for the purpose of producing a new work of art, but in an attempt to reclaim what had been voluntarily and irrevocably surrendered. To declare that by such a change a photograph, engraving, or other style of picture, which has become public property, may be made a proper subject of copyright, would be to encourage deceit and extortion in a manner impressively illustrated by the facts of this record. Infringement of a valid copyright cannot be evaded by slight and merely colorable changes in a picture, and, as said by the court below, the rule must work both ways. The judgment below is affirmed.

LOWRY et al. v. TILE, MANTEL & GRATE ASS'N OF CALIFORNIA et al.
(Circuit Court, N. D. California. November 13, 1899.)

No. 12,698.

1. MISJOINDER OF PARTIES—WAIVER BY APPEARANCE.

Defendants by a general appearance waive the objection of a misjoinder because other defendants are not inhabitants of the district.

2. GENERAL APPEARANCE.

There is a general appearance by a demurrer which does not alone object to the jurisdiction, but goes to the merits of the case.

3. ANTITRUST LAW—UNLAWFUL COMBINATION.

A complaint alleging that members of an association have conspired and combined to raise the prices of tiles, mantels, and grates, to control the output, and to regulate the prices thereof, with the intent to monopolize the trade and commerce between the other states and California in regard thereto, as well as to arbitrarily fix their prices independently of their natural market value, brings the case within the antitrust act of July 2, 1890 (26 Stat. 209).

Action at Law to Recover Damages under the Provisions of Act July 2, 1890 (26 Stat. 209).

Reddy, Campbell & Metson, for plaintiffs.

Linforth & Whitaker, for certain defendants.

MORROW, Circuit Judge. This is an action at law brought to recover damages alleged to have been sustained by plaintiffs by reason of injury to their business caused by the forming of an association by defendants claimed to be within the prohibitory provisions of the act of congress of July 2, 1890, commonly known as the "Sherman Antitrust Act." The amended complaint alleges: That plaintiffs are co-partners doing business under the firm name of Lowry & Daly, citizens of the state of California, and residents of the Northern district of said state. That the Tile, Mantel & Grate Association of California, and the officers and members thereof, have since the ——— day of January, 1898, and do now, constitute an unincorporated organization composed of wholesale dealers in tiles, mantels, and grates, and that they are now, and ever since that day have been, citizens and residents of the city and county of San Francisco, and of the city of Sacramento, and of the city of San José, in the state of California, and of the states set forth hereinafter, and that all said defend-

ants have been since that date, and now are, carrying on business in the state of California, and within the jurisdiction of the Northern district thereof. That the defendants hereinafter named are corporations created and existing under the laws of the respective states set opposite to their names: Columbia Encaustic Tile Company, Indiana; United States Encaustic Tile Works, Indiana; Cambridge Tile Manufacturing Company, Kentucky; Pittsburg Tile Company, Pennsylvania; Trent Tile Works, New Jersey; W. W. Montague & Co., California; Bush & Mallett Company, California; Star Encaustic Tile Company, Limited, Pennsylvania; Mangrum & Otter, California; American Tile Company, Ohio; Providential Tile Works, New Jersey; the John Stock Sons, California. That the defendants the Columbia Encaustic Tile Company, Cambridge Tile Manufacturing Company, the American Tile Company, the Pittsburg Tile Company, the Providential Tile Works; and the Star Encaustic Tile Company, Limited, are, and were at all the times mentioned, manufacturers of tiles in the states set forth, and that the defendants Heavener Meir, the John Stock Sons, W. W. Montague & Co., Bush & Mallett, Bennett & Schutte, and Mangrum & Otter are, and ever since January 1, 1898, have been, engaged in the wholesale and retail business of buying and selling tiles, mantels, and grates in the cities of Sacramento, San Jose, and San Francisco, in this state. That the following cities, with the respective populations placed opposite their names, are each situated in the Northern district of California: San Francisco, 290,000 and upwards; Oakland, 40,000 and upwards; Sacramento, 30,000 and upwards; San Jose, 20,000 and upwards. That in said cities there are a great number of dwelling houses, buildings used for business, trade purposes, and manufactories. That new buildings are being constantly erected, and in their construction large quantities of tiles, mantels, and grates are necessarily used for their safe construction and comfortable occupation. That none of the tiles used about buildings or dwellings are made in the state of California, but are manufactured in Eastern states, and imported thence, and such importations into this state amount to the annual value of \$100,000 or thereabouts. That for many years past plaintiffs have been engaged in the wholesale business of dealing in tiles, mantels, and grates, and in conducting this business have purchased these articles from the various corporations defendant, and shipped them to the state of California, and there sold them; that defendants and their associates who are bound by contract with them comprise all the wholesale dealers who handle and import and sell tiles in the cities aforesaid, and, when combined together, can and do absolutely control the price charged for tiles in said cities, by reason of the distance of these cities from any manufacturers or wholesale dealers other than defendants and those combined with them in other states or foreign countries, who do not belong to the said Tile, Mantel & Grate Association of California. The rates of transportation are prohibitory, so that no tiles have been or can be imported from places other than those in which the corporations and above-named persons have manufactories, stock on hand, or warerooms, and all the grates and tiles made and manufactured within reach of the state of Cali-

fornia, where the rate of freight is such that an importation can be made to San Francisco and said other cities at such an amount as to admit of their importation at all, are, and at all times mentioned have been, controlled by the said defendants, or some of them, or those bound by contracts to them. That before the association, combination, and conspiracy hereinafter referred to, defendants were uncombined, and were selling grates, mantels, and tiles on their respective merits, their prices being determined by the law of supply and demand. That in the years 1896 and 1897 there were in San Francisco and the other said cities numerous persons engaged in the wholesale and retail business of selling tiles, and in the placing and laying of them. That defendants, with intent to form a contract, trust, and conspiracy in restraint of trade and commerce between the state of California and the states of Indiana, Kentucky, New Jersey, Pennsylvania, and Ohio, for the purpose of controlling the output and regulating the price of these commodities, and monopolizing the said trade, combined and conspired to monopolize the grate, tile, and mantel importations and trade and commerce from other states to and with the state of California, to the extent of the tiles, grates, and mantels that could be used in the state of California in the erection and construction of dwellings and buildings, and so conspired to raise the price of these commodities in the California market, and for this purpose on or about the ——— day of January, 1898, formed an organization and adopted a constitution and by-laws, which constitution and by-laws are now in effect. That the said constitution and by-laws provided that no sales and deliveries, or contracts for the sale or delivery, or the placing, of tiles, grates, or mantels, will be made by the manufacturers thereof to any person dealing in these commodities, unless such person belong to the said unincorporated association, and shall pay or cause to be paid ——— dollars to that organization, and bind themselves to abide by its constitution and by-laws; that is to say, that no one who is a member of that organization shall sell to, or deal with or deliver to, any person engaged in the business of buying, selling, or placing tiles, grates, or mantels in the cities of San Francisco, Oakland, Sacramento, and San Jose, and other cities in this state, unless such person shall become a member of the said unincorporated organization, and shall agree that in their general business of selling such commodities to the general public they shall sell them at such prices as may be arbitrarily fixed by the said unincorporated association. That, prior to the formation of that organization, plaintiffs were doing a large business in selling tiles, mantels, and grates, and were making an annual profit of about \$5,000. That plaintiffs are unable to join the said organization, because, according to its constitution and by-laws, a unanimous vote of the members of the association is required to elect a member thereof, and certain members of that organization are so antagonistic to plaintiffs, by reason of business differences, that they would not allow them to enter the organization; and further, the rules and regulations of the association require that members must keep constantly in stock goods to the value of \$3,000, and there are times when plaintiffs' stock does not amount to that value. That, if

plaintiffs join said association, they would be bound to sell their wares at prices arbitrarily fixed by the association, and not at their fair market value. That said association is illegal and void, by virtue of the act of congress approved July 2, 1890, and by joining it plaintiffs would be guilty of a crime under the said act. That, since the formation of said organization, plaintiffs have been unable to purchase tiles, mantels, or grates from any of the defendants, although they have tendered to the defendants the price of the same. That defendants have refused to deliver any tiles, mantels, or grates to them since the organization of said association. That, about the time of the formation of said association, plaintiffs had placed with defendants certain orders for tiles; but these orders were not filled, but were canceled, by the parties with whom they had been placed, for the reason that plaintiffs did not belong to, and would not join, said organization. That, about the time of the formation of the association, plaintiffs had placed orders for tiles with the Columbia Encaustic Tile Company, which canceled plaintiffs' orders because plaintiffs did not belong to the Tile, Mantel & Grate Association. That said organization is within the statute of the 51st congress, passed and approved July 2, 1890, known as "Chapter 647, Supplement to the Revised Statutes at Large of the United States." That, by reason of the monopoly of such association, plaintiffs are damaged in the sum of \$10,000. Plaintiffs pray for treble the sum of \$10,000, in accordance with the provisions of the above-named act, and for further equitable relief.

To this amended complaint the defendants W. W. Montague & Co., a corporation; the Bush & Mallett Company, a corporation; Mrs. Mary Bennett and John H. Schutte, partners trading as Bennett & Schutte; the John Stock Sons, a corporation; Heavener Meir; Mangrum & Otter, a corporation; and the Tile, Mantel & Grate Association,—filed a demurrer. The grounds of this demurrer are: That the amended complaint does not state facts sufficient to constitute a cause of action against defendants, or any of them. That there is a misjoinder of parties defendant, in that the Columbia Encaustic Tile Company, the United States Encaustic Tile Works, the Cambridge Tile Manufacturing Company, the Pittsburg Tile Company, the Trent Tile Company, and the Star Encaustic Tile Company, Limited, are all improperly made and joined as defendants in this action. That the amended complaint is uncertain, (1) in that it does not appear therefrom whether the plaintiffs were at any of the times mentioned in the amended complaint engaged in interstate commerce; (2) in that it cannot be ascertained therefrom whether the acts of defendants complained of interfere with interstate commerce directly, immediately, or at all; (3) in that it cannot be ascertained therefrom with sufficient certainty whether plaintiffs have been damaged in the sum of \$10,000 or at all. It does not appear from the record that the foreign corporations joined as defendants have been served with process, and they have made no appearance.

This action is brought under the provisions of an act of congress dated July 2, 1890, and entitled "An act to protect trade and com-

merce against unlawful restraints and monopolies." 26 Stat. 209. Section 7 of this act provides:

"Any person who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States, in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit including a reasonable attorney's fee."

It is contended by the counsel for defendants that there is a misjoinder of parties defendant in the amended complaint, in that certain corporations organized and doing business in states other than this state have been joined as defendants in this action; such corporations being residents of districts other than this, and not found within this district, so that no service of process can be made upon them, and themselves subjected to the jurisdiction of the court. The allegations of the amended complaint in this respect are as follows:

"All of said defendants have been since that date, and are now, carrying on business in the state of California, and within the jurisdiction of the Northern district thereof."

Defendants' counsel contend that these allegations are not such as to give the court jurisdiction over such defendants as do not reside in this district, and that, as the defendant corporations joined with them reside only in the states in which they have been respectively organized, they can only be sued in their own districts. It is contended by plaintiffs' counsel that the defendants who have demurred are estopped from demurring to the amended complaint upon the ground that some of their co-defendants are being sued in the wrong district, since they have made a general appearance, and by so doing have lost the right to raise the question that there is a misjoinder of parties on these grounds. In the case of *Improvement Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, the action was at law, and the court discussed the effect of a general appearance by a defendant upon a demurrer by the same defendant based upon jurisdictional grounds. In this case the complaint alleged that the plaintiff was incorporated under the laws of New Jersey, and was a citizen of that state, and that all the defendants were citizens and residents of the state of Indiana. "On June 19, 1890, the defendants Gibney, McElwaine, and Wheeler, by their attorney, entered a general appearance, but Gibney neither pleaded nor answered, and the defendant Bartley never appeared or made any defense. On September 19, 1891, McElwaine and Wheeler pleaded in abatement that at the time of the bringing of this action, and ever since, Gibney and Bartley were citizens of the state of Pennsylvania, and not citizens or residents of the state of Indiana, and that therefore the court had no jurisdiction of the case. The plaintiff demurred to this plea as not containing facts sufficient to constitute a cause for the abatement of the action. The plaintiff declining to plead further, but electing to stand upon its demurrer to the plea, the court adjudged that the plaintiff take nothing by its action, and that the defendant recover costs." The case was

taken to the supreme court upon a writ of error. Mr. Justice Gray delivered the opinion of the court, and in the course of that opinion said, at page 220, 160 U. S., page 273, 16 Sup. Ct., and page 402, 40 L. Ed.:

"In *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, this court held that the provision of the act of 1888 as to the district in which a suit between citizens of different states should be brought, required such a suit, in which there was more than one plaintiff or more than one defendant, to be brought in the district in which all the plaintiffs or all the defendants were inhabitants. When there are several defendants, some of whom are, and some of whom are not, inhabitants of the district in which the suit is brought, the question whether those defendants who are inhabitants of the district may take the objection, if the nonresident defendants have not appeared in the suit, has never been decided by this court. Strong reasons might be given for holding that, especially where, as in this case, an action is brought against the principals and sureties on a bond, and one of the principals is a nonresident and does not appear, the defendants who do come in may object at the proper stage of the proceedings to being compelled to answer the suit. But in the present case it is unnecessary to decide that question, because one of the principals and both sureties, being all the defendants who pleaded to the jurisdiction, had entered a general appearance long before they took the objection that the sureties were citizens of another district. Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and, of course, cannot object that others of the defendants were such."

The judgment of the circuit court was reversed, and the case remanded, with directions to sustain the demurrer to the plea.

A general appearance, therefore, on the part of these defendants, must be deemed a waiver of the objection of a misjoinder because the other defendants are not inhabitants of this district. Counsel contend that they have not made such a general appearance, but have demurred specially on the ground that certain defendants are improperly joined with them. The terms of the demurrer constitute a sufficient answer to this contention.

The grounds of demurrer are not confined to the jurisdiction of the court, but the merits of the case are involved in the objection that the complaint does not state facts sufficient to constitute a cause of action. In the case of *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, the question of special appearance was considered. The action was at law, and was brought in the circuit court of the United States for the Western district of Texas. The petition alleged that the defendant was a corporation duly incorporated under the laws of the state of Kentucky, a citizen of the state of Kentucky, and a resident of El Paso county, in the state of Texas; that defendant "was and is engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio, and the city of San Antonio, all of the state of Texas; that the defendant is now doing business as aforesaid, and has an agent for the transaction of its business in the city and county of El Paso, Texas, to wit, W. E. Jessup." The plaintiff resided in the county of Red River, which is in the Eastern district of Texas. Defendant, by leave of court, filed a document desig-

nated as an "answer or demurrer," "for the special purpose, and no other; until the question herein raised is decided, of objecting to the jurisdiction of this court," and demurred and excepted to the petition because, upon the above allegations, "it appears that the suit ought, if maintained at all in the state of Texas, to be brought in the district of the residence of the plaintiff,—that is to say, in the Eastern district of Texas"; and the defendant prayed judgment whether the court had jurisdiction. The court overruled the demurrer. Defendant thereupon answered to the merits, and, judgment being given against it, sued out a writ of error in the United States supreme court on the question of jurisdiction only, under the act of February 25, 1889 (25 Stat. 693, c. 236). Mr. Justice Gray said, at page 206, 146 U. S., page 45, 13 Sup. Ct., and page 944, 36 L. Ed.:

"It may be assumed that the exemption from being sued in any other district might be waived by the corporation by appearing generally or by answering to the merits of the action without first objecting to the jurisdiction. *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. But in the present case there was no such waiver. The want of jurisdiction, being apparent on the face of the petition, might be taken advantage of by demurrer, and no plea in abatement was necessary. *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179. The defendant did file a demurrer, for the special and single purpose of objecting to the jurisdiction; and it was only after that demurrer had been overruled, and the defendant had excepted to the overruling thereof, that an answer to the merits was filed."

The case of *Railway Co. v. McBride*, 141 U. S. 127, 130, 11 Sup. Ct. 982, 983, 35 L. Ed. 659, cited in *Southern Pac. Co. v. Denton*, supra, was also an action at law; and the only question involved was what constituted a general appearance, and its effect upon the jurisdiction of that court. Mr. Justice Brewer, delivering the opinion of the court, said:

"Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds; two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was therefore in the first instance a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives, not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

In the case at bar defendants did not file their demurrer "for the special and single purpose of objecting to the jurisdiction," but for the further purpose of attacking the merits of the case upon the facts as stated in the complaint; and this last issue the court is called upon to decide as a material question in controversy, as will appear hereafter. The appearance of defendants demurring in this action must, in view of these authorities, be regarded as a general appearance, and they are therefore prevented from objecting that their co-defendants are improperly joined with them on the ground that they are being sued in the wrong district.

Considering next the ground of demurrer that the amended com-

plaint does not state facts sufficient to constitute a cause of action: The statute under which this action is brought (26 Stat. 209) provides:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. * * *

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor. * * *

"Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in any territory of the United States, or the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal."

Defendants' counsel rely upon the case of *Anderson v. U. S.*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300, as supporting their demurrer upon this point. The bill in that case was filed, under the direction of the United States attorney general, by the United States district attorney for the Western district of Missouri. It alleged, among other things, that defendants—

"Have unlawfully entered into a contract, combination, and conspiracy in restraint of trade and commerce among the several states and with foreign nations, in this, to wit: That they have unlawfully agreed, contracted, combined, and conspired to prevent all other persons than members of the Traders' Live Stock Exchange, as aforesaid, from buying and selling cattle upon the Kansas City market, at the Kansas City Stock Yards, as aforesaid; that the commission, firm, person, partnership, or corporation to whom said cattle are consigned at Kansas City, as aforesaid, is not permitted to, and cannot, sell or dispose of said cattle at the Kansas City market, as aforesaid, to any buyer or speculator at the Kansas City Stock Yards, unless said buyer or speculator is a member of the Traders' Live-Stock Exchange, and these defendants, and each of them, unlawfully and oppressively refuse to purchase cattle, or in any manner negotiate or deal with or buy from any commission merchant who shall sell or purchase cattle, from any speculator of the said Kansas City Stock Yards who is not a member of the said Traders' Live-Stock Exchange; that by and through the unlawful agreement, combination, and conspiracy of these defendants, the business and traffic in cattle at the said Kansas City Stock Yards is interfered with, hindered, and restrained, thus entailing extra expense and loss to the owner, and placing an obstruction and embargo on the marketing of cattle shipped from the states and territories aforesaid to the Kansas City Stock Yards."

Mr. Justice Peckham, in the course of the opinion of the court, says:

"The agreement now under discussion differs radically from those of *U. S. v. Jellico Mountain Coal & Coke Co.* (C. C.) 46 Fed. 432, 12 L. R. A. 753; *U. S. v. Coal Dealers' Ass'n* (C. C.) 85 Fed. 252; and *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271. The agreement in all of these cases provided for fixing the prices of the articles dealt in by the different companies; being in one case iron pipe for gas, water, sewer, and other purposes, and coal in the other two cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration that they form no basis for its decision. This association does not meddle with prices, and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting, or in any manner restraining, interstate commerce, which, if affected at all, can only be in a very

indirect and remote manner. The rule has no direct tendency to diminish or in any way impede or restrain interstate commerce in the cattle dealt in by defendants. There is no tendency, as a result of the rule, directly or indirectly, to restrict the competition among defendants for the class of cattle dealt in by them. Those who are selling the cattle have the market composed of defendants, and also composed of the representative buyers of all the packing houses at Kansas City, and also of the various commission merchants who are constantly buying on orders, and of those who are buying on their own account. This makes a large competition wholly outside of the defendants. The owner of cattle for sale is therefore furnished with a market at which the competition of buyers has a broad effect. All yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof."

The allegations of the amended complaint in the present case are that the members of the Tile, Mantel & Grate Association have conspired and combined to raise the prices of tiles, mantels, and grates, to control the output and to regulate the prices of these commodities, with the intent of monopolizing the trade and commerce between the other states and California in regard to such commodities, as well as to arbitrarily fix their prices independent of their natural market price. It will be seen, therefore, that the case of *Anderson v. U. S.* cannot be considered as applicable to the case at bar.

The case of *U. S. v. Jellico Mountain Coal & Coke Co.* (C. C.) 46 Fed. 432, 12 L. R. A. 753, is more in point. The action was brought under the antitrust act against the members of the Nashville Coal Exchange. The purpose of the agreement in that case was to establish the price of coal at Nashville, and to change the same from time to time. Members found guilty of selling coal at a less price than the price fixed by the exchange, either directly or indirectly, were fined 2 cents per bushel and \$10 for the first offense, and 4 cents per bushel and \$20 for the second offense. Owners or operators of mines were not to sell or ship coal to any persons, firms, or corporations in Nashville who were not members of the exchange, and dealers were not to buy coal from any one but a member of the exchange. The court, commenting upon the agreement of this association of coal dealers, said:

"This clearly indicates the purpose of the association to be to control the price of coal in the Nashville market used in manufacturing and in steamboats whenever it could; that the mines of coal tributary to Nashville were all expected to become members of the exchange, whereupon the prices of coal could be fixed absolutely; and the necessary inference from this declaration and the entire organic structure of the body is that it felt strong enough already to regulate and establish the prices of domestic coal in that market to a large extent, at least, and that this exchange might now monopolize the business of dealing in domestic coal in the Nashville market, and in the future monopolize by and confine to its membership the entire trade in coal at that point. It seems to me that the purposes and intention of the association could hardly have been more successfully framed to fall within the provisions of the act of July 2, 1890, had the object been to organize a combination, the business of which should subject it to the penalties of that statute; and there is no need of authorities to sustain such view of the case."

In the case of *U. S. v. Coal Dealers' Ass'n* (C. C.) 85 Fed. 252, the bill alleged that defendants comprised all the wholesale dealers handling coal in San Francisco, and that they, together with certain retail dealers, had conspired with intent to monopolize the coal

trade and commerce between British Columbia, Washington, and Oregon, to the extent of the coal used for domestic purposes in the city of San Francisco. It was said by this court in that case:

"But the agreement of the importers and wholesale dealers, which alone gives life and force to the combination, is directed specifically to the maintenance of card rates for certain imported coals, by name; and it is this agreement, and what may be accomplished under it by the combination, that is to be considered, and not what it may be doing at any particular time."

In *U. S. v. Addyston Pipe & Steel Co.*, 54 U. S. App. 723, 29 C. C. A. 141, and 85 Fed. 279, the United States began proceedings in equity against six corporations engaged in the manufacture of cast-iron pipe in localities in Ohio, Kentucky, Alabama, and Tennessee. The bill of complaint charged the defendants with a combination and conspiracy in unlawful restraint of interstate commerce. It appeared that the defendants, who were manufacturers and vendors of cast-iron pipe, entered into a combination to raise the price of pipe for all the states west and south of New York, Pennsylvania, and Virginia, comprising some 36 states in all; and, to carry out this combination, the associated defendants entered into an agreement which provided certain methods of procedure in dealing with the public, whereby competition between themselves was avoided in the territory mentioned. The court, in an able opinion reviewing the whole subject of the law relating to combinations and contracts in restraint of trade, arrived at the conclusion that the association of the defendants was a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood under the act of July 2, 1890. The doctrine of that case is applicable here. The allegations charging conspiracy and combination to raise the price of the commodities in question, and of an agreement by the members of such combination to sell these commodities at such prices as shall be arbitrarily fixed by the combination in question, together with the further allegation that such combination has been made with the intent of monopolizing trade and commerce between California and other states, are sufficient, under these authorities, to bring the case within the operation of the provisions of the Sherman act. Defendants' demurrer upon the ground of the insufficiency of the facts stated to constitute a cause of action cannot, therefore, be sustained.

Defendants also demur on the ground of uncertainty, contending that the complaint fails to show that defendants were engaged in interstate commerce, or that their acts directly or immediately interfered with interstate commerce, or in what manner plaintiffs have been damaged, or at all. Upon consideration, however, this ground of demurrer does not appear to be well founded. The allegations of the complaint are obviously free from uncertainty in these particulars, and this ground of demurrer must therefore be denied. The demurrer of defendants will therefore be overruled.

LESLIE v. STANDARD SEWING-MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 625.

1. APPEAL—REVIEW OF INSTRUCTIONS—ASSIGNMENT OF ERROR.

Where the only instruction given was the direction of a verdict for defendant, the other portion of the charge being simply explanatory of the reasons for that action, a general exception to the charge, and an assignment of error that the court erred in directing a verdict for defendant, are sufficiently specific.

2. SAME—BILL OF EXCEPTIONS.

The rule that the bill of exceptions must contain all the evidence, to enable an appellate court to pass upon the correctness of an instruction directing a verdict for one of the parties, will not be applied where the reason for it fails,—as where the bill, though not purporting to contain all the evidence, contains a statement of evidence on behalf of the plaintiff sufficient on every issue to have justified a verdict in his favor, and the action of the court was evidently the result of a misapprehension of the bearing of such evidence.

3. PATENTS—LICENSE—ACTION FOR ROYALTIES.

Under a license to make sewing machines under a patent, which provides that the patentee does not guaranty the validity of the patent, but that all royalties thereunder shall cease in the event such patent shall be adjudged invalid, and, further, that the licensee may make such alterations in the machines as it may deem expedient, but no such alteration shall relieve it from the payment of royalties "so long as the machine made by it involves any of the essential principles covered by the patent," the licensee cannot avoid the payment of royalties on the ground that it has so changed the machine that it does not infringe the combination of the patent as limited by the prior art.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The principal question in this case is whether the circuit court erred in directing a verdict for the defendant. The entire charge of the court, ending with the peremptory direction, was as follows: "Gentlemen of the Jury: The court being of the opinion that there are no questions of fact in this case to be submitted to the jury, it would be the duty of the court to direct a verdict in favor of the defendant upon these general grounds: Each of the patents in suit,—the five which have been introduced on the part of the plaintiff,—and each of the claims of those patents which have been referred to, are restrictive by the terms of the patent, and, in view of the clearly-shown prior art, to such an extent that the doctrine of mechanical equivalents cannot be invoked in this case, in the opinion of the court. It is conceded that all of the various elements which enter into each of the claims are old and well known, and the only claim of invention is in uniting and bringing together in a combination these old elements. In the state of the art of sewing machines, as here disclosed, there can be no such construction given to these claims as would authorize the submission to you of the question whether they were mechanical equivalents in some way, or any of the changes which have been introduced. It is conceded that in every instance, as to every claim, that the elements are not employed by the defendant in any of the machines since 'No. 1,' as it is called. Strike out the word 'concede.' I will just state that a combination claimed in a patent is one in which several elements enter, which, combined, together make what is called 'invention.' They may be old. If the combination is a new one, producing new results, then it becomes a patentable invention. The difficulty in this case is that the machines introduced as showing the use of the patented devices (all except No. 1) fail in each instance to employ all the elements entering into each of these combination claims. That being the case, so far as the manufacturers of the machines 2,

3, 4, and 5 are concerned, and, under the evidence in this case, the construction to be put upon these patents, the court feels bound to instruct you that they do not employ the devices in the patents. As to machine No. 1, there is no dispute but that it is generally in accord with the patents,—at least, with a portion of them,—so that all of the machines which were manufactured in accordance with the model or plan shown in machine No. 1 would be liable for royalty. It is, however, undisputed in this case that the number of machines so manufactured will be much less, in the amount of royalties to be produced, than the amount which was advanced on the contract. Therefore that is not material here. And the court being of opinion that the plaintiff is not entitled to the showing of mechanical equivalents to the extent which would bring these several devices shown in the machines, from 2 to 5, within the patent, you are instructed that a verdict should be returned finding the issues for the defendant." "To which instruction," the bill of exceptions proceeds to say, "the plaintiff, by his counsel, then and there duly excepted." The sixth specification of error is that "the circuit court erred in instructing the jury to find the issues for the defendant." It is objected that the question cannot be considered, because the exception to the charge and the specification of the error are not sufficiently specific (*City of Milwaukee v. Shailer*, 55 U. S. App. 522, 28 C. C. A. 286, 84 Fed. 106), and because the bill of exceptions does not contain, nor purport to contain, all the evidence adduced at the trial. The proof made of the prior art, it is conceded, is not in the transcript. The action was in assumpsit on a contract, a copy of which will be found in the report of the opinion of this court upon a former writ of error in the case. *Machine Co. v. Leslie*, 46 U. S. App. 680, 24 C. C. A. 107, 78 Fed. 325.

James H. Teller, for plaintiff in error.

John Dane, Jr., and Charles S. Holt, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The essential point of the court's charge to the jury was the direction to find the issues for the defendant, the other parts being simply explanatory of the reasons for that action; and the exceptions saved and the specification of error, being both aimed directly at that point, cannot be said to be indefinite or uncertain. The objection to the bill of exceptions has better foundation, but should not prevail. Beyond doubt, and for obvious reasons, it is the rule that, if the bill of exceptions does not contain all the evidence, the question whether a general verdict or finding of the lower court was supported by the evidence will not be considered; and the same rule has often been applied when the question was whether a peremptory instruction, directing a verdict for one party or the other, was justified. The latter question, however, it is evident, is or may be essentially different from the former; and, when all reasons for applying the rule fail, it should not be given effect. The question whether a verdict or finding was supported by the evidence obviously cannot be answered, if the bill of exceptions leaves it uncertain what the entire evidence was. It must always be presumed in such a case that any defect in the evidence presented would be removed by a full statement, but, while every presumption must be indulged in favor of a judgment, it should be a reasonable presumption, not inconsistent with what is shown in the record; and when a find-

ing has been directed in favor of the defendant in a case, and the bill of exceptions, though not purporting to contain all the evidence, contains a statement of evidence in behalf of the plaintiff sufficient on every issue to have justified a verdict in his favor, the rule manifestly ought not to apply, especially if it be apparent that the action of the court was the result of a misapprehension of the bearing of the proof adduced. It is plain that there was such an error in this case. Upon the evidence set out in the bill of exceptions, the plaintiff was entitled to recover on one paragraph of the declaration a stipulated sum for each machine manufactured by the defendant, if those machines involved "any of the essential principles covered by the patents." The question was taken from the jury because in the judgment of the court, as stated in its charge, the claims of each of the patents "are restrictive by the terms of the patent, and, in view of the clearly-shown prior art, to such an extent that the doctrine of mechanical equivalents cannot be invoked in this case." That was to treat the case as if there were no contract between the parties, and the question were simply of infringement by a wrongdoer. In *Eureka Co. v. Bailey Co.*, 11 Wall. 488, 20 L. Ed. 209, there was a contract by which a licensee "was to pay a royalty of fifty cents for every machine manufactured by it in which the patent should be used"; and, in regard to the denial there made that the machines manufactured and sold were covered by the plaintiff's patent, the court declared itself "not at all satisfied that in equity it can be permitted to set up this defense, while it makes no attempt by cross bill, or even in the answer, to show that the agreements were obtained by fraud, surprise, or imposition." The present case is at law, and the question is not one of equity, but of strict contract right. The contract is explicit, and, in our opinion, excludes any inquiry into the prior art for the purpose of limiting the scope of the patents. It contains the express stipulation that Leslie "shall not be held to guaranty the validity of said patents, or any of them, or to protect said second party against infringement thereof, * * * but all royalties hereunder shall cease upon the date of a decree of any court of competent jurisdiction declaring the invalidity of said patent or patents"; and it is further provided that the "second party shall not be obliged to make rotary shuttle sewing machines like any model that has been or may be constructed or settled upon as a standard, but it may from time to time make such changes as may seem to it expedient, but no such alteration or change shall relieve the second party from the payment of royalties as hereinafter provided, so long as the machine made by it involves any of the essential principles covered by the patent of the first party." This last expression clearly means that changes or alterations which should introduce only equivalents of the original elements should not relieve the second party from the payment of the stipulated royalties, and, like the other provision, that all royalties should cease on the date of a decree declaring the invalidity of the patents, is inconsistent with the proposition of the court that the doctrine of mechanical equivalents could not be invoked in the case. To the same effect in our former opinion we said:

"Leslie was unwilling to guaranty the validity of his patented inventions, or to protect the company in their use, should they prove to infringe upon another's protected rights. This risk was assumed by the company,—upon the condition, however, that the payment of royalty should cease when a competent court should declare the invalidity of the invention."

It is unnecessary to consider whether, upon other counts of the declaration, the case should have been submitted to the jury. The judgment below is reversed, with instruction to grant a new trial.

CITY OF CHICAGO v. BAKER.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 629.

1. TRIAL—VIEW OF PREMISES BY JURY.

It is within the discretion of the court to refuse to permit representatives of the parties to accompany the jury on their view of premises to which the action relates, although it is the better practice to grant such permission.

2. MUNICIPAL CORPORATIONS—INJURY TO PROPERTY BY VACATION OF STREET—MEASURE OF DAMAGES.

While the interruption of public travel along a street by the vacation of a portion of it is a common injury, for which an individual cannot recover, the owner of property fronting on the street may recover damages for the special inconvenience in the use and enjoyment of his property, caused by his being deprived of the previous means of access thereto, the amount of such damages to be determined by the jury from a consideration of the situation, character, and probable uses of the property.

3. SAME—ACTION FOR DAMAGES—EVIDENCE.

In an action against a city by a property owner to recover damages because of the vacation of a street on which such property fronted at a point near by where it was crossed by railroad tracks, to permit the elevation of the tracks, evidence introduced by the city in reduction of damages, by showing that by reason of the elevation of the tracks subways had been made on adjacent streets, which gave better and safer means of access to plaintiff's property than was afforded by the grade crossing previously maintained on the street which was closed, does not render admissible in rebuttal evidence of additional injury to the property from smoke and cinders by reason of the elevation of the tracks, which is an injury for which defendant is not liable.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Thomas J. Sutherland, for plaintiff in error.

Morris St. P. Thomas, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge. For the opinion delivered in this case when first here, see *City of Chicago v. Baker*, 58 U. S. App. 569, 30 C. C. A. 364, 86 Fed. 753. Some of the questions then decided are again brought forward, but, of course, are not open to reconsideration. Other questions, however, are presented. After the remand of the case, an amended declaration was filed, to which the city alone was made defendant, and by which damage was claimed only

for the vacation of 21st street within the limits of the right of way of the Chicago, Rock Island & Pacific Railway Company and the Lake Shore & Michigan Southern Railroad Company. At the commencement of the trial, at the instance of the plaintiff in error, the jury was sent, in charge of a bailiff, to view the premises; and it is assigned for error that the court refused to direct a view of the entire work of the elevation of the tracks of the railroads named from 17th street to 63d street, that the court unduly restricted the opening statement which should be made by counsel for the plaintiff in error before the jury's view of the premises was had, and that the court refused permission to counsel or other representative of the plaintiff in error to be present with the jury at the time of the view. These were matters of discretion, and, while we incline to think it the better practice that a representative of either party, if the privilege be asked, should be allowed to be present and witness the action and conduct of the jury in taking a view of premises, we are satisfied that in this instance no harm resulted from the refusal. The situation was so simple that a diagrammatic representation would have been enough, without sending the jury out. The scope of the examination ordered, including, as it did, 21st street from the lake to the river, and other neighboring streets and the subways near the vacated portion, was certainly sufficient. To have required more would have been needless, and possibly misleading.

The important questions in the case concern the elements of injury which the jury were permitted to consider. In the amended declaration it is averred that prior to the alleged vacation a crossing of the streets and railroad tracks at grade had been maintained, so that pedestrians and vehicles and the public generally were able to cross at that point; that by reason of the premises large numbers of persons passed the land of the plaintiff, which in that way was accessible and in close proximity to the portion of the city west of the crossing; that upon the vacation of the street the railroad companies, with the consent of the city, built, and ever since have maintained, upon and across the entire portion of the street within their right of way, a structure of earth and stone of the height of ten feet, and have laid thereon their railroad tracks; and that by reason of the vacation of that portion of the street, and the construction and maintenance of the railway embankment, "the public, and all persons and vehicles, were and are absolutely excluded and prevented from using said street for the purpose of crossing said right of way, and the direct and easy access from and to the land of the plaintiff as aforesaid, to and from the portion of the city lying west of said right of way, was destroyed, and said land was and is thereby rendered difficult of access from the west, such access being now inconvenient and circuitous, thereby depreciating the value of said land, to the damage of the plaintiff \$20,000." It is now contended that the injury so averred is limited to the interruption of travel upon the street, that no proof was made or evidence offered of injury of any other kind, and that the court, therefore, erred in refusing to direct a verdict of not guilty.

In our former opinion, the rule was recognized that the cutting off of travel along a street is "a common injury, for which individual relief is not allowed"; and it follows that the allegation in the declaration that the travel on the street by the premises of the plaintiff was diminished, or wholly interrupted, and the evidence to that effect, if admissible for any purpose, were unavailing as a cause of action or for the enhancement of damages; but it remains clear, both by the averments of the declaration and by the proofs, that the street was vacated, making on the north of the plaintiff's premises a mere cul-de-sac, and cutting off, as stated in that opinion, "egress and ingress which had existed to and from the west, * * * leaving no immediate communication with the next cross street in that direction." "In that respect, at least," it was then said, and so became the law of the case, "he suffered a special inconvenience in the use and enjoyment of his property, for which he should receive compensation." That seems to us to be in accordance with the decision in *City of Chicago v. Burcky*, 158 Ill. 103, 42 N. E. 178, 29 L. R. A. 568, which is a case not essentially different from this. See, also, *Hohmann v. City of Chicago*, 140 Ill. 226, 29 N. E. 671. It is to be observed, however, that the ingress and egress, the deprivation of which we declared special and actionable, pertained, not to the public who might pass upon the street if it had not been closed, but to the owner or occupants of the premises. The damage attributable to such deprivation ordinarily can be estimated by no certain rule, but in each instance must be determined by the jury on consideration of the situation, character, and probable uses of the property affected. There was therefore no error in the refusal of the court to direct a verdict.

In rebuttal, evidence was offered and admitted, over objection and exception, to the effect that, after and by reason of the elevation of the railroad tracks, smoke, cinders, and dust in increased quantities were blown upon the plaintiff's property. It is conceded that this evidence was not admissible primarily against the city, but, testimony having been offered in the city's behalf for the purpose of showing benefits to the property by reason of the elevation of the railroad tracks, the abolishment of grade crossings, and the establishment of subways under the railroads at Archer avenue on the north, and at 22d and other streets to the south, it is urged that it became competent to show the disadvantages resulting from the elevation of the tracks in abatement of the supposed benefits. The fallacy of this position is evident. The plaintiff sought, and was entitled to claim, damages only for the vacation and closing of the street. The railroads, owning their right of way, were privileged, doubtless, to elevate their tracks, without liability for the consequences to adjacent lands. In no event, certainly, could the city be responsible for such consequences. Within the rule stated, the city was liable to the plaintiff for the injury caused by the closing of the street, but, the vacation having been ordered in connection with the elevation of the railroad tracks and the establishment of subways near by, which could be used in going to and from the plaintiff's premises without incurring the dangers of the grade crossing, it was proper that the jury, in de-

termining the amount of damages, should consider these facts, since they had a direct and necessary bearing upon the question to be determined. The plaintiff was deprived of ingress and egress in one direction, but at the same time was furnished with better and safer ways of coming and going by circuitous routes, and the question was, what was the net injury? The original evidence of the plaintiff and that adduced by the plaintiff in error bore directly upon the point, both having relation to the means of ingress and egress; but the evidence in rebuttal, to which objection was made, has no bearing upon that point. It is true that witnesses for the city spoke of the advantages resulting from the elevation of tracks and the establishment of subways, but it is clear that the fact of elevation was a mere incident, not deemed to be in itself beneficial, except as it made subways possible. If benefit to the plaintiff had been asserted merely on account of the embankment, as, for instance, that it afforded a desirable protection to the premises of plaintiff, it might have been proper in rebuttal to show any disadvantage resulting from the same cause, but on the case as presented the evidence excepted to was incompetent. The judgment below is reversed, with direction to grant a new trial.

In re WOODBURY et al.

(District Court, D. North Dakota. January 19, 1900.)

1. **BANKRUPTCY—JURISDICTION.**

Section 2 of the bankruptcy act of 1898 confers upon district courts full jurisdiction of actions at law and suits in equity to collect the estates of bankrupts, and this jurisdiction is in no way impaired by subdivision b of section 23.

2. **SAME—SUITS BY TRUSTEES.**

Subdivision b of section 23 relates only to venue, and requires suits by the trustee to be brought in the district and division in which they should properly have been brought if prosecuted by the bankrupt.

3. **SAME—JURISDICTION OF STATE COURTS.**

Congress has not the power to impose the execution of any part of the federal bankruptcy law upon the state courts.

(Syllabus by the Court.)

In Bankruptcy.

Freerks & Freerks, for bankrupt.

Corbet & Murphy, for trustee.

AMIDON, District Judge. A petition has been presented in this proceeding by the trustee in bankruptcy, asking permission to file a bill in equity in the United States district court to set aside certain alleged fraudulent conveyances made by the bankrupts. The application is opposed upon the ground that this court has no jurisdiction to entertain such a suit. The objection thus raised presents two questions: (1) What jurisdiction, if any, is granted by section 2 of the bankruptcy act of 1898 to the United States district courts in actions at law and suits in equity to collect the estate of the bankrupt? (2) If such jurisdiction is granted by that section, to what extent is

it limited by the last clause of subdivision 7 thereof, and the other portions of the act to which reference is therein made?

We shall best ascertain the scope of the present act by examining the grant of jurisdiction to district courts in previous bankruptcy statutes, and the interpretation given to them by the federal courts. The provision on that subject in the act of 1841 is contained in section 6, and reads as follows:

"The district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act. And the jurisdiction hereby conferred on the district court shall extend to all acts, matters and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the closing of the proceedings in bankruptcy."

It will be observed that in this language there is no specific grant of jurisdiction at common law or in equity, and no power expressly vested in the district courts to collect the estate of the bankrupt. Yet the federal courts held that such jurisdiction was in fact incidental to the powers conferred, and upon that ground sustained its plenary exercise by those courts. *Mitchell v. Manufacturing Co.*, Fed. Cas. No. 9,662; *Ex parte Christy*, 3 How. 312, 11 L. Ed. 603. Owing, however, to the questions which had been raised in respect of the common-law and equity jurisdiction of the United States district courts under the act of 1841, that jurisdiction was made more specific and ample in the act of 1867, by expressly conferring upon those courts power to collect all the assets of the bankrupt. The provision on that subject reads as follows:

"The several district courts of the United States are hereby constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. And the jurisdiction hereby conferred shall extend * * * to the collection of all the assets of the bankrupt."

It is noticeable, however, that no specific grant of jurisdiction at common law or in equity is contained in this act. Such jurisdiction was nevertheless sustained by the federal courts in the fullest measure, as necessarily implied from the powers expressly granted. *Sherman v. Bingham*, Fed. Cas. No. 12,762; *Goodall v. Tuttle*, Id. 5,533; *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414. But even under this act much doubt arose as to whether jurisdiction could be exercised by the federal courts of any district other than that in which the original bankruptcy proceeding was instituted. The authorities bearing upon the question are fully discussed in the cases just cited. The language of the act of 1898 would seem to have been chosen with direct reference to this conflict of judicial opinion. All powers that were derived under earlier acts by implication are here bestowed in express terms. Every objection that had been raised in the course of previous litigation to the jurisdiction of federal courts of bankruptcy in such cases is answered in section 2 of the act of 1898 by a specific grant of power. Its material provisions are as follows:

"The district courts of the United States are hereby made courts of bankruptcy, and are hereby invested within their respective territorial limits with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to cause the estates of bank-

rupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Here, for the first time, jurisdiction "at law and in equity" is expressly vested in the United States district courts, and that jurisdiction is "such as will enable them to cause the estates of bankrupts to be collected and determine controversies in relation thereto." Such is the grant. The exception will be considered hereafter.

In the case of *Mitchell v. McClure* (D. C.) 91 Fed. 621, doubt is expressed as to whether any grant of plenary jurisdiction at common law or in equity is vested in district courts by the act of 1898. This doubt, however, seems to be based upon an erroneous view of the source of such jurisdiction under the act of 1867. The third clause in section 2 of that act provided:

"Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest or by such person against such assignee, touching any property or rights of property of said bankrupt, or vested in such assignee."

The learned judge writing the opinion in that case considers this section to be the source of the common-law and equity jurisdiction of district courts under the act of 1867, and, inasmuch as no similar provision is contained in the act of 1898, he reaches the conclusion that the district courts have not plenary jurisdiction at common law or in equity under the latter act. The error here consists in deriving the jurisdiction of the district courts from the third clause of section 2, above quoted. The federal courts, in construing the act of 1867, uniformly held that full common-law and equity jurisdiction was vested in the district courts by section 1 of that act, instead of that part of section 2 which gives to circuit courts concurrent jurisdiction. The very grant of concurrent jurisdiction to the circuit courts assumes jurisdiction in the district courts elsewhere conferred. In the case of *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414, the supreme court, speaking by Justice Bradley, describes the jurisdiction of the district courts and its source as follows:

"The jurisdiction of the circuit courts in cases of bankruptcy, as conferred by the act of 1867, was twofold,—original and appellate. But the enacting clauses which confer this jurisdiction make such direct reference to the jurisdiction of the district court that it is necessary first to examine the latter jurisdiction. Of this there are two distinct classes: First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge, or the refusal of a discharge, of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The language conferring this jurisdiction of the district courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy (Section 1.) The various branches of this jurisdiction are afterwards specified; resulting, however, in the two general classes before mentioned."

See, also, to same effect, *Sherman v. Bingham*, Fed. Cas. No. 12,762; *Goodall v. Tuttle*, Id. 5,533.

A comparison of the bankruptcy acts of 1841, 1867, and 1898 has shown a steady growth in the explicitness with which jurisdiction at

common law and in equity is granted to the United States district courts, and in no act has such jurisdiction been conferred in language both so comprehensive and specific as in the act of 1898. It remains to be considered whether congress, after having been at such pains to grant this ample jurisdiction at the beginning of the act, has in its later provisions wholly annulled its grant. I am of the opinion that the last clause of subdivision 7 of section 2, "except as herein otherwise provided," upon which the denial of jurisdiction is based, does in fact refer to subdivision "b" of section 23, though this is doubted in the learned opinion of Judge Adams in the case of *In re Sievers* (D. C.) 91 Fed. 366. That subdivision reads as follows:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Does this subdivision mean that district courts are without jurisdiction of suits at law and in equity brought by a trustee in bankruptcy, unless they would have such jurisdiction if the suits had been brought by the bankrupt? Such has been the uniform assumption of the cases which have denied jurisdiction to the district courts. But does not this prove too much? It is tantamount to saying that the district courts shall under no circumstances have jurisdiction; for, if we exclude the bankruptcy act, as *ex hypothesi* we must, those courts, with a few exceptions which are not material to the present subject, are not vested with jurisdiction of suits of a civil nature at common law or in equity brought by a private individual, and therefore could in no case exercise jurisdiction of a suit brought by the bankrupt in person. It results that, if those courts have no jurisdiction of suits prosecuted by a trustee unless they would have such jurisdiction if the suits were prosecuted by the bankrupt, they are wholly deprived of jurisdiction of suits by trustees, and subdivision "b" becomes simply a roundabout way of declaring that result; and, if this conclusion be adopted, the United States district courts are wholly without jurisdiction to cause the estates of bankrupts to be collected, for the only way in which that object can be accomplished is by suits instituted in the name of the trustee. Let us then bring together the ample grant of jurisdiction made by section 2, and the exception to such grant embodied in subdivision "b," as thus construed. If the interpretation contended for be adopted, the bankruptcy act should read:

"District courts are hereby invested with jurisdiction at law and in equity to cause the estates of bankrupts to be collected and determine controversies in relation thereto, except that such courts shall never exercise any such jurisdiction."

Either the construction which denies jurisdiction is erroneous, or congress has been guilty of a manifest absurdity.

There are many other reasons why the construction which denies jurisdiction cannot be adopted:

First. It violates the cardinal principle of statutory interpretation, that an exception ought not to be so construed as to wholly destroy the grant to which it is attached. *Dollar Sav. Bank v. U. S.*, 19 Wall.

227, 22 L. Ed. 80; *Ryan v. Carter*, 93 U. S. 78, 23 L. Ed. 807; *U. S. v. Dickson*, 15 Pet. 141, 10 L. Ed. 689.

Second. It would devolve entirely upon the state courts the duty of administering the federal bankrupt law, in so far as it relates to the collection of the estates of the bankrupts. This congress had not the power to do, as had been pointed out by the decisions of the federal courts in construing the previous bankruptcy acts,—a circumstance which furnishes strong reason for believing that congress did not violate the rule in framing the present statute. While state courts may exercise a concurrent jurisdiction with the federal courts in enforcing rights and duties created by federal law, it is a purely discretionary jurisdiction upon their part, which may at any time be wholly renounced or incumbered with onerous conditions. *Sherman v. Bingham*, Fed. Cas. No. 12,762; *Goodall v. Tuttle*, Id. 5,533; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 330, 4 L. Ed. 97; *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed. 715.

Third. If not indispensable to a uniform system of bankruptcy throughout the entire country, it would certainly be highly conducive to such a system that the federal courts should be vested with full jurisdiction, for the purpose of securing the highest degree of uniformity in the interpretation and administration of the law. This has been a controlling consideration in construing all previous bankruptcy acts, and was, no doubt, present to the mind of congress in framing the statute of 1898. In speaking of this subject in the case of *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603, Justice Story said:

"If we are told that resort may be had to the state courts for redress, one answer is that in some of the states no adequate jurisdiction exists in the state courts. But a stronger and more conclusive answer is that congress did not intend to trust the working of the bankrupt system solely to the state courts of twenty-six states, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is by the constitution competent for all such purposes; and congress by the act intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do. The truth is that in no other way could the bankrupt system be put into operation without interminable doubts, controversies, embarrassments, and difficulties, or in such a way as to achieve the true end and design thereof."

See, also, on the same subject, *Mitchell v. Manufacturing Co.*, Fed. Cas. No. 9,662; *McLean v. Bank*, Id. 8,885; *Sherman v. Bingham*, Id. 12,762; *Goodall v. Tuttle*, Id. 5,533; *Lathrop v. Drake*, 91 U. S. 516, 518, 23 L. Ed. 414. In the last case the supreme court, speaking of the act of 1867, says:

"But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence on those of the states in which it is possible that embarrassments might arise.

Fourth. The construction of subdivision "b" of section 23, which denies jurisdiction to the district courts, renders subdivision "a" of that section wholly nugatory; for it will be noticed that subdivision "b" covers all courts. Therefore, if it excludes jurisdiction of the district courts in all cases which could not have been prosecuted in those courts by the bankrupt, it would be equally effectual to exclude the jurisdiction of the circuit courts under the same circumstances.

But congress has placed precisely that limitation upon the circuit courts in subdivision "a." It must therefore follow that subdivision "b" does not relate to the subject of jurisdiction, or else subdivision "a" is wholly superfluous.

These are some of the reasons why the construction of the bankruptcy act of 1898 which denies jurisdiction to the district courts in suits at law and in equity brought by the trustee to collect the estate of the bankrupt ought not to be accepted. Many others are presented in the authorities which have already been cited. I refer especially to the elaborate opinions in *Goodall v. Tuttle*, Fed. Cas. No. 5,533; *Sherman v. Bingham*, Id. 12,762.

We will now endeavor to find a construction of the bankruptcy act which will harmonize its different provisions. The solution of the whole difficulty is indicated by the last phrase of subdivision "b" of section 23,—“unless by consent of the proposed defendant.” Those courts which have denied jurisdiction have entirely passed over this clause. It certainly renders impossible their construction of the balance of the subdivision. If the limitation which the statute imposes may be set aside by consent of the defendant, then it must relate to a matter wholly subject to his discretion. But, according to the interpretation of those courts that deny jurisdiction, it relates to the jurisdiction of the subject-matter. It is elementary, however, that jurisdiction of courts as respects the subject-matter cannot be left to the discretion of parties. That jurisdiction must be created and defined by law, and, if it does not exist, the action of the court is a nullity, notwithstanding the most solemn stipulation of the litigants. My conclusion, therefore, is that subdivision "b" does not relate to the jurisdiction of courts, but to the venue of suits. Under the federal statutes in force at the time the bankrupt law was passed, a defendant, with certain exceptions not now important, could not be sued in a district of which he was not an inhabitant; and, in case the district was divided into divisions, he could not be sued except in the division of which he was a resident. The object of subdivision "b" was to apply this restriction specifically to suits brought by trustees under the bankruptcy act. But that act furnishes still more direct cause for the limitation. Under section 45, the trustee need not be a resident or citizen of the district in which the proceeding is pending; he need only maintain an office in the district. It would frequently occur that a majority of the creditors, especially in the case of insolvent merchants, would be residents of a district other than that of the bankrupt. Take, for example, the states of Wisconsin, Iowa, Indiana, and Michigan. It might easily happen that a majority of the creditors of a bankrupt in either of these states would consist of the wholesale dealers at Chicago; and such creditors might naturally prefer to place a trustee from their own community, with whom they were personally acquainted, in control of the bankrupt estate. If this should occur, it would be possible for such a trustee to sue any debtor of the estate from either of the states named in the district of Illinois, if he should be found there; for it is well established that, when one sues in a representative capacity, it is his own, and not the residence or citizenship of the per-

son represented, that fixes the venue and jurisdiction of federal courts. *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179. It was this possible hardship that congress had in mind when it adopted the language contained in subdivision "b." But these statutes forbidding the suing of a defendant in a district of which he is not an inhabitant, or a division of which he is not a resident, create only a personal privilege, which the defendant may waive, and which he does waive unless he makes timely objection. *Improvement Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401. It was to give force to this rule that the last phrase of subdivision "b" was employed,—"unless by consent of the proposed defendant." In the light of these considerations, the words in subdivision "b," "in the courts where," should be given their most obvious sense, as relating to venue, and not be construed as meaning "in the courts which would possess jurisdiction." Giving to subdivision "b" this construction brings all the provisions of the bankruptcy act on the subject into harmony, and also harmonizes the act of 1898 with previous statutes of the same character, as they have been interpreted by the highest federal courts. Permission will therefore be granted to file the bill.

IN RE MAYER.

(District Court, E. D. Wisconsin. January 16, 1900.)

1. **BANKRUPTCY—REQUIRING BANKRUPT TO SURRENDER PROPERTY.**

Where a bankrupt is shown to be in possession or control of money or property belonging to his estate in bankruptcy, and which he conceals or withholds from his trustee, the court of bankruptcy has power summarily to order him to surrender the same to the trustee, and to enforce his obedience to such order by punishment as for contempt.

2. **SAME—PROPERTY IN POSSESSION OF THIRD PERSONS.**

The power of a court of bankruptcy to order the bankrupt, under pain of punishment for contempt, to surrender to his trustee money or property constituting assets of his estate, and which he withholds from the trustee, cannot be employed to reach property which is in the hands of third persons, claiming title thereto by transfer or conveyance from the bankrupt prior to the bankruptcy proceedings, though such transfer was manifestly fraudulent, nor to force the bankrupt or his transferees to make restitution of money or property previously transferred in fraud of the act.

3. **SAME—EVIDENCE OF BANKRUPT'S POSSESSION OR CONTROL.**

Where application is made for an order requiring the bankrupt to surrender to his trustee money or property alleged to belong to his estate in bankruptcy, and the bankrupt denies that he has possession or control of the same, it must be shown by indubitable evidence, and beyond a reasonable doubt, either that the bankrupt actually has the present possession or control of the money or property in question, or that his alleged transfer or other disposition of it was fictitious or a mere subterfuge, such as would not prevent him from producing the property if required.

4. **SAME—JURISDICTION OF REFEREE.**

A referee in bankruptcy has jurisdiction of an application by a trustee in bankruptcy for an order requiring the bankrupt to surrender money or property of his estate alleged to be in his possession or control, and to be withheld or concealed from the trustee, and to make an order in accordance with his findings on such application.

5. SAME—REVIEW BY JUDGE.

On review by the district judge of an order made by the referee in bankruptcy, requiring the bankrupt to surrender to his trustee money or property alleged to be in his possession and to constitute assets of his estate, the ordinary rule as to the force of the referee's findings of fact is not applicable, because the determination is not governed by the weight of testimony; but it is the duty of the judge to ascertain that cause is shown for making such order, beyond a reasonable doubt.

In Bankruptcy.

On examination and proceedings had before the referee, and on findings of fact thereupon filed, the referee entered an order on November 16, 1899, requiring the bankrupt to turn over to the trustee \$6,635.02, as "money in his possession which he has failed to turn over," and to turn over and deliver to the trustee "merchandise in his possession which he has failed to deliver" to the amount and value of \$22,700.91, "or the proceeds thereof in money," all within five days after due service, etc. On November 20th the bankrupt filed a petition for review and examination by the district court, and the matter was thereupon certified, together with a certificate by the referee that the time for compliance with said order expired on November 22, 1899, after due service, and that the bankrupt "willfully and contumaciously defied and disobeyed the said order" in said proceedings, and was guilty of contempt, and should be committed, etc.

Bloodgood, Kemper & Bloodgood, for creditors.

J. A. F. Groth and Timlin & Glicksman, for bankrupt.

SEAMAN, District Judge. The district court has the inherent general power to punish for contempts of its process and orders, and such power and duty are expressly provided in bankruptcy, to "enforce obedience by bankrupts, officers and other persons to all lawful orders by fine or imprisonment," or both, and to "punish persons for contempts committed before referees." Bankr. Act 1898, c. 2, § 2, cls. 13, 16; Id. c. 5, § 41. For money or property traced to the possession or control of the bankrupt, concealed and withheld from the trustee, this provision is applicable, and must be summarily enforced. It is not applicable, however, to reach property beyond the present control of the bankrupt, and in the hands of third parties claiming title derived prior to the proceedings in bankruptcy, although the transaction is manifestly fraudulent. Nor can this means or provision be employed to punish for frauds committed by the bankrupt against the bankruptcy act, nor can it be used to coerce the bankrupt or transferees to make restitution of money or property previously transferred in fraud of the act. Frauds which are made criminal by the act are punishable only on conviction by the verdict of a jury, or on plea of guilty, and fraudulent transfers which have been consummated cannot be reached by this summary proceeding. An order requiring the bankrupt to turn over money or property withheld from the trustee, when the bankrupt denies possession or control, can be so enforced only on indubitable testimony which establishes either the fact of his present possession, or that a purported transfer or disposition is a mere subterfuge by which the property manifestly remains within his control, and can be produced by him. And in a proceeding of this nature the order is sustainable only to the extent the testimony so establishes the fact of actual possession or control, with all reasonable doubt resolved in favor of the bankrupt. Ques-

tions of fraud in the transactions, and of the credibility and weight of testimony, must be left for determination in other proceedings, except within the strict rule above stated. Upon these premises I have examined the findings and testimony upon each of the three matters involved in the order, and have reached the following conclusions:

1. The sum of \$6,635.02, found by the referee to be money in the possession of the bankrupt not turned over to the trustee, is the aggregate of two findings of fact: (1) Of moneys purporting to be paid to Mary Mayer, his wife; and (2) of moneys purporting to be paid to Anton Mayer, his brother. The amount so found as purporting to be paid to the wife will be first considered, namely, \$3,583.02, which appears on the books to have been paid to her between January 4 and July 6, 1899, in various sums, and is claimed as repayment of advances made by the wife from time to time for expenses of the business. The referee finds that this account is fictitious, that no such advances were made by the wife from her separate estate, and that the money belongs to the bankrupt and is still in his possession. The referee states that the further sum of \$6,000 was in fact paid to the wife by the bankrupt within the same time, of which only \$1,000 was her separate property, and \$500 belonged to their children, and that no indebtedness existed in her favor for the remainder, but that the money was actually paid to her, and is not in the bankrupt's possession. Whether the last-mentioned sum is correctly stated at \$6,000, or whether such separate payment is composed alone of \$5,000 which was obtained by the bankrupt through a mortgage upon his real estate, now claimed as a homestead, I have not deemed essential for determination, as the finding of the referee is approved, that any sum so paid appears by the testimony to have been placed beyond the present power of the bankrupt to pay the same over to the trustee, and is further largely in excess of any separate estate shown in the wife, aside from the claim for money received from boarders, which cannot be regarded as individual earnings (*Bloodgood v. Meissner*, 84 Wis. 452, 54 N. W. 772), and, even if so treated, would be covered by such payment. The account of \$3,583.02 of purported payments to the wife is either fictitious, as found by the referee, or a manifest subterfuge on the part of the bankrupt to retain that amount for his own use and benefit. The assertion of advances by the wife from her own means is discredited by all the circumstances, and this amount must be regarded as within the possession and control of the bankrupt; and the finding, to that extent, is approved.

2. The remainder of the sum of \$6,635.02 is made up of \$3,052 purporting to have been paid to Anton Mayer, the brother and employé of the bankrupt, for services, of which the referee finds that the account is fictitious, and that the money was not paid to him, and is in possession of the bankrupt. It must be conceded that the testimony introduced in support of this claim and of the payment is inconsistent in many particulars, and is by no means convincing of the bona fides of the entries or payments as shown in the books. Nevertheless, both the bankrupt and Anton Mayer testify positively to the fact of such payment in accordance with the entries; and,

laying aside the questions of fraud and ultimate liability in respect of the transactions, I am of opinion that the narrow issue of payment in fact cannot be determined as conclusively established against the testimony of both witnesses on this inquiry as to actual possession or control by the bankrupt over this amount.

3. The finding of merchandise to the amount and value of \$20,392.39 in the hands of the bankrupt is predicated on a showing which raises strong suspicion of a large amount of goods unaccounted for during the half year preceding the failure, but the testimony is deemed insufficient to establish beyond reasonable doubt the fact of abstraction of goods from the stock. No surreptitious transactions are shown respecting the goods, notwithstanding inquiry and search to that end which appear to have been diligently pursued. The discrepancy stated in the findings rests upon valuations taken of the stock on hand without the presence of the bankrupt, not in reference to the present inquiry, not based on the bills rendered for the purchases nor on the actual cost to the bankrupt, and offered for this issue after the goods have passed beyond reach for testing the valuations by the bills,—a test which would otherwise be practicable for a large portion of the stock made up of recent purchases. The testimony of certain of the appraisers that such valuations would approximate the cost to the bankrupt is forcibly met by proof of numerous instances wherein the cost, as shown by the bills, materially exceeds the appraisal; and, after extended enumerations from the inventory in comparison with the bills, an estimate of such excess is tendered which would cover the discrepancy. Whether the shortage is thus satisfactorily accounted for is not the test, but it is sufficient that the valuation which constitutes the sole basis of the charge is placed in doubt, both as to a definite amount and as to the fact of surreptitious taking of goods, and no ground is established for an order of this nature to turn over either certain goods or a definite amount on pain of imprisonment; and, so regarded, the order, to that extent, is not sustainable.

The jurisdiction of the referee to entertain the hearing in question, and to enter an order thereupon, is undoubted, and the objection to such hearing interposed on behalf of the bankrupt was properly overruled. On review of the order in such case, I am of opinion that the ordinary rule as to the force of the findings of fact is not applicable, for the reason that determination is not governed by the weight of testimony. Enforcement of the order devolves upon the reviewing court, and with it the duty to ascertain that cause exists, beyond reasonable doubt, for the exercise of the severe means thus intrusted to the court, where an error in judgment as to the credibility or force of testimony involves indeterminate imprisonment without just cause. Let this opinion be certified to the referee for modification of the order in accordance therewith, and further proceedings thereupon as advised.

In re EGGERT.

(District Court, E. D. Wisconsin. January 8, 1900.)

1. BANKRUPTCY—PREFERENCE—KNOWLEDGE OF CREDITOR.

Where a creditor settles his account with his debtor by giving him a discount for cash to the amount usual in his line of business and stipulated for in the contract, and by accepting for the balance an order on a city for money due or to become due the debtor under a contract with the city, and within four months thereafter the debtor becomes bankrupt, the transaction is not voidable by the trustee as a preference, if the creditor had no knowledge or reasonable cause to believe that the debtor was insolvent, or that a preference was intended.

2. SAME—NOTICE OF DEBTOR'S INSOLVENCY.

Under Bankr. Act 1898, § 60b, providing that a preference given by an insolvent debtor within four months before the filing of a petition in bankruptcy shall be voidable by the trustee if the creditor had "reasonable cause to believe that it was intended thereby to give a preference," such cause of belief on the creditor's part implies, as its foundation, reasonable cause to believe that the debtor is insolvent, within the meaning of that term as defined in the present act; and mere knowledge that the debtor "was behind in his payments with his creditors" is not sufficient to charge the creditor with such notice, though he made no inquiries as to the debtor's solvency, if he did not practice any fraud, deceit, or collusion with the debtor.

In Bankruptcy. On question certified by the referee whether an assignment by the bankrupt of a claim against the city of Milwaukee for \$1,241.10, made to the Rundle-Spence Manufacturing Company, a creditor, within four months before the filing of the petition, in consideration of a cash discount granted by the creditor on an account for goods theretofore sold, constitutes an unlawful preference, under the provisions of section 60 of the bankruptcy act.

Bloodgood, Kemper & Bloodgood, for trustee.

A. G. Weissert, for Rundle-Spence Mfg. Co.

SEAMAN, District Judge. The findings of fact certified in this matter are conclusive against the contention of a preference received by the creditor within the definitions of the statute. The transaction, as so found, was substantially this: The bankrupt was indebted to Rundle-Spence Manufacturing Company in the sum of \$1,373.04 for supplies sold between April 28 and June 5, 1899, on credit, and on July 1st the account was adjusted by giving the bankrupt "a discount of ten per cent., which is the usual discount for cash in that line of business" and "pursuant to the contract under which the goods were purchased," and by the acceptance of an order on the city of Milwaukee for \$1,241.10, due or to become due from said city on a contract with the bankrupt. The creditor "had no knowledge of the fact that the said" bankrupt "was insolvent, and had no reasonable cause to believe that it was intended by the transfer to give it a preference." The transaction thus stated is not prohibited by the act; and the further findings of knowledge that the bankrupt "was behind in his payments with his creditors," and that no inquiries were made by the creditor to ascertain his solvency, do not affect the liability, when followed by the finding that the creditor "practiced no fraud or

deceit, nor did it act in collusion with the bankrupt." To constitute a voidable preference, as defined in sections 60a, 60b, the creditor must have reasonable cause to believe the debtor to be insolvent in fact, as the foundation for reasonable cause to believe that an unlawful preference is intended; and on that inquiry the test of insolvency under the present act differs so materially from that established under the act of 1867 that decisions under the earlier act are not applicable. As now defined (section 1, cl. 15), a person is to be deemed insolvent when the aggregate of his present property "shall not, at a fair valuation, be sufficient in amount to pay his debts," while insolvency was found to exist under the act of 1867 when one "was unable to pay his debts as they became due in the ordinary course of his daily transactions" (*Buchanan v. Smith*, 16 Wall. 277, 308, 21 L. Ed. 280), and the state of facts which would constitute notice must differ accordingly. Even under that act, however, mere grounds of suspicion were not sufficient notice, but the creditor must have a knowledge of facts calculated to produce a belief of insolvency in the mind of an ordinarily intelligent man. *Grant v. Bank*, 97 U. S. 80, 82, 24 L. Ed. 971. Both findings and testimony in this case disclose a fair business transaction, without taint or suspicion of fraudulent preference, and the conclusions of the referee in favor of the claimant are approved.

In re PHILLIPS et al.

(District Court, S. D. New York. January 16, 1900.)

1. BANKRUPTCY—OPPOSITION TO DISCHARGE—BURDEN OF PROOF.

Creditors opposing a bankrupt's application for discharge on the ground of his having concealed property from his trustee must assume the burden of proving that the bankrupt was in the possession or control of assets of substantial value at the time the petition in bankruptcy was filed.

2. SAME—CONCEALMENT OF BOOKS.

To sustain a specification, in opposition to a bankrupt's application for discharge, that he has concealed his books of account, it is not sufficient to show that the books disappeared at the time of his failure,—about two years before the bankruptcy act was passed,—as it cannot be inferred that there was a "contemplation of bankruptcy" at that time. Creditors must show that the bankrupt, at or about the time the petition was filed, knew or could ascertain where the books were, and so was responsible for the failure to produce them.

In Bankruptcy. Certain creditors filed specifications in opposition to the bankrupts' application for discharge on the ground that they had concealed property belonging to their estate in bankruptcy, and also on the ground of their having concealed their books of account in contemplation of bankruptcy, and with intent to conceal their true financial condition.

David Steckler, for bankrupts.

Theron G. Strong, for creditors.

BROWN, District Judge. As respects the concealment of assets, the burden of proof is evidently upon the creditors to prove an "offense committed." Notwithstanding the large disappearance of

assets, the account given of the wastefulness before failure, of the losses on sales, and the looting by creditors at the time of the failure, constitutes a story that, however disgraceful, does so far explain the losses as to make it scarcely reasonable to find the bankrupts in the possession or control of any substantial assets at the time of this petition, some three years after the failure.

It is much the same as respects the books. The failure was too long before the passage of the bankruptcy act to make reasonable the inference of any intentional concealment of the books "in contemplation of bankruptcy." To sustain this charge, it must appear that the bankrupts at or about the time of the petition knew, or might ascertain, where the old books were, and that they were, therefore, privy to the nonproduction of them. The evidence, as it stands, does not warrant such a finding. It would seem that only an examination of Cohen, the bookkeeper, if he can be found, or of the creditors who were looting the bankrupts' place of business at the time of failure, could furnish any clew to the disposition of the books. The burden of this too falls upon the creditors. If any further efforts in this direction are desired, the matter will be referred back to the referee for that purpose on application of the objecting creditors within 10 days. In default of their doing so, the discharge will be granted.

IN RE HAMMOND.

(District Court, D. Massachusetts. December 22, 1899.)

No. 1097.

1. **BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEE.**

A court of bankruptcy has jurisdiction of a proceeding by a trustee in bankruptcy for the recovery of property of the bankrupt held by an attaching creditor whose attachment was obtained in a suit begun against the bankrupt within four months prior to the filing of the petition in bankruptcy.

2. **SAME—ASSETS IN BANKRUPTCY—PROPERTY OF BANKRUPT'S WIFE.**

Where a married woman engages in business on her own account, but does not file the certificate required by the state law (Pub. St. Mass. c. 147, § 11) to entitle her to the privileges of a feme sole trader, so that her property employed in such business remains liable to attachment as the property of her husband at the suit of his creditors, the husband's trustee in bankruptcy will take title to such property, attached by a creditor of the husband within four months before the filing of the petition in bankruptcy, since it is property "which might have been levied upon and sold under judicial process against him," within the meaning of Bankr. Act 1898, § 70a, cl. 5.

3. **SAME—ATTACHMENT LIEN—SUBROGATION OF TRUSTEE.**

Where a creditor of the bankrupt, within four months before the filing of the petition in bankruptcy, had attached property belonging to the bankrupt's wife, and employed by her in her business, but remaining liable to such attachment by reason of her neglect to file the married woman's certificate required by the state law, and the creditor had sold some of the property attached, and held possession of the remainder, *held*, under Bankr. Act 1898, § 67c, cl. 3, that the dissolution of such lien would militate *against* the best interests of the estate, and consequently it should not be

dissolved, but that the trustee was entitled to the property, and to the proceeds of that sold, and should be subrogated to the rights of the attaching creditor, as respects the lien.

William W. Dwyer, for bankrupt.

LOWELL, District Judge. In this case the trustee seeks to obtain certain property held under attachment on mesne process by a creditor of the bankrupt. The property in question belonged to the bankrupt's wife, and was used by her in a business which she carried on. She did not file a married woman's certificate, as required by Pub. St. Mass. c. 147, § 11. The property was, therefore, subject to attachment as the property of her husband by the husband's creditors. The court has to determine (1) if it has jurisdiction to compel the delivery by the creditor and his agents to the trustee of property to which the trustee is entitled, and (2) if the property here in question passed to the trustee by virtue of the bankrupt act.

1. Has the district court jurisdiction of proceedings to compel an attaching creditor of the bankrupt to deliver up to the trustee property in the creditor's possession to which the trustee is entitled by virtue of the bankrupt act? Before seeking to interpret the provisions of the bankrupt act concerning the jurisdiction of this court, certain general observations should be made. An answer absolutely satisfactory to the question proposed is made impossible by the composition of the existing bankrupt act. This statute, as finally passed, is the last revision of a bill which had been before congress and the country about 10 years. The provisions of the original bill, as prepared by Mr. Torrey, may have been altogether consistent, though this can hardly be asserted positively of any draft of important and complicated legislation. Whatever was the consistency of the original Torrey bill, the numerous modifications made in it from time to time have introduced into the several sections of the original bill some inconsistencies, so that the problem sometimes presented to the courts in construing the finished act is not, it must frankly be said, the making of a consistent whole out of several parts, but rather the rejection of one of two inharmonious parts as least in accord with the general plan of the whole. A study of the development of the bill through its successive drafts shows clearly that jurisdiction originally conferred in one section has been taken away or enlarged by a modification of that section, without a corresponding amendment of other sections in which the jurisdiction originally conferred was asserted or implied. There is no intention to declare that in this respect the bankrupt act of 1898 is more faulty than other measures of important legislation passed by congress, by the legislature of the states, or by the legislatures of foreign countries. It may be impossible to frame an important legislative measure, where much change by way of compromise is necessary, without the inadvertent introduction of some inconsistencies, especially if the measure has been discussed through a number of years; but it is well that the court should recognize the nature of the problem under consideration, and should not pretend to seek for absolute harmony in the provisions of a statute where absolute harmony is demonstrably non-

existent. In re Richards, 37 C. C. A. 634, 96 Fed. 935, 939. The jurisdiction of the district court is supposed to be conferred principally by section 2 of the act, and especially in clauses which read substantially as follows:

"The district courts are hereby invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings;" to "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;" "(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;" "(15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

Section 2 is said to be derived from section 6 of the bankrupt act of 1841 and section 1 of the bankrupt act of 1867, both which last-mentioned sections, it is said, conferred jurisdiction upon the district court for the determination of controversies like that presented in this case. The interpretation thus put upon section 6 of the act of 1841 appears to be pretty well established by *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603. As to the act of 1867, the case is not so clear. See *Smith v. Mason*, 14 Wall. 419, 430, 20 L. Ed. 748. It may be admitted, however, that if section 2 of the act of 1898 stood unaffected by subsequent sections, and by the phrase, "except as herein otherwise provided," it might fairly be supposed to give to the district court that jurisdiction over suits brought by the trustee to recover property alleged to belong to the bankrupt's estate which was exercised in this country under the acts of 1841 and 1867 by the United States courts. The omission in the existing bankrupt act of any section corresponding to section 8 of the act of 1841 or to section 2 of the act of 1867, if it were merely an omission, probably would not be taken to deprive the district court of so important a part of the jurisdiction conferred upon United States courts by earlier bankrupt acts. The difficulty in the present act, though aggravated by the vagueness of section 2, is created mainly by section 23. Subsection "a" does not concern immediately the question presented in this case. It limits the jurisdiction of the circuit courts of the United States, and has no direct reference to the district courts, or to the state courts. Its form retains traces, however, of an epoch when the circuit court of appeals did not exist, and when an appeal lay to the circuit court from the district court. So far as I can discover, the circuit court has, under the act of 1898, no jurisdiction whatever over "proceedings in bankruptcy" in the sense in which these words are evidently used in subsection "a." In the earlier drafts of the bill prepared before the establishment of the circuit court of appeals, the circuit court was naturally given an appellate jurisdiction in bankruptcy. See H. R. 3316, 51st Cong., 1st Sess. §§ 8, 10. Subsection 23b provided that:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

In discussion and in decided cases, three constructions have been put upon the limitations imposed by this subsection. The first construction, as it will hereinafter be called, limits the operation of the subsection to the circuit court. By this first construction, therefore, no limitation is imposed upon the jurisdiction given to the district court by section 2. The second construction interprets subsection "b" as giving to the state courts exclusive jurisdiction, except with the defendant's consent, of all suits concerning the bankrupt's estate brought by the trustee against any person other than the bankrupt. The third construction, by way of compromise, gives to the state courts exclusive jurisdiction, except with the defendant's consent, of suits concerning the bankrupt's estate, if they be suits which the bankrupt himself could have brought had he not been a bankrupt, but gives to the district court jurisdiction, at least concurrent, of those suits brought by the trustee against an outside claimant which the bankrupt himself could not have brought; as, for instance, suits brought to set aside an assignment which is avoided by the bankrupt act, or to restrain the sale of property held under an attachment avoided by the act. The history of the development of section 23 from the original provisions of the Torrey bankrupt bill does not furnish an authoritative interpretation of the section as finally passed, but, if the language of the section be ambiguous, the court may properly look to this history for light upon the meaning of that language. In *re Richards*, 37 C. C. A. 634, 96 Fed. 935. The eleventh section of the original Torrey bill read as follows:

"Sec. 11. Jurisdiction of State Courts. Controversies between trustees and adverse claimants, concerning the property and rights acquired by the trustee as such, may, with the approval of the courts of bankruptcy in which the proceedings are pending, be litigated in state courts, in the same manner as if such controversies had been contested between the bankrupt, prior to becoming such, and the adverse claimants."

Under the amended act of 1867 the court of bankruptcy had some authority to direct the trustee to bring suit in the state courts. See Acts 1874, c. 390, § 2; 18 Stat. 178. See, also, section 9 of the so-called "Lowell Bill," S. 1372, 48th Cong., 1st Sess. In the modified Torrey bill, introduced into the house of representatives, and printed H. R. 3316, 51st Cong., 1st Sess., section 11, above quoted, appears in substantially the same form. It is somewhat difficult to determine whether (1) section 10 of H. R. 3316 was intended to confer upon the court of bankruptcy summary and plenary jurisdiction, while section 11 merely permitted that court to direct that some of the controversies over which it had jurisdiction should be, for reasons of convenience, litigated in the state courts; or (2) that section 10 was intended to give to the court of bankruptcy only summary jurisdiction, while section 11 limited the jurisdiction over plenary suits to the state courts, after the approval of the court of bankruptcy for bringing such suits had been obtained. As the act did not pass in this form, the question need not be answered definitely. H. R. 3316 passed the house of representatives; on July 25, 1890, was read twice in the senate, and was referred to the committee on the judiciary. On August 26, 1890, that committee reported a substitute bill. See

Calendar No. 1937, 51st Cong., 1st Sess. Section 8 of the bill thus reported was as follows:

"Sec. 8. Jurisdiction of the United States and State Courts. Suits by the trustee shall be brought in the courts where the bankrupt might have brought the same if he had been entitled to recover therein. Suits to recover property in the possession of the trustee, including suits for the foreclosure of mortgages upon real estate, shall be brought in the court having jurisdiction thereof if they had been brought against the bankrupt. Suits for the establishment of liens against the personal property of the bankrupt, or the fund in the possession of the trustee, shall be brought in the district court of the United States where the proceedings in bankruptcy are pending. It shall be within the competence of the bankrupt court, on application by the trustee or any creditor, to issue certiorari to any other court in which a controversy is pending, to certify that controversy into such court to be there proceeded with and determined according to law."

This section, it will be noticed, compelled the trustee to bring suit in the state courts, but gave to the court of bankruptcy, if dissatisfied with the proceedings of the state court, jurisdiction to review them by certiorari. It seems unlikely that the section was intended to discriminate between suits which the bankrupt himself could have brought and those which he could not have brought, and that the district court was given original jurisdiction of the latter, while over the former it had jurisdiction only by certiorari. This bill failed of passage in the senate. In January, 1892, a bankruptcy bill was introduced into the senate. See S. 1694, 52d Cong., 1st Sess. Section 9 read as follows:

"Sec. 9. Jurisdiction of State Courts and United States Circuit Courts. (a) The state courts and United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired by the trustees, in the same manner and to the same extent as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. (b) Suits by the trustee shall only be brought in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. (c) The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

This section, it will be observed, is substantially section 23 of the existing act, except for the caption and the first four words of subsection "a." "The state courts and." At page 65 of the "Analysis," appended to the bill, appears the following comment on section 9:

"Jurisdiction of State Courts and United States Circuit Courts. The proposed plaintiff in a suit against the bankrupt estate may institute proceedings in the appropriate state court, or, if qualified, in the United States circuit court, or if he desires, in the court of bankruptcy; but the trustee is limited to the institution of such suits as he may wish to bring in the court in which the bankrupt, of whose estate he is trustee, might have brought them if proceedings had not been instituted. These provisions are for the purpose of having controversies litigated at the places most convenient for the parties litigant and witnesses."

The contemporary exposition of the intent of section 9 thus contained in the senate document affords some indication that the section was intended to limit the jurisdiction of the district court as well as

that of the circuit court, to give the party opposed to the trustee the right to consent to suit in the district court, but to deprive the trustee, except with that consent, of the right to go to any United States court whatsoever. No distinction is suggested between suits which the bankrupt could have brought himself had he not become bankrupt and those which the trustee can bring though the bankrupt could not have brought them. If, as has been suggested, the trustee was, by the provisions of section 8 of H. R. 3316, forbidden to bring suits of the latter class in the state courts, and was deemed to be sufficiently protected by the remedy of certiorari given in that section, it is improbable that his rights were extended by section 9 of S. 1694, which, in substance, is much like section 8 of H. R. 3316, with the provision concerning certiorari left out. In the first session of the 52d congress several bills to establish a system of bankruptcy were introduced into the house of representatives, and were referred to the committee on the judiciary. On June 27, 1892, that committee reported H. R. 9348. See Report No. 1674, 52d Cong., 1st Sess. Section 23 of H. R. 9348 is substantially like section 23 of the existing act, except for its caption, "Jurisdiction of United States Circuit Courts." The difference between subsection 9a of S. 1694 and subsection 23a of H. R. 9348 is substantially this: The former, by its caption and language, defines the jurisdiction both of the state court and of the circuit courts, while the latter defines and limits the jurisdiction of the circuit courts, saying nothing about that of the state courts. Subsection "b" is, however, identical in the two bills. In the exposition of H. R. 9348 made by the house committee on the judiciary, it is said, "The trustee can only sue in the state or federal court in which the bankrupt might have sued had he not become a bankrupt except by consent;" and in the appendix to H. R. 9348 appears the same exposition of section 23 as that made of section 9 in S. 1694. In 1898 congress again took up the question of bankruptcy, apparently much where it was left in 1892 (S. 1035, 55th Cong., 2d Sess.), and passed the existing section 23, which differs from section 23 of H. R. 9348 in little else than its caption, "Jurisdiction of the United States and State Courts." As there is nothing said concerning the jurisdiction of the state courts in subsections "a" and "c," it is an inference of some weight from the caption of the section that their jurisdiction is somewhat dealt with in subsection "b." Again, the change in the caption made between H. R. 9348 and S. 1035 affords an indication, though perhaps slight, that the jurisdiction of all United States courts is determined, and not merely the jurisdiction of the circuit court. The language of subsection "b," moreover, is not expressly limited to the circuit court, as is that of subsection "a," but is grammatically applicable to all courts of every sort, state and federal.

The account just given of the development of the existing section 23 from its original draft in the first Torrey bill shows that there are historical considerations which make for what has been called the "second construction" of subsection "b,"—that construction which deprives the district court of all jurisdiction of proceedings against any person except the bankrupt himself to recover property alleged

to belong to the bankrupt's estate. The history of the section has been stated thus fully, not because the history of a statute establishes authoritatively its interpretation, but because the historical argument is entitled to some weight, and because it has not been fully stated in any of the decided cases which will presently be referred to. Opposed to the conclusion which would be reached by a following of historical considerations exclusively, there are weighty considerations derived from other parts of the present bankrupt act, from the analogy of other bankrupt acts passed by congress, from convenience, and from decided cases. If, by subsection 23b, congress intended to declare that the bankrupt act should not confer upon any court of the United States jurisdiction of any suit brought by the trustee to recover property alleged to belong to the bankrupt's estate, it is hard to find a reason for subsection 23a, which is concerned with the jurisdiction of the circuit court only. If subsection 23b declares the congressional intent regarding all United States courts, why should it be preceded by a declaration of intent regarding the circuit court specifically? There is, indeed, this difference between subsections "a" and "b": The only jurisdiction left to the circuit court by subsection "a" is that conferred by diversity of citizenship, while subsection "b" would seem to permit any court to take jurisdiction of a controversy by consent of the proposed defendant. To suppose, however, that the object of congress in enacting these two separate subsections was to provide that the circuit court should not have jurisdiction of suits brought by the trustee except on the ground of diversity of citizenship, and that the district court should not have jurisdiction of such suits except by consent, is to impose upon the two subsections and their relation to each other a far-fetched meaning. It ought to be added, perhaps, that the relation of the two subsections to each other is not quite satisfactorily explained by any interpretation proposed. Again, it is hard to reconcile with section 69 the second construction of section 23b,—that which deprives the court of bankruptcy of jurisdiction of suits brought by the trustee to recover property alleged to belong to the bankrupt's estate. By section 69 it is provided that, after the filing of an involuntary petition, the court of bankruptcy may, upon certain conditions, issue a warrant to the marshal to seize the property of the bankrupt, and to turn it over to the bankrupt's trustee, in case the adjudication of bankruptcy is subsequently made. If section 69 is held to empower the marshal to seize only that property which is found in the actual possession of the bankrupt himself, the section is rendered practically nugatory. If, when the marshal, acting under the warrant of the court of bankruptcy, proceeds to seize the bankrupt's property, he is to be stopped from doing so by any claim to the property set up by any person other than the bankrupt himself, manifestly the issuance of the warrant and the proceedings of the marshal will be vain formalities. A claimant for the bankrupt's property can always be provided. Yet if the court of bankruptcy is, by section 69, given power to place in the custody of the marshal property alleged to belong to the bankrupt, but claimed by a third person, it is hard to reconcile the jurisdiction of the court to seize this property sum-

marily under section 69, with a deprivation by subsection 23b of jurisdiction over a suit by the trustee to recover the same property. If the court is given jurisdiction to place such property in the marshal's custody by section 69, but is forbidden by section 23b to take jurisdiction of a suit to recover it by the trustee, this result would follow: Creditors of the bankrupt would generally apply for a warrant to the marshal, under section 69, because under that section property deemed by the court of bankruptcy to belong to the bankrupt would, after adjudication, come into the trustee's possession, and a third person claiming the property would be driven to his action, while, if no warrant issued to the marshal, the property would remain in the possession of the third person, and the trustee would be put to his action to recover the same in the state courts. By the inevitable working of the two sections of the law this would lead to an extension of section 69 which congress never intended, and the possibility of this undue extension, manifestly resulting from the second construction of section 23b, furnishes an argument of some weight that section 23b should not be considered to deprive the court of bankruptcy of all jurisdiction over the suits mentioned. It is true that section 69 applies in terms only to involuntary petitions, but in many cases a voluntary petition can be turned into an involuntary petition by the exercise of a little ingenuity. See, also, sections 3e, 38 (3). Again, section 2 (3) authorizes the court of bankruptcy to appoint receivers, upon application of parties in interest for the preservation of the bankrupt's estate, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed, or the trustee is qualified. The considerations just stated as applicable to the marshal under section 69 are equally applicable to a receiver under section 2 (3); that is to say, either the appointment of a receiver would be a vain formality, or, by the appointment, the court of bankruptcy might ultimately place in the possession of the trustee property concerning which the court would have had no jurisdiction, had the trustee brought suit to recover the same after his appointment. If the second construction of subsection 23b prevails, other inconsistencies in the act will be found to exist. Under sections 3a and 19 it is for the court of bankruptcy to determine, perhaps with a jury, if the bankrupt has given a preference; but it will be for the state court to set aside the preference, and restore the property to the trustee. Under section 26, the trustee may submit controversies to arbitration, and the finding of the arbitrators is to be filed in the court, and to have like force and effect as the verdict of a jury. In what court is the finding to be filed,—the court of bankruptcy or the state court? The controversies to be arbitrated will commonly be those covered by subsection 23b. By section 60d, the court of bankruptcy is to determine the reasonable amount of the attorney's fee, and the trustee may recover the excess for the benefit of the estate. Is the excess to be recovered in the state court or in the district court? If in the former, is the finding of the court of bankruptcy concerning the reasonableness of the amount binding upon the state court? If the excess is to be recovered in the district court, then that court has jurisdiction of some suits by the trustee against persons other than

the bankrupt, and section 23b is not of universal application. By section 67f, certain levies are avoided under certain circumstances, but, if the court shall order that the right under such levies shall be preserved for the benefit of the estate, then the right will pass to the trustee, and is to be preserved by him for the benefit of the estate. Under these circumstances the court may order such conveyance as shall be necessary to carry the purpose of the above provisions into effect. If the court of bankruptcy may, by virtue of this section, order a third party to make a conveyance to the trustee of his right under a lien, then that court has jurisdiction of some suits brought by the trustee against a third party, and the second construction of section 23b is not of universal application. By section 68, in case of set-offs, the amount shall be stated, and the balance only shall be allowed and paid. Now, the allowance must be made by the court of bankruptcy. Does not this fact make it probable that the court of bankruptcy is to pass upon the set-off also? If it does so pass, then it has jurisdiction of some controversies between the trustee and parties other than the bankrupt. So again, under section 68b, it would seem that the set-off is to be passed upon by the court of bankruptcy. The inconsistencies just noted are none of them decisive of the interpretation of section 23, but, taken together, they have some bearing upon its construction.

It has been urged that clauses 6 and 15 of section 2 are also contradictory of the second construction, so called, of subsection 23b, but it seems unlikely that those clauses were intended by their own force to extend largely the jurisdiction of the district court. The authority to bring in and substitute parties was not intended by itself to give this court jurisdiction of controversies concerning which it had received no other grant of jurisdiction. In like manner, clause 15, by giving to the court authority to make orders, issue process, and enter judgments in addition to those specifically provided for, does not extend the jurisdiction of this court to controversies otherwise outside its jurisdiction. The clause provides merely that in controversies within its jurisdiction all appropriate orders may be made, process issued, and judgments entered. See *In re Rudnick* (D. C.) 93 Fed. 787. It will thus be seen that, upon the whole, a comparison of subsection 23b with some other provisions of the act makes against the second construction of the subsection.

A construction of the statute of 1898 which would deprive the federal courts of jurisdiction of the suits in question would make the act of 1898 unprecedented among bankrupt acts. Under the act of 1800 it is somewhat difficult, indeed, to determine if the district court was intended to have jurisdiction of suits brought by the trustee against third parties concerning the bankrupt's estate. Such jurisdiction was expressly given to the federal courts by the acts of 1841 and 1867. Act 1841, §§ 6, 8 (5 Stat. 445, 446); Act 1867, §§ 1, 2 (14 Stat. 517, 518). This jurisdiction, as vested by the bankrupt act either in the district or the circuit court or both, is particularly important in this country, in view of the separation of the state and federal courts. If nearly all contested suits concerning the estate of the bankrupt are within the exclusive jurisdiction of the state

courts, it will be difficult, and perhaps impossible, for the federal courts to give the law a uniform administration and application. It is true that some of the decisions of the state courts concerning the rights of trustees in bankruptcy are subject to review by the supreme court of the United States; but this right, it is to be feared, will not avail much in the details of petty suits which are concerned with small amounts of property. Plainly, in the acts of 1841 and 1867, congress considered it eminently desirable—even absolutely essential—that the United States courts should be made sufficient unto themselves for the entire administration and collection of the estates of bankrupts, though the aid of the state courts might be availed of.

The analogy of the English law and practice in bankruptcy is not particularly instructive, but it should be noticed briefly. The English bankrupt law was originally administered by the chancellor, and, as was said by Lord Eldon in *Ex parte Cawkwell*, 19 Ves. 233, his predecessor, Lord Hardwicke, "took a very large principle as to the jurisdiction in bankruptcy; thinking that, the legislature having committed to the lord chancellor the jurisdiction in bankruptcy, he had all the authority that he had when sitting in the court of chancery." It was not unnatural, therefore, that no strict distinction was maintained between that which could be done by the chancellor sitting in equity and sitting in bankruptcy. In bankruptcy, as Lord Eldon said in *Ex parte Roffey*, Id. 468, "the lord chancellor exercises, more by habit and practice than authority, both a legal and an equitable jurisdiction. Upon the statutes and the decisions in bankruptcy it is obvious that no authority is given by those statutes for a great part of the jurisdiction actually exercised, and, unless Lord Hardwicke was right in supposing, according to a note which I have, that the legislature giving this jurisdiction to the lord chancellor intended him to exercise both a legal and equitable jurisdiction, there is no other authority for a vast deal that is done." Upon the whole, however, it seems that the English court of bankruptcy in the last century and in the first half of this century was not considered to have jurisdiction of suits brought by an assignee to recover from third persons property alleged to belong to the bankrupt's estate. *Ex parte Pease*, Id. 25, 47; *Ex parte Dobson*, 1 Mont. & A. 666, 673; *Ex parte Scudamore*, 3 Ves. 85; *Halford v. Gillow*, 13 Sim. 44. A like rule seems to have been applied to suits brought by third persons against the assignee to recover property in his hands to which he was not entitled. *Ex parte Heath*, Mont. & B. 169. The reports of the courts of equity and common law, on the other hand, contain not a few cases brought by the assignee to recover from third persons property conveyed to them by way of fraudulent preference and the like, suits which the bankrupt himself could not have brought, and which were maintainable only by virtue of the bankrupt laws. See 1 Cooke, *Bankr. Laws* (8th Ed.) c. 8, § 12; *Bourne v. Dodson*, 1 Atk. 154; *Brown v. Heathcote*, Id. 160; *Morgan v. Brundrett*, 5 Barn. & Adol. 289. This limitation of jurisdiction was not very strictly applied, especially in proceedings against the assignee. See *Ex parte Bulteel*, 2 Cox, Ch. 243; *Ex parte Marsh*, 1 Atk. 158; *Ex parte Dale*, Buck, 365; *Ex parte Flynn*, 1 Atk. 185 (a proceeding brought by agreement); *Ex*

parte Pooley, 2 Mont. D. & D. 505; *Ex parte Coysegame*, 1 Atk. 192. The amended bankrupt act of 1869 enlarged greatly the jurisdiction of the court of bankruptcy. *Ex parte Anderson*, 5 Ch. App. 473; *Ex parte Rumboll*, 6 Ch. App. 842. Even under the act of 1869, however, it has been felt that there is a limit to the jurisdiction of the court of bankruptcy over suits brought by the assignee against third parties. *Ex parte Rippon*, 4 Ch. App. 639; *Ex parte Dickin*, 8 Ch. Div. 377. In the latter case the master of the rolls, Sir George Jessel, said:

"It never could, I think, have been the intention of the legislature that the court of bankruptcy should exercise a jurisdiction to decide the title to any real estate in the country which was claimed by a man who happened to be a bankrupt."

Taking the English cases together, they seem to indicate that in the beginning English courts of bankruptcy had considerably less jurisdiction than that which would be conferred upon the district courts by the third construction of subsection 23b of the existing bankrupt act; but that their jurisdiction, by statute and decision, has been extended until they now have a jurisdiction only less than that which would be conferred upon the district court of the United States by what has been called the "first construction" of subsection 23b. The English decisions also illustrate a natural desire to find for the courts of bankruptcy a jurisdiction which shall be a compromise between a jurisdiction over the bankrupt alone and a jurisdiction of all suits concerning property alleged to have belonged to him. They illustrate further the difficulty of establishing this distinction. It should further be observed that English courts of bankruptcy never have had that jurisdiction of plenary suits which was given to the courts of bankruptcy of the United States by the acts of 1841 and 1867.

Having considered the history of section 23 of the bankrupt act, which makes against the jurisdiction of the district court in this case; having considered also certain other provisions of the bankrupt act which make in favor of the court's jurisdiction; having considered the argument from the analogy of other bankrupt acts, and the argument from convenience,—we are brought last to consider the cases which construe this section of the act of 1898. These decisions are both numerous and conflicting. The decisions of the circuit courts of appeals will first be dealt with.

In *Re Gutwillig*, the circuit court of appeals for the Second circuit affirmed an order of the district court for the Southern district of New York enjoining the assignee under a general assignment from disposing of the assigned property of the respondent in an involuntary petition until after adjudication. The injunction was sought by creditors, not by a trustee, but, if the district court has jurisdiction to deal with property in the possession of a third party which is alleged to belong to the bankrupt's estate when the proceeding is instituted by a creditor, and has not jurisdiction in like circumstances when the proceeding is instituted by a trustee, great confusion will obviously arise. Trustees seeking to recover the bankrupt's property will be much given to making use of creditors' names. The question of jurisdiction is not considerably discussed either in the opinion of the

court of appeals or in that of the court below. It was said by the court of appeals, however, that:

"If the general assignment made by the alleged bankrupt would, in the event of an adjudication of bankruptcy, be treated as void as against the trustee of his estate, the order enjoining the assignee from disposing of or interfering with the property transferred pending the hearing was a proper and expedient exertion of the authority conferred upon courts of bankruptcy by clause 15, § 2, of the present act." 34 C. C. A. 377, 92 Fed. 337. See *Id.* (D. C.) 90 Fed. 475.

In *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325, the circuit court of appeals for the Eighth circuit confirmed the action of the district court for the Eastern district of Missouri in directing the marshal to take possession of the property of the respondent in an involuntary petition, which had been conveyed by general assignment. The question of jurisdiction had been raised, and elaborately discussed by the learned judge of the district court. In *re Sievers* (D. C.) 91 Fed. 366. Judge Adams there stated his opinion that section 23b was a limitation upon the jurisdiction of the circuit court only, and did not affect the jurisdiction of the district court. Without expressly affirming this doctrine, the circuit court of appeals, after speaking with apparent approbation of the careful consideration given to the case by the district judge, went on to say that:

"The trial court, in our judgment, pursued the proper course, and took proper steps to recover the assigned property from the assignees, and preserve it for the time being, until the assignor should be adjudicated a bankrupt, and a trustee had been selected by the creditors. Full warrant for all that was done in this circuit is to be found in section 2 of the act, which empowers courts of bankruptcy in substance to appoint receivers or the marshals upon application of parties in interest, to take charge of the property of bankrupts after the filing of petitions against them, for the preservation of their estates, and to make such orders, issue such process, and enter such judgments as may be necessary for the enforcement of the provisions of the act."

It will be perceived that the court of appeals, while not expressly concurring in the reasoning of Judge Adams, yet held distinctly that the court of bankruptcy had jurisdiction of a suit or controversy between the creditors of a respondent in an involuntary petition and his general common-law assignee.

In *Carriage Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 637, the circuit court of appeals for the Sixth circuit affirmed the action of the district court by which the general common-law assignee of the respondent to an involuntary petition was enjoined from disposing of the assets in his hands, and required to hold them subject to the order of the court of bankruptcy. The question of jurisdiction appears to have been raised, and the court said:

"It is next objected in argument and the briefs, though we do not find an assignment of error specifically directed to the point, that the assets of this defendant bankrupt are in the hands of the assignee for the benefit of creditors, subject to the orders of the probate court; that the district court in bankruptcy cannot obtain jurisdiction to administer the assets which are in the course of administration, and in the possession of officers of other courts. If this objection were to be sustained, it would seriously embarrass the enforcement of the bankruptcy law, and make it subordinate to the state insolvency and assignment laws, wherever an insolvent debtor who had committed an act of bankruptcy had placed his assets in the hands of the assignee acting by state law under the direction of the probate court. It is generally true that,

as between courts of concurrent jurisdiction, the court which first obtains possession of the res must retain possession of it until the res has been finally disposed of, and any one else interested in the res must apply to that court if he desires relief with respect to the property in the possession of that court. But, as between district courts sitting in bankruptcy and state courts for the administration of insolvent estates, there is no concurrent jurisdiction. The constitution of the United States, by giving to congress the power to pass uniform bankruptcy laws, gives to the courts in which congress shall vest this power paramount jurisdiction in bankruptcy proceedings. The orders in bankruptcy are, therefore, superior to those of a state insolvency court. Section 720, which forbids a court of the United States from enjoining proceedings in a state court, expressly excepts bankruptcy proceedings. This is the plain intimation, by federal and paramount law, that, where a federal bankruptcy court shall take jurisdiction, there the state insolvency court must yield. Hence it is that the assignee for the benefit of creditors of the defendant company, the grantee in the deed which is by the federal law an act of bankruptcy, may be made a party in the bankruptcy court, and may be required to hold the assets of the bankrupt subject to the order of the district court in bankruptcy."

It will be perceived that the court of appeals in this case was clearly of opinion that the district court has jurisdiction to restrain and control a general assignee, even though that assignee is acting under the state law, and under the direction of the probate court. It is true that the proceedings in *Carriage Co. v. Stengel* were instituted by the creditors, and not by the trustee, but the language of the opinion shows plainly that the court would have taken jurisdiction of a similar suit if begun by the trustee in bankruptcy.

In *Re Francis-Valentine Co.* (D. C.) 93 Fed. 953, same case on appeal, 1 Nat. Bankr. N. 529, 36 C. C. A. 499, 94 Fed. 793, the circuit court of appeals for the Ninth circuit dismissed a petition to review the action of the district court for the district of Northern California, in enjoining the sheriff from interfering with the trustee's possession of property alleged to belong to the bankrupt, the property being held by the sheriff under a writ of attachment. The question of jurisdiction was distinctly raised and well considered, and the court said as follows:

"In support of the first contention the petitioner cites and relies upon certain cases, of which the principal is *Marshall v. Knox*, 16 Wall. 551, 21 L. Ed. 481. In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the district court, sitting in bankruptcy, had no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The court, referring to the seizure of the goods, said: 'The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words, quoted from the opinion, fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt, nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt. Upon the adjudication of bankruptcy, the sheriff's right to the possession terminated, for the writs were dissolved; and upon the appointment of a trustee in bankruptcy the right to the immediate possession vested in the latter. There was no question of conflicting claims to be adjudicated by the district court. The question is purely one of the respective rights of the sheriff and of the trustee of the estate of the bankrupt."

So far as the question of jurisdiction is concerned, *In re Francis-Valentine Co.* is on all fours with the case at bar.

In *Re Abraham*, 35 C. C. A. 592, 93 Fed. 767, the circuit court of appeals for the Fifth circuit held that the trustee in bankruptcy cannot, by summary proceeding in the district court, recover from the bankrupt's general assignee property covered by the assignment, but must proceed in a state court, unless the circuit court is open by reason of diverse citizenship. From this part of the decision Judge Parlange dissented. So far as the opinion of the majority of the court is concerned, *In re Abraham* is opposed to the contention of the trustee in this case. No cases other than the five just cited, bearing upon the question, have been found to be decided in any circuit court of appeals. In *Re Richards*, 37 C. C. A. 634, 96 Fed. 935, it seems that the jurisdiction was consented to, and the question was not discussed. It follows, therefore, that the decision of the court of appeals for the Ninth circuit, the language of the court of appeals for the Sixth circuit (and probably the decision also), the strong analogy of cases decided in the Second and Eighth circuits, and the dissent of one judge in the Fifth circuit, favor the contention of the trustee in this case, while the decision of the majority of the court in the Fifth circuit is opposed to it. The weight of authority is manifestly much in favor of the court's jurisdiction in this case.

The decisions of the various district courts, by a considerable majority, sustain the same view. See *In re Brooks* (D. C. Vt.) 91 Fed. 508; *In re Smith* (D. C. Ind.) 92 Fed. 135, 139; *Robinson v. White* (D. C.) 97 Fed. 33; *Carter v. Hobbs* (D. C.) 92 Fed. 594; *Id.*, 94 Fed. 108; *Keegan v. King* (D. C. Ind.) 96 Fed. 758; *In re Pittelkow* (D. C. Wis.) 92 Fed. 901; *In re Kletchka* (D. C. N. Y.) *Id.* 901; *In re Baudouine* (D. C. N. Y.) 96 Fed. 536; *In re Kenney* (D. C. N. Y.) 1 Nat. Bankr. N. 401, 95 Fed. 427; *In re Nathan* (D. C. Nev.) 92 Fed. 590; *In re Fellerath* (D. C. Ohio) 1 Nat. Bankr. N. 292, 95 Fed. 121; *In re Booth* (D. C. Ga.) 96 Fed. 943; *In re Kimball* (D. C. Pa.) 97 Fed. 29; *Trust Co. v. Benbow* (D. C. N. C.) 96 Fed. 514; *In re Fixen* (D. C. Cal.) *Id.* 748; *In re Newberry* (D. C. Mich.) 97 Fed. 24.¹ These cases are not all of precisely equal application, but commonly by the actual point decided, and always, either by that or by the language of the several opinions, they support the district court's jurisdiction in this case. Opposed to them, and agreeing more or less with the majority of the court in *Re Abraham*, are as follows: *In re Kelly* (D. C. Tenn.) 91 Fed. 504; *In re Rockwood* (D. C. Iowa) *Id.* 363; *In re Buntrock Clothing Co.* (D. C. Iowa) 92 Fed. 886; *Hicks v. Knost* (D. C. Ohio) 94 Fed. 625; *Mitchell v. McClure* (D. C. Pa.) 91 Fed. 621; *Burnett v. Mercantile Co.* (D. C. Or.) *Id.* 365; *In re Franks* (D. C. Ala.) 95 Fed. 635 (expressly following *In re Abraham*).

In the case at bar the proceedings are instituted by the trustee in bankruptcy, and the respondent is the attaching creditor. Between the latter and the bankrupt there is no controversy. The bankrupt could not have brought this action. To paraphrase the language of the court of appeals in *Re Francis-Valentine Co.*, the creditor has possession, not in opposition to the right of the bankrupt, nor in

¹ So *Murray v. Beal* (D. C., Utah) 97 Fed. 567, printed since *In re Hammond* was decided.

antagonism to its title, but entirely upon the assumption that the title was in the bankrupt. Upon the adjudication of bankruptcy the creditor's right to the possession terminated, for the writs were dissolved, and upon the appointment of a trustee in bankruptcy the right to the immediate possession vested in the latter. There is no question of conflicting claims to be adjusted by the district court. Whether, therefore, what has been called the "first" or the "third" construction of section 23b of the bankrupt act be the correct one, in either case this court has jurisdiction of these proceedings begun by the trustee.

It may be urged that the difference between the above-mentioned first and third constructions of subsection "b" is entirely illusory, and that, if the court of bankruptcy has jurisdiction in this case, where the bankrupt could not have brought suit himself, it will be practically impossible to draw a line which will bar this court from jurisdiction of those suits brought by the trustee which the bankrupt could have brought himself if bankruptcy proceedings had not supervened. This attempt to show that the "third construction," so called, is an untenable compromise between the first and second constructions, is made as an argument in favor of the second construction, on the assumption that the first construction is certainly untenable, and that we are, by the exclusion of the third, shut up to the second. There are great difficulties, indeed, in drawing a line to separate the two classes of suits mentioned. If the district court has jurisdiction of suits which the bankrupt could not have brought, while it has no jurisdiction of suits which the bankrupt could have brought,—suits in which the claim is adverse, to use the language of the court in *Re Francis-Valentine Co.*,—then the defendant in any proceeding in this court, by setting up in his answer a title wholly adverse to that of the bankrupt, will oust the jurisdiction of the district court until the defendant's asserted title adverse to that of the bankrupt has been passed upon in the state court. If this be the law, it may be supposed that defendants in suits brought in the district court by a trustee will usually avail themselves of the subterfuge of an adverse claim. Certainly it would not be convenient to try in one court the defense of a party which is adverse to the bankrupt, and in another court another defense of the same party which is not adverse to the bankrupt. The two defenses would, not infrequently, be inseparable. This argument against the third, or compromise, construction is re-enforced by the language of subsection 23b itself. That construction of the subsection, as has been said, permits the trustee to bring in a district court suits against third persons which the bankrupt could not have brought, but, where the suit could have been brought by the bankrupt, limits the trustee to the state court. This is not the reading of the language. Subsection "b" does not read, "Suits by the trustee which could have been brought by the bankrupt shall be brought only in the courts where the bankrupt might have brought them," but "Suits by the trustee [presumably all suits] shall be brought only in the courts where the bankrupt might have brought them if proceedings in bankruptcy had not been instituted." This and other arguments that it is impossible to maintain

the third, or compromise, construction, are of weight, but, instead of making for the second construction of the subsection, they may rather make for the first, and may lead federal courts which, like the courts of appeals already mentioned, have taken jurisdiction of proceedings similar to that brought in this case, to go further, and take jurisdiction of all proceedings begun by a trustee to collect his bankrupt's estate. However that may be, in this case the court is not called upon to choose between the first and third constructions, but to determine only that, where the suit could not have been brought by the bankrupt, where the respondent is not an adverse claimant, as those words were used in *Re Francis-Valentine Co.*, the district court has jurisdiction. No opinion is expressed concerning a suit brought against "an adverse claimant." It should be observed that the creditor in this case made no objection to the form of the trustee's proceedings as by summary process, and not by plenary suit.

2. Did the property in question pass to the trustee by virtue of the bankrupt act? The trustee rests his claim upon section 67c, cl. 3, and section 70a, cl. 5. It is more convenient first to consider the latter provision, which reads substantially as follows: "The trustee shall be vested with the title of the bankrupt to all property which might have been levied upon and sold under judicial process against the [bankrupt]." By virtue of Pub. St. Mass. c. 147, § 11, as has been said, the property in question might have been levied upon under judicial process,—that is, by attachment on mesne process against the bankrupt,—and so it would seem to be covered by the provision just stated. The bankrupt's counsel contends, however, that this provision applies only to property which belonged to the bankrupt, and that it does not pass to the trustee any property not belonging to the bankrupt, though that property might have been attached upon mesne process against him. Thus broadly stated, this contention is inadmissible. Clause 5 says nothing about property of the bankrupt, or of the bankrupt's title thereto. The word "property" is used without qualification so far as clause 5 is specifically concerned. The only qualification is found in the earlier words, "the title of the bankrupt," which apply to clause 4 (property transferred by the bankrupt in fraud of creditors) as well as to clause 5. Now, it would be absurd to limit the application of clause 4 to property belonging to the bankrupt. By the very terms of the clause, the property covered by it does not belong to the bankrupt, and the bankrupt has no title therein. Probably the words "title of the bankrupt" are meant to cover cases in which the bankrupt has an estate in property less than absolute ownership, like an estate for life or for years. If the limitation suggested be manifestly inapplicable to clause 4, there is no reason why it should be held to apply to clause 5. Clause 5 was not found in the bankrupt act of 1867, and was, not improbably, suggested by Pub. St. Mass. c. 157, § 46, which it follows pretty closely in many respects. The last-mentioned provision is substantially as follows: "The assignment shall vest in the assignee all the property of the debtor which might have been taken on execution upon a judgment against him." Under the Massachusetts law, it has been held that not all property which could have been attached by some one of

the bankrupt's creditors passes to his assignee. *Audenried v. Betteley*, 5 Allen, 382; *Holmes v. Winchester*, 133 Mass. 140; *Sibley v. Bank*, Id. 515; *Low v. Welch*, 139 Mass. 33, 29 N. E. 216. Upon these cases the contention of the creditor is mainly based, and it is necessary briefly to examine them.

In *Audenried v. Betteley* it was held that an assignment under the insolvent laws did not vest in the assignee property which had been put into the hands of the debtor for the fraudulent purpose of giving him a false credit, although the transferror of this property might be estopped from contesting its attachment in the bankrupt's hands by a creditor who had been induced to give the bankrupt credit because of his apparent ownership of the property. Mr. Justice Hoar said that this property could not be regarded as "the property of the debtor which might have been taken on execution upon a judgment against him." "An estoppel in pais on the ground of fraud is personal to the particular creditor defrauded, and does not pass the property so as to inure to the benefit of creditors generally." The learned justice then stated that property conveyed in fraud of creditors, though no longer the property of the debtor, might be taken by creditors on execution, and so would pass to the assignee in insolvency. "But the defect in this analogy is," he said, "that the property which a debtor attempts to convey in fraud of creditors has once been his. When the conveyance is avoided by a creditor, or by one succeeding to the rights of a creditor, in the mode prescribed by law, it is the property of the debtor which is to be dealt with." It is to be observed that the property in question in *Audenried v. Betteley* was not subject to attachment by the creditors of the bankrupt generally, but only by a particular creditor, who, having been induced to act in reliance upon the bankrupt's apparent ownership, should avail himself of the estoppel thereby created.

In *Holmes v. Winchester* a wife had released her dower in her husband's land in consideration of an agreement by him to transfer to her shares in a corporation, the husband being solvent at the time of making the agreement. The transfer was made after he had become insolvent, and it was held that his assignee in insolvency could not avoid the transfer. The shares could not have been attached as the bankrupt's property.

In *Sibley v. Bank* it was held that the beneficial owner of stock in a national bank, who had transferred it to another person in trust, could recover the stock after the insolvency of the transferee, and against his assignee in insolvency, though the stock, as transferred, stood in the name of the transferee, without mention of the trust, and although it had been attached by a creditor as the property of the transferee. The court held that the right of the attaching creditor, whether arising by statute or otherwise, was by way of estoppel, inasmuch as a creditor with notice of the trust could not have attached the stock as the transferee's property. Following *Audenried v. Betteley*, the court therefore held that the title to the stock did not pass to the assignee. The case of *Low v. Welch* followed the principle laid down in *Sibley v. Bank*, though the property there in question was land, and not bank stock.

The principle underlying these decisions, so far as they relate to the questions involved in this case, may be stated thus: The assignee in insolvency does not take the title to property which can be attached as the property of the bankrupt, where the attachment can be upheld only through an estoppel in favor of a particular attaching creditor existing against the true owner of the property. "This was not property which could be taken on execution by creditors generally, but only by creditors without notice." 139 Mass. 34, 29 N. E. 217. See Lowell, Bankr. § 349. In the case at bar there is no question of estoppel. Under Pub. St. Mass. c. 147, § 11, a creditor with notice of the wife's right to this property could attach it just as effectively as a creditor without notice. This was property which could be taken on execution by creditors generally, and not only by creditors without notice, to paraphrase the statement just quoted of Mr. Justice Holmes in *Low v. Welch*. Even under the Massachusetts insolvent law, therefore, this property would pass to an assignee in insolvency, and the phraseology of the bankrupt law is quite as unfavorable to the contention of the attaching creditor as is the language of the insolvent law.

A consideration of general principles supports the conclusion just reached from an examination of the decided cases. To permit property to be attached and taken on execution by any individual creditor of a bankrupt is to permit precisely that which the bankrupt law was passed to prevent, viz. inequality of payment among the bankrupt's unsecured creditors, and a scramble on their part to secure advantage and priority. A law which permits each and every creditor to attach property as if it belonged to his debtor (though in fact the title is in some one else) exists because the lawmaking power thinks it just that the property should be applied to the payment of the debtor's obligations, and there should be no difference whether payment be sought by way of attachment proceedings or in bankruptcy.

Under section 67c, cl. 3, also, the rights of the trustee must prevail. It is there provided that a lien obtained in or pursuant to any suit or proceedings at law or in equity which was begun against a person within four months before the filing of the petition in bankruptcy by or against such person, shall not be dissolved if the dissolution of such lien would militate against the best interests of the estate of such person, but that the trustee of the estate for the benefit of the estate shall be subrogated to the rights of the holder of such lien, and empowered to perfect and enforce the same in his name as trustee, with like force and effect as such holder might have done had not bankruptcy proceedings intervened. We have here to deal with a lien obtained in a suit which was begun within four months of the filing of the petition. That the dissolution of this lien would militate against the best interests of the estate is evident, for this reason, if for no other; that it would deprive the attaching creditor of his security, and so would increase his claim as an unsecured creditor upon the rest of the bankrupt's estate. Following the plain language of the section, I must hold that the trustee in this case is subrogated to the rights of the holder of the lien. As the holder of the lien, the attaching creditor, has sold some of the property attached, and holds the proceeds thereof, while holding some of the attached property

unsold, I think I am justified, under the provision just stated, in awarding to the trustee possession of the proceeds and property aforesaid, though it may be that the trustee's petition is not framed in the best possible manner to attain this result. Under the circumstances stated in *Sibley v. Bank*, where the stock in question had been attached, it was held that any right which the creditor there had to attach the stock as the property of the insolvent was a right personal to the particular creditor, arising from the relation between him and the beneficial owner of the stock, which personal right did not pass to the assignee in insolvency. The right of the attaching creditor in this case is in no way personal to him. Any creditor of the bankrupt could have attached the property in question, and, except for the rights of the trustee in bankruptcy, could attach it now, subject to the existing attachment, unless the wife's certificate has been recently recorded. If property is held under an attachment which might have been made by any of the bankrupt's creditors, and was made within the time limited in the bankrupt law, it is proper that the trustee should be subrogated to the attaching creditor's rights.

It follows, therefore, that this court has jurisdiction of this proceeding brought by the trustee, and that the trustee is entitled to the property in question.

PEPPERDINE v. HEADLEY et al.

(District Court, W. D. Missouri, S. D. January 5, 1900.)

No. 165.

1. **BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEES.**

A district court of the United States, as a court of bankruptcy, has jurisdiction of a bill in equity by a trustee in bankruptcy against the bankrupt and a third person, to set aside a conveyance made by the bankrupt to his co-defendant, on the ground of its being fraudulent as to creditors, although the parties are all citizens of the same state.

2. **SAME—CONSTRUCTION OF STATUTE.**

Bankr. Act 1898, § 23b, providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is to be strictly construed, as being a limitation upon the general grant of jurisdiction to the courts of bankruptcy in other parts of the act; and this provision applies only to suits upon causes of action originally vested in the bankrupt, and which he might have maintained if there had been no adjudication in bankruptcy, and not to suits upon causes of action created by the bankruptcy proceedings, or vesting originally in the trustee as trustee.

On Demurrer to Bill in Equity. This is a bill in equity filed by the complainant as trustee in bankruptcy of the estate of Frank E. Headley, bankrupt. The purpose of the suit is to set aside conveyances made by the bankrupt to the co-defendants O. M. Headley and Joseph D. Sheppard on the ground that the transfers were made in fraud of the creditors of the bankrupt, and for other special relief against the other co-defendants as mortgagees under said grantees. As the complainant as well as the defendants are resident citizens of said district and division, the defendants demur to the

bill on the principal ground that the district court has not jurisdiction over the subject-matter of the suit.

Massey & Tatlow, for complainant.

Jas. R. Vaughan and McLain Jones, for defendants.

PHILLIPS, District Judge. This presents for decision what has been a vexata quæstio to the courts ever since the present bankrupt act was passed. There is a general consensus of opinion that the jurisdiction over the subject-matter of this suit would inhere in the courts of bankruptcy under the general powers conferred by section 2 of the act. In respect of the jurisdictional powers conferred on such courts, this section is but little different in its scope from that of the act of 1867, under which all are agreed that the power to entertain jurisdiction in the present case existed. The controversy arises by reason of the words in subsection 7 of said section 2, to wit, "except as herein otherwise provided," which evidently refer to section 23b, which declares that "suits by the trustee shall only be brought or prosecuted in courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if the proceedings in bankruptcy had not been instituted, unless by the consent of the proposed defendant." The construction given to this section by Judge Marshall in *Murray v. Beal* (D. C.) 97 Fed. 567, accords with the conclusion which I had reached touching this statute; and it is so concisely and perspicuously expressed, and so supported by authority and reason, that it would be but a work of supererogation for me to undertake to augment its force. The argument is that where there is a general grant of jurisdictional power to the bankrupt courts, as expressed in section 2 of the act, it should be liberally construed in favor of such jurisdiction, where it is essential to the effectual accomplishment of the design of its beneficial purposes, and therefore an exception by which its operation is abridged or impaired should receive a restricted construction. And it might be added that especially should this rule obtain when the liberal or enlarged construction of the exception would lead to absurdity or contradiction. Literally construed, the language employed in the exception might with great plausibility be said to convey the idea that, in case of an antecedent fraudulent transfer of property by a bankrupt debtor, no suit to vacate it and subject the property to distribution among the creditors could be maintained at all by the trustee in bankruptcy. The power conferred by this exception upon the trustee is to sue "only" in such courts as the bankrupt himself could have sued "if the proceedings in bankruptcy had not been instituted." The grantor would have no standing in any court to assail and vacate his fraudulent transfer of property. Regardless of the question of diverse citizenship and other conditions which under the general judiciary act would authorize the bankrupt to sue in the federal court, he could not maintain such suit in any court, state or federal. Therefore a suit like this, to avoid such transfer or preference, and to subject the property to distribution among

the debtor's creditors, is clearly not one which the bankrupt "might have brought or prosecuted * * * if proceedings in bankruptcy had not been instituted." And for this reason it is not a suit contemplated by section 23b. The conclusion reached in the case supra is that that section "must be restricted to suits to enforce rights of action once existing in the bankrupt, and vested in the trustee pursuant to the adjudication in bankruptcy." This construction of the statute is sensible and practical, and commands my assent. It results that as there never was any right of action in the bankrupt to avoid his fraudulent transfer of his property, but as such right of action is conferred by the bankrupt act upon the trustee, the jurisdiction to adjudicate this question exists in the district court. The demurrer, therefore, is overruled.

In re CHAMBERS, CALDER & CO.

(District Court, D. Rhode Island. January 3, 1900.)

1. BANKRUPTCY—POSSESSION OF RECEIVER—ENJOINING ACTION IN STATE COURT.

Where a receiver appointed by a court of bankruptcy to take charge of the estate of the bankrupts, and authorized to carry on their business, has entered upon the occupancy of a building leased by the bankrupts, and containing their stock in trade, and there continued the business, and, the rent being in arrear at the time of the adjudication, the landlord thereafter brings ejectment in a state court against the bankrupts and the receiver to recover possession of the leased premises, he will be enjoined from the prosecution of such action, especially where it appears that the enforcement of a judgment therein would seriously interfere with the administration of the estate in bankruptcy, and cause unnecessary loss to creditors.

2. SAME—RIGHTS OF LANDLORD.

In such a case the landlord must seek his remedy in the court of bankruptcy, and that court, in the exercise of its equitable powers, will direct the receiver to surrender possession of the premises at the expiration of such time as may be reasonably necessary for the execution of his trust, and will award the landlord suitable compensation for their occupation in the meantime.

3. SAME—ASSETS IN BANKRUPTCY—ONEROUS PROPERTY.

A trustee in bankruptcy, or a receiver appointed by the court of bankruptcy, is not bound to accept property of the bankrupt which is of an onerous or unprofitable character, nor to assume a lease made to the bankrupt, unless such a course would be for the benefit of the creditors.

In Bankruptcy. On petition of B. W. Persons, receiver and trustee, for an injunction.

James & William R. Tillinghast, for petitioner.

Van Slyck & Mumford, for respondent.

BROWN, District Judge. This petition seeks to enjoin the Industrial Trust Company from proceeding by action of ejectment in the state court to recover possession of real estate leased to the bankrupts, Chambers, Calder & Co., who were in possession at the date of the adjudication of bankruptcy. In the leased building was a large stock of goods appropriate to the business of wholesale druggists. Though the rent was overdue for more than 15 days,

and under Gen. Laws R. I. c. 269, § 7, the landlord was thereby authorized to re-enter or recover possession discharged from the lease, no action amounting to an election to discharge the lease had been taken prior to November 25, 1899, the date of the adjudication of bankruptcy and the appointment of a receiver. B. W. Persons was appointed receiver of the estate of the bankrupts, and was authorized to continue the business until further order of the court. He duly qualified, entered upon the premises, and carried on the business. Afterwards, on December 4th, the trust company brought its action of ejectment against Persons and the bankrupts in the state court. On December 6th the trust company made proof of claim before the referee for the full amount of rent overdue. On December 7th Persons was elected trustee by the creditors, and duly qualified. It thus appears that this court had taken into its custody and control the entire estate of the bankrupts, including the leased building, before the beginning of any proceedings in the state court. It is a firmly established rule that, where property is in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process issued out of another court. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; *Ex parte Johnson*, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; *Jordan v. Taylor* (Cir. Ct. Dist. Mass., Dec. 29, 1899) 98 Fed. 643; *Keegan v. King* (D. C.) 96 Fed. 758; *Chapin v. James*, 11 R. I. 87. Execution in ejectment would, in the present case, interfere with the possession of this court, and on that ground alone might be enjoined. It is furthermore apparent that it would most seriously embarrass this court in the administration of the bankrupts' estate, and result in unnecessary loss to the creditors. There is trustworthy and undisputed evidence that the stock of goods on the leased premises is such that their proper packing and safe removal from the premises cannot be accomplished in much, if any, less than four weeks. A tenant, even though the conditions of his lease is broken by nonpayment, has such legal right of ingress and egress as is necessary for the removal of personal property. There could be little practical value to the landlord in the possession of the premises during this time, and there is no suggestion of any facts indicating that pecuniary compensation will not be entirely adequate for a reasonable delay in the surrender of the premises. Whatever may be the right of the landlord, process or judicial authority for its enforcement must now be sought in this court, upon which the bankruptcy act has conferred equity powers adequate to meet a situation in which the strict and immediate enforcement of a legal right would lead to unnecessary and disproportionate loss to others, or would result collaterally in conferring an inequitable advantage. A court of equity, while giving the fullest recognition to a legal right, may so regulate the time and manner of its enforcement as not to cause unnecessary loss to others. *Deweese v. Reinhard*, 165 U. S. 386, 390, 17 Sup. Ct. 340, 41 L. Ed. 757. The jurisdiction of this court having attached to the exclusion of jurisdiction at law, the right of the landlord can be enforced only upon equitable terms. Neither receiver nor trustee in bankruptcy is bound to

accept property of an onerous or unprofitable character, or to assume a lease of the bankrupts, unless for the benefit of the creditors. *File Co. v. Garrett*, 110 U. S. 288, 4 Sup. Ct. 90, 28 L. Ed. 149. If they are confronted with the alternative of an immediate ejection from the premises, with the consequent depreciation of the personal estate, or the assumption of an undesirable lease and the payment of a large sum for unsecured rent, whereby an unsecured creditor will secure a preference, a court of equity should relieve them from the coercion of the situation. If time is essential for an equitable adjustment of the various rights, the court may impose such delay as is reasonably necessary upon the enforcement of any particular right, making pecuniary compensation therefor whenever that is adequate.

In applying the principle that in equity relief will be granted only upon equitable terms, we must deal with the special circumstances of each case. The time necessary for the proper removal of goods from the leased premises is not necessarily the limit of an equitable delay in placing the landlord in possession. If more time is necessary for the preservation of the personal estate, if goods will not bear removal, or if great loss can be avoided by a sale upon the premises, and a reasonable sum for use and occupation will be full and equitable compensation to the landlord, a court of equity should give such weight to these considerations as fair-minded and reasonable men give to them in practical affairs, and should, if possible, preserve the substance of the rights of all by adapting its decrees to the practical situation before it. I am of the opinion, however, that the evidence presented at the hearing is insufficient to enable me to determine at what date possession should be surrendered. As it appears that at the time of bringing the action of ejectment the receiver was in possession, and carrying on the business under the orders of this court, he is entitled to the protection of an injunction as prayed in his petition. The draft decree may be presented accordingly.

IN RE KINDT.

(District Court, S. D. Iowa, E. D. January 22, 1900.)

BANKRUPTCY—JURISDICTION IN VOLUNTARY CASES—APPEARANCE BY ATTORNEY.

An adjudication of bankruptcy duly entered upon the voluntary petition of a debtor personally within the jurisdiction of the court, the petition and schedules being signed and verified by the bankrupt himself in proper form, will not be set aside, on motion of a creditor, because the attorney who appeared on the petition as the bankrupt's attorney, and who represented him before the referee, had not been admitted to practice in the federal courts of the district; such an objection not affecting the jurisdiction of the court.

In Bankruptcy. On review of decision of referee in bankruptcy overruling a motion to set aside the adjudication and dismiss the proceedings.

Isaac Petersberg and C. F. Hubbell, for creditor.
Ely & Bush, for bankrupt.

SHIRAS, District Judge. From the record in this case it appears that Charles T. Kindt filed in the office of the clerk of this court at Keokuk a voluntary petition in bankruptcy, the petition and schedules thereto attached being signed and sworn to by the bankrupt in proper form. The judge of the district being then absent from the division, the clerk referred the case to the proper referee, by whom the adjudication was duly entered. Upon the petition thus filed, Ely & Bush appeared as attorneys for the bankrupt, and they represented him before the referee. Subsequently one W. W. Humphrey, scheduled as a creditor of the bankrupt, appeared before the referee, and moved to set aside the adjudication in bankruptcy and to dismiss the proceedings on the ground that this court, including the referee, had never acquired jurisdiction in the case, because the bankrupt had elected to prosecute the proceedings by an attorney, to wit, the firm of Ely & Bush, and that neither of the members of the firm had been admitted to practice in the federal courts of the Southern district of Iowa, although they had been residents in the district for over four years. The referee overruled the motion to dismiss, and his ruling in this particular is now brought before the court for review.

On behalf of the creditor it is urged that under the provisions of general order No. 4, as promulgated by the supreme court (18 Sup. Ct. iv.), and the practice in this court, as established by Judge Woolson, the appearance of Ely & Bush on behalf of the bankrupt should not have been recognized, as they were not then admitted as attorneys of the court. The fact that recognition may have been given to the appearance of these attorneys, when under the rules of the court it should have been refused, does not affect the jurisdiction of the court over the proceedings, nor render void the adjudication in the case. General order No. 4 provides that proceedings in bankruptcy may be conducted by the bankrupt in person, in his own behalf, and that "every party may appear and conduct the proceedings by attorney, who shall be an attorney or counsellor authorized to practice in the circuit or district court." We do not look to this order for the law governing the method of acquiring or conferring jurisdiction over bankruptcy cases. It is not questioned that the bankrupt, when the petition was filed, was a resident of the district, and had been such resident for more than six months preceding the time of filing the petition. Therefore, when the petition and schedules, duly signed and sworn to by the bankrupt, were filed in the clerk's office, the jurisdiction over the case and over the person of the bankrupt was acquired by the court, under the provisions of section 2 of the bankruptcy act, and the court, including the referee, had the right to enter the adjudication. In the further proceedings had in the case, under general order No. 4, the bankrupt could act in his own behalf, or through an attorney of the court. In this case it appears that the bankrupt was represented by attorneys who had not been admitted to practice in the federal courts of this district. It was unquestionably irregular to recognize their appearance, but it was done. If the motion made by the creditor had been to expunge their appearance, or to ask an order from the

court staying the proceedings until the bankrupt procured an attorney of the court to appear for him, there might have been ground for granting such a motion; but what is now asked is that the adjudication be set aside and the case be dismissed for want of jurisdiction in the court, and, as already said, jurisdiction was acquired over the case, not through the appearance of Ely & Bush as attorneys, but by the filing of the petition and schedules signed and sworn to by the bankrupt. The ruling of the referee is therefore affirmed. It may be further stated that since the filing of the motion to dismiss before the referee the members of the firm of Ely & Bush have been admitted to the bar of this court, so that in the further progress of the case the bankrupt will be represented by attorneys of this court.

In re LANGSLOW et al.

(District Court, N. D. New York. April 7, 1899.)

BANKRUPTCY—FILING FEE—PARTNERSHIP PETITION.

Upon the voluntary application of a partnership for the benefit of the bankruptcy act, only one petition need be filed, and all that is done thereupon constitutes but one proceeding, although it includes granting a discharge to each of the partners; and only one deposit of the filing fee of \$25 required by the act is necessary. It cannot be demanded of the partners, as a prerequisite to discharging them, that they should each separately deposit a like fee.

In Bankruptcy.

Perkins & Hays, for petitioner.

Quincy Van Voorhis, in pro. per.

COXE, District Judge. The question involved is whether the court can withhold discharges from these bankrupts, who were co-partners and who filed a partnership petition, upon the ground that they have not, severally, paid the fees required by the act. I do not see how the court can follow the course suggested by the learned referee. The law permits a partnership petition to be filed even after dissolution. Section 5. Section 40 and general order No. 35, 32 C. C. A. xxxiv., 89 Fed. xiii., recognize no other compensation to the referee, where there are no assets, than the preliminary fee deposited with the clerk. That this fee is wholly inadequate in many cases cannot be denied, but the remedy, of course, is with congress. The court has no power to enlarge the statutory fee. A partnership petition is but one proceeding. Only one petition (in triplicate) need be filed. The clerk has no authority to demand more than the statutory fees. The adjudication and reference follow as a matter of course, and the referee must proceed as required by the law, general orders and rules. The question is determined by the fact that, in contemplation of law, there is but one petition and one proceeding.

In re GAY et al.

(District Court, D. New Hampshire. December 14, 1899.)

No. 78.

1. **BANKRUPTCY—PARTNERSHIP PETITION.**

Where a petition in voluntary bankruptcy is presented both in the name of a partnership and in the names of the individual partners, and is accompanied by schedules setting forth the debts and assets of the firm and also of the partners, and thereupon the petitioners are adjudged bankrupt as prayed, it is not necessary that each partner should also file an individual petition, in order to be relieved from his individual debts, but the court of bankruptcy may administer upon the separate estates of the partners as well as upon the estate of the firm in a single proceeding, and may grant to the partners a discharge from both separate and joint debts, and apportion the costs equitably between the individual and the joint estates.

2. **SAME—FILING FEE.**

A proceeding in bankruptcy, upon a voluntary petition by a firm, in which the individual partners also join, is but a single proceeding, although each of the partners seek a discharge from all classes of debts; and only one deposit of the filing fee of \$25 required by the act is necessary.

3. **SAME—FORM OF DISCHARGE.**

A discharge in bankruptcy granted to a member of a firm in proceedings based on a voluntary petition in which both the firm and the individual partners joined, and on which the petitioners were adjudged bankrupt as prayed, should be made to cover his liability on the debts of the firm, and also his individual indebtedness.

In Bankruptcy. On application for leave to amend a voluntary petition in bankruptcy filed by a partnership, and on petition of the partners for discharge.

Edmund Sullivan, for the bankrupts.

ALDRICH, District Judge. Gay Bros. is the partnership name, and J. A. Gay and L. D. Gay were the two partners. In the original petition the firm and the individual partners all joined as petitioners. They used Form 2, setting out the partnership debts which they were not able to pay, and stating that they were willing to surrender all their property for the benefit of their creditors. The petition sets out, by schedule annexed, marked "A," and verified by oath, a full and true statement of the debts of said partners, etc.; by schedule marked "B," verified by oath, an accurate inventory of the property of said partners; by schedule marked "C," a full and true statement of the individual debts of Joseph O. Gay; by Schedule D, an inventory of all his individual property, real and personal; by Schedule E, the individual indebtedness of Louis P. Gay; and by Schedule F, an inventory of his individual property. The petition concludes with a prayer that the firm may be adjudged, by a decree of the court, to be bankrupts (in the plural). The adjudication indorsed by the judge on the back of the original papers was "Petitioners adjudged bankrupts, and petition referred to Benjamin H. Corning, Esq., referee." The order of the clerk, which I suppose was for publication, was not so comprehensive as the indorsement by the judge, for it states only that "the said Gay Bros. are adjudged

bankrupt." It appears, however, from subsequent proceedings in the case, that the referee notified the individual as well as the partnership creditors; so, if there was any defect in the language of the order promulgated by the clerk, it was cured by the notice of the referee and the appearance of the creditors.

Paragraph "c" of section 5 of the bankrupt law contemplates that the bankruptcy court which has jurisdiction of one of the partners may have jurisdiction of all the partners, and of the administration of the partnership and individual property. Paragraph "d" provides that the trustee shall keep separate accounts of partnership property and property belonging to the individual partners; and paragraph "e" that the expenses shall be paid from the partnership property and the individual property in such proportion as the court shall determine. So it would seem that in a proper case (and I mean by that upon sufficiently comprehensive papers, and conditions warranting it) the court may wind up the affairs and relieve from the indebtedness of the partnership and the individual partners in one proceeding, and apportion the expenses as equity may require. Furthermore, it may be said that congress, for the purpose of making the law a practical, working law, authorized and called upon the supreme court to promulgate necessary rules and forms to be used in its administration. Form 2 of the rules prescribed by the supreme court (18 Sup. Ct. xviii.) is entitled "Partnership Petition"; and I assume that it was intended to provide a form for putting the provisions of section 5 of the bankrupt law into practical operation, and that it was formulated in accordance with the view of the supreme court as to what section 5 contemplated should or might be done. That form, which was strictly followed by the petitioners in this case, clearly contemplates that not only the partnership assets may be inquired into, but that the assets and liabilities of the individual partners may be inquired into and wound up in one proceeding. Aside from what seems fairly to follow from the different paragraphs of section 5, and the form promulgated by the supreme court, it may be observed that the different results may be more easily, conveniently, and inexpensively reached in one proceeding, upon proper papers, than upon several separate and distinct proceedings, involving different hearings, and what might be called circuitry of legal process.

There has been no consideration upon argument of this particular question in any of the districts of the First circuit, that I am aware of; but I do understand that the practice in the Massachusetts district, and in the Maine district as well, has been to discharge from both partnership and individual indebtedness in one proceeding upon one petition, where the firm and the individual partners become petitioners, and set out the various kinds of indebtedness, and the assets of the various interests, and ask to be adjudged bankrupts. I see no reason why this practice should not be adopted for New Hampshire; and it may be understood that it is the practice, until there is an authoritative and controlling decision to the contrary, or until I am convinced upon argument that this should not be so. While a single fee to the clerk, the referee, and the trustee may

be meager or entirely inadequate in such a comprehensive proceeding, I am disposed to follow the decision of Judge Coxe in *Re Langslow*, 1 Nat. Bankr. N. 232, 98 Fed. 869, and the practice in Massachusetts and in Maine, until argument convinces me that I am wrong in this respect.

As to the form of the discharge, in Massachusetts the practice is, in such a case, to discharge each individual partner from all debts and claims, making no distinct reference to their partnership or individual character,—the theory being that the discharge of the partner from all debts and claims covers both; while in Maine, as I understand it, the practice is to expressly discharge each individual partner from firm indebtedness, and individual indebtedness as well.

In the view which I hold, the application for an amendment by annexing to the original petition a separate individual petition for each partner, in addition to the one in which they join as individuals, is unnecessary, and therefore is disallowed. The petition for discharge is granted, and a discharge should be issued to each individual partner, and should cover his liability on the debts and claims against Gay Bros., and his individual indebtedness as well.

DADIRRIAN v. YACUBIAN et al.

(Circuit Court of Appeals, First Circuit. January 3, 1900.)

No. 287.

1. TRADE-NAMES—FOREIGN NAME OF ARTICLE.

A word which has been for centuries in Armenia the name of an article of food or diet prepared from sterilized and fermented milk cannot be appropriated as a trade-name by the person who introduced the article and the name into this country.

2. SAME—SIMILARITY BETWEEN NAMES.

The fact that a correct transliteration of the Armenian word into English would make it "Madzoon," rather than "Matzoon," does not render the latter subject to monopoly as a trade-name; the difference between the two words being too slight to be recognized as creating a distinction in the law of trade-marks.

3. SAME—SUIT FOR INFRINGEMENT—EQUITABLE ESTOPPEL.

The rule applied that a complainant cannot maintain a suit in equity to protect his monopoly in the use of a trade-name, which is in fact the name of an article well known in foreign countries, on the ground that the product to which he applies it is a new article of manufacture, and not the article of which the name is descriptive, where he has represented by his labels and otherwise that it was such article, and has built up the business which he seeks to protect upon such representations.

4. SAME—UNFAIR COMPETITION.

Applying the rule that when a trade-name of a descriptive character has been used by a manufacturer for so long a time, and has come to be so associated by the public with his goods that it makes it the duty of another, who then commences its use in connection with a product of his own, to couple with it such caution as is suitable to guard the public from confusing the source of production, the latter, under the facts of this case, is held to have done all that can be required.¹

¹ As to unfair competition in trade, see note to *Scheuer v. Muller*, 20 C. C. A. 165, and, supplementary thereto, note to *Lare v. Harper & Bros.*, 30 C. C. A. 376.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

James R. Sheffield (Frederic H. Betts and James J. Cosgrove, on the brief), for appellant.

Alexander P. Browne (Everett D. Chadwick, on the brief), for appellees.

Before PUTNAM, Circuit Judge, and ALDRICH and LOWELL, District Judges.

PUTNAM, Circuit Judge. We assent to the decree entered in this case by the circuit court, and to the principles of law stated in the opinion of the learned judge who sat in that court (90 Fed. 812); but, apparently, certain phases of the facts have been urged upon us more strenuously than they were urged below, so that we find it necessary to give expression to our views about them.

The trade-mark of the complainant below (now the appellant) was registered by virtue of an application filed on August 7, 1885, under the act of March 3, 1881 (21 Stat. 502). The application is given at length in the record, and conforms to the statute; so that, in accordance with the provisions of section 7 thereof, and, indeed, independently of that, the registration is *prima facie* evidence of the complainant's ownership of the alleged trade-mark, and therefore of whatever is necessary to establish its validity. The application states that the complainant had used the trade-mark since on or about the 17th day of July, 1885. It is also clear that the complainant remained, within the United States, in the exclusive and undisturbed possession and use of the alleged trade-mark for about seven years, and that he had meanwhile not only enjoyed an extensive and valuable trade in connection therewith, but that he created it, so far as this country is concerned. This is true to so striking an extent that till, and even through, the time of taking the proofs in this case, it is apparent that, with the larger portion of the community accustomed to the use of the article put on the market by the complainant in connection with his alleged trade-mark, including, indeed, a number of the members of the medical profession, the article and the complainant's name were linked together to such an extent that when the same article, or a similar one, was put on the market by the alleged infringers, the common understanding was blind to the fact that there were any new sources of production; and the article, by whomsoever sold or produced, and notwithstanding noticeable changes in the labels, was frequently accepted by intelligent persons, including members of the medical profession, as the complainant's article. These facts, of course, make a very strong *prima facie* case for the complainant; so that neither justice to him, nor the interests of the public, will permit the denial of the relief which he asks, unless legal principles clearly require it.

Turning back to the complainant's trade-mark registration, its leading element is that it states its "essential feature is the arbitrarily selected word symbol 'Matzoon.'" Accompanying the application

was a fac simile of the label as "generally" arranged, as to which the application said that the word "Matzoon" is printed in a straight line, with, immediately below it, the words "or Fermented Milk Food," and below that a pictorial representation of Mt. Ararat, surmounted by the ark, to which the dove is just returning, bearing an olive branch. Nevertheless, the application said that the words "or Fermented Milk Food" and the pictorial representation might be omitted without altering the trade-mark; stating in this connection (what we have already said) that its essential feature was the word symbol "Matzoon." In accordance with the statute, the application further stated that the class of merchandise to which the trade-mark had been appropriated was medicinal preparations, and that a more particular description would be "a medicinal beverage consisting of a fluid preparation of fermented milk," "especially adapted as a nutritious food for invalids," and as a remedy for various diseases which were named, and which we need not repeat.

The substantial defense rests on the proposition that the word "Matzoon" is not an arbitrarily selected word symbol, but that the complainant's article of merchandise is a historically and locally well known Armenian healthful beverage, containing certain medicinal qualities, of which "Matzoon" is the proper Armenian descriptive word; so that, notwithstanding the facts to which we have referred, every person has the right to import the article and sell it under its proper Armenian name, or to produce the article in this country and sell it in the same way. The facts being so established, there would be no question that the rules of law accepted by the circuit court would apply, and it would be impossible to maintain an exclusive right in behalf of the complainant, no matter how strong the equities might be in his behalf.

It is insisted, however, in reply, that "Matzoon" is a word symbol—First, because the Armenian word, when correctly transliterated, is "Madzoon," and not "Matzoon"; second, because the Armenian product known as "Madzoon" is not a beverage, and does not have the liquid form which characterizes the merchandise put on the market by both the complainant and the respondents, but is solid, as an ordinary cup custard or blancmange is solid; and, third, as alleged in the bill, that complainant's product is "a new article of manufacture."

The first ground of the complainant's reply is clearly not sufficient, because any distinction between "Madzoon" and "Matzoon" is too refined to be of use with reference to rules so practical as those which appertain to trade-marks. Section 3 of the act of March 3, 1881, contains a prohibition against registering any alleged trade-mark "which is identical with a registered or known trade-mark owned by another and appropriate to the same class of merchandise, or which so nearly resembles some other person's lawful trade-mark as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers." This is a very practical expression of a fundamental rule touching trade-marks. While, on the one hand, if the complainant could lawfully claim the word

"Matzoon," it would be plain that other persons could not use the word "Madzoon," because the two words so nearly resemble each other as to be likely to cause confusion or mistake, as expressed in this citation from the statute, so, on the other hand, if the public at large is entitled to use the word "Madzoon," it is quite clear that the word "Matzoon" would come so well within the practical rules applicable to trade-marks as to prevent any lawful appropriation thereof for a monopoly. Therefore, without going into any philological discussion for the purpose of showing how, in different localities, or at different dates, slight changes in pronunciation occur, which make, for practical purposes, "d" and "t" the same letter, the distinction which complainant makes in this respect is too refined for practical uses in this branch of the law.

With reference to the second ground of reply on the part of the complainant, the opinion of the learned judge of the circuit court finds the facts against him, and apparently adopts the conclusions of Judge Showalter in *Dadirrian v. Yacubian*, 72 Fed. 1010, to the effect that the word "Madzoon" includes, in Armenia, the liquid or semiliquid form of the article in question. The careful re-examination of the proofs which the complainant has called on us to make, leads us to doubt this conclusion, even as against some early statements of the complainant, much relied on by the respondents, as well as by the learned judge who sat in the circuit court. It is now maintained by the complainant that the liquid form of the Armenian production is locally known as "Taan" or "Tann," and the solid form as "Madzoon," and that therefore, inasmuch as he applies the word "Matzoon" to a liquid substance, it must in any event be taken to be a word symbol, as stated in his application for the registration of his trade-mark. The testimony of those witnesses who may be said to have absorbed most thoroughly the knowledge of Armenian domestic manners and customs favors this proposition. Mr. Bliss, for example, who was born in Erzeroum, and resided there as a child, thus at an age when the mind is most impressionable, and afterwards for years in Constantinople, with frequent journeys throughout the whole of ancient Armenia, fully sustains this proposition. He says that Matzoon is "a preparation of milk curdled, and having much the consistency and general appearance of a custard or blanchmange; not unlike," he adds, "what is known as 'bonnyclabber,' only with a little more solidity than bonnyclabber." He gives the Armenian root of the word "Matzoon," which is defined as "curd," "clot," and he states that the transitive verb with the same root is translated as follows: "To solder; to glue; to conglutinate; to cement; to fasten; to join; to curdle; to make coagulate; to thicken; to congeal." This going back to the root is particularly suggestive. He also says that the Armenians, in describing the use of "Madzoon," never speak of drinking it, but always use the verb "to eat," and, in substance, that the only thing which in Armenia represents the complainant's preparation is what the Armenians call "Taan." This, however, he says is a preparation of Madzoon "beaten up and then diluted with water, and used as a beverage."

The careful testimony of such well-known gentlemen as Dr. Hamlin and Dr. Washburn, each of them at some time president of Robert College, is to the same effect, although the general terms of some of their letters lead to a different conclusion. It is to be noted, however, that in substance "Taan" and "Madzoon" are the same thing; the former being only the diluted form of the latter, there being no chemical nor molecular differences between them. All this, however, whatever may be the facts on this issue, as well as the claim made by the complainant's bill, which we have stated to be the third matter in reply, that the complainant's article now on the market is "a new article of manufacture," are clearly met by a proposition of law which we will state, and by the facts which make this proposition applicable.

The most important underlying principles of the law of trade-marks, in their modern development, are largely ethical, and it is well settled that the rule that one who seeks equity must come into court with clean hands is peculiarly applicable to a complainant in a suit of the class at bar. For illustration, so far as the rule condemns misrepresentations as to the nature or origin of articles made in, or in connection with, the trade-mark by the aid of which the articles seek a market, it is sufficient to refer to *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; *Church v. Proctor*, 13 C. C. A. 426, 66 Fed. 240; *Syrup Co. v. Putnam*, 16 C. C. A. 376, 69 Fed. 740; and *Leather-Cloth Co. v. American Leather-Cloth Co.*, 11 H. L. Cas. 523, affirming the views of Lord Westbury hereafter referred to. The rule is not limited to misrepresentations made by the trade-mark itself, but it covers whatever is substantially calculated to deceive the public if used in such connection that it became one of the essential forces which made the trade-mark successful. A comprehensive statement of the rule was made by Lord Westbury in *Leather-Cloth Co. v. American Leather-Cloth Co.*, 4 De Gex, J. & S. 137, 142, as follows:

"When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation; for, if the plaintiff makes any material false statement in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity."

This citation from Lord Westbury is accepted by the latest authority (*Sebastian's Law of Trade-Marks* [1899] at page 207), and the rule is so well settled that there can be no doubt on this score. As, therefore, the general rule requiring clean hands applies both to the trade-mark and to its relation to the business connected with it, it follows that what is said in *Sebastian's Law of Trade-Marks* at page 65 is, with proper limitations, applicable to representations made in the business, although what is there said relates by its terms only to what appears in the trade-mark itself. The author says:

"An attempt has occasionally been made to meet the contention that a word claimed as a trade-mark is incapable of appropriation by reason of its descriptiveness, by the allegation that the goods to which it is applied do not answer

the description imported by the word, and therefore that the word is not in fact descriptive of the goods. But, in cases where a word is used which is descriptive of qualities which the goods might reasonably be supposed to possess, if the goods do not possess those qualities the use of the word is deceptive, so that *quacunque via* the claim fails."

The same rule is repeated by the same author at page 350, in connection with his explanation of the English patents, designs, and trade-marks acts of 1883 and 1888. It is to be noted in this connection that the court is not bound to inquire whether or not the representations are false, in the obnoxious sense of the word, because it is sufficient that they are in their nature misleading, if they are also material, and do in fact mislead. Indeed, that the public are equally prejudiced by deceptive statements in a trade-mark, or in connection therewith, whether the purpose of its owner was fraudulent or not; that therefore the equity courts have no occasion to inquire into his secret intents; and that such courts will not protect a business built up as the result of deceptive representations, whatever were those secret intents,—are such fundamental rules in the law of trade-marks that we have no occasion to elaborate them, or to cite authorities in reference to them, except so far as proper to illustrate them; and the case at bar runs clearly counter to these rules, whatever may be the proper transliteration of the Armenian word, and whether or not the article which the complainant has been selling is in substance the same as the product commonly known in Armenia as "Madzoon," or whether or not, as alleged in the complainant's bill, it is "a new article of manufacture."

As we have already said, the application for the complainant's registered trade-mark was filed on August 7, 1885. He stated in it that he had used the trade-mark in his business since on or about July 17th of the same year. There are in the record various circulars and labels, put out by the complainant with reference to the nature of the preparation spoken of in his application, and to the character of the business which the bill at bar seeks to protect. These are not all of the same positive description, and, indeed, some of the later of them do not come within the line of observations which we are compelled to make with reference to the earlier. In this connection we do not rely on the statements made by the complainant to the New York Academy of Medicine in June, 1885, referred to in the opinion of the learned judge of the circuit court. We need only refer to one circular and one label. The dates when these were put out are not shown by anything to which our attention has been called, except that it is admitted by the complainant in argument that the label was issued about the time he introduced his preparation into the United States in 1885. What is styled in the record "Label No. 1" included the trade-mark as registered, and also contained explanatory notes, of which we need read only the following: "Matzoon is a fermented milk food in the liquid condition, and used extensively in Armenia and Asia Minor as a refreshing beverage and invalid's food."

In the circular, appears the following: "Matzoon, or Fermented Milk Food." Underneath this is the picture of Mt. Ararat, accom-

panied with the words, "Trade-mark registered," thus putting beyond all doubt that this circular connected itself with the trade-mark in issue here. Then follow the words, "Prepared by Markar G. Dadirrian, M. D.," describing him as a graduate of the New York University Medical College of 1871, and also as a resident and practicing physician for many years in Constantinople and Asia Minor, thus giving the public to understand that he had proper means of knowledge of the matters whereof the circular speaks. The circular then proceeds as follows:

"This preparation of milk originated in Armenia, around Mt. Ararat, and extended thence to distant countries in Asia Minor, etc. It is used in those countries largely as food, and as medicine in every form of febrile diseases," etc.

It further adds:

"In Asia Minor and Arabia," etc., "the inhabitants, during the season of intense heat, both within doors and under the sun, resort to Matzoon to allay their burning thirst, instead of using beer, soda water, lemonade, ices, and the like, and find unequaled refreshment therefrom. They also drink freely of it while enjoying the luxury of the Turkish bath."

Further on the circular says:

"Matzoon is prepared in two forms, liquid and solid. The liquid form is used mostly for the sick, though frequently also as a beverage by those in health. The solid is used mostly as food, and as a dessert at the table."

Then ensue some further commendations of the preparation, which conclude by asking for it a trial, accompanied with this expression:

"With great confidence in its value, based upon a personal experience in its use during three years in Asia Minor, ten years in Constantinople, and considerable time in New York, and from observing its usefulness in the hands of eminent American, German, and French physicians in Constantinople."

This circular contains extracts from letters from Dr. Hamlin and Dr. Van Lennep, an eminent American missionary, confirming the statements made by the complainant; the letter from Dr. Van Lennep addressing itself to the great biblical and missionary side of the people of the United States, as follows:

"I am glad to learn that you are introducing into this country the celebrated Oriental 'fermented milk food' called 'Matzoon.' The Arabs set so high a value upon it that they hold a tradition that an angel was sent from heaven to reveal the secret of this preparation to their father, Abraham; and they drink no water, but their favorite Matzoon instead, which stands night and day in a large dish near the entrance to the tent."

The biblical and missionary sentiment thus appealed to was sought to be further interested by letters from the eminent Rev. Dr. Howard Crosby and the eminent Rev. Dr. John Hall, appended to the circular, commending in a general way the complainant and "Matzoon."

Presumably, this label and this circular, with the matters appended to it, accomplished their evident purpose, and were among the principal means of securing the introduction of the complainant's preparation into the United States, and of creating the business which he now asks the court to protect. Indeed, the record shows sufficiently that it was a thorough belief of, at least, some part of the medical profession in the United States, that complainant's

preparation was the wholesome drink used in Asia Minor, which has given it, not only a place in the market, but in the United States Dispensatory. This early information which Dr. Dadirrian gave the public denied in advance the positions now taken, to the effect that "Matzoon" is not "Madzoon," that "Madzoon" is exclusively a solid preparation, and that what Dr. Dadirrian offers is "a new article of manufacture." We state this conclusion without intending to pass judgment on any question of the complainant's integrity, and without refusing to accept the explanations made at bar, because a business based on a trade-mark which the equity courts are asked to protect cannot, as we have said, be built up in this way. The result is the dilemma stated by Mr. Sebastian in his work already cited, at page 351, omitting his reference to particular provisions of statute which are not necessary for this purpose, as follows:

"The applicant is in the dilemma that the alleged trade-mark is either descriptive or deceptive. If the word or words are properly applicable to the article, and may be truly used with respect to it, they are descriptive. If they may be read as stating something with respect to the article which is untrue, they are deceptive. So that quacunque via the application must fail."

It was said in the opinion of the learned judge who sat in the circuit court that the label of the respondents below is so different in appearance from complainant's that no relief could be granted on the ground that the ordinary purchaser is likely to be deceived, or of unfair trading. There is much evidence tending to show that purchasers at times mistook what was offered on the market by the respondents for that of the complainant, but that such misunderstandings should occur to some extent arises inevitably from the nature of the trade-mark in issue here. There was also evidence of unfair dealing; but that arose rather from personal representations made by the respondents in particular instances than from any simulation of the complainant's merchandise, and it is not the purpose of this suit to remedy matters of that nature.

Aside from the question of an absolute right to a monopoly of the alleged trade-mark in issue, inasmuch as the complainant introduced into the market of the United States the foreign article which it represents, and had held that market exclusively for so many years that the article became known to the public as his article, the principle underlying the rule announced in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, applies. So, also, cases like *Reddaway v. Banham* [1896] App. Cas. 199, where, to a certain extent, what is called a "secondary use of a generic term" has been protected, are not to be overlooked. It may be well to add that the rule of *Reddaway v. Banham* is explained somewhat in *Cellular Co. v. Maxton* [1899] App. Cas. 326, 336,—the latest case on the topic. *Singer Mfg. Co. v. June Mfg. Co.* and *Reddaway v. Banham* are, after all, essentially of the same class; so that, as to each, it may be said that it is well settled that, while a trade-mark of a descriptive character cannot be monopolized as such, yet there may be such circumstances that subsequent users are bound to distinguish their merchandise, and may be restrained unless they couple with the use of the generic name some caution suitable to guard the

public from confusing the sources of production. In the case at bar it is alleged in the bill on this point that the respondents had put up their product in pint bottles, identically the same in shape and color as those used by the complainant, and had also used white labels, as does also the complainant. These are the only particulars as to which the bill describes simulation. The bottles of the complainant, however, are common pint bottles in use everywhere; and the exhibits produced to the court do not show labels whose color would be mistaken by the ordinary public as that of the white ones in use by the complainant. The complainant has throughout used on his label a picture of Mt. Ararat; being, for the eye of the purchaser, the most prominent feature which it contains. This was omitted by the respondents in their labels. Not only in this respect, but in others, theirs are distinguished in such marked manner from those of the complainant that, as we have already said, the public has a reasonable warning of the difference in the sources of production, although, as we have suggested, the article itself had been so long exclusively combined in the public mind with the complainant that little less than personal explanations would in many cases prevent the purchaser from deceiving himself. All that can be claimed of the respondents in this particular is that they conform to the rule of *Singer Mfg. Co. v. June Mfg. Co.*; and the complainant has not suggested to the court, and the court is unable to perceive from its own inspection of the exhibits, what the respondents could do, more than they have done, to perform their obligation in that respect. *Centaur Co. v. Marshall* (C. C. A.) 97 Fed. 785, 789. We are speaking here only of the exhibits which were brought to our attention. It was said orally that, at a hearing in the circuit court on a motion for a preliminary injunction, packages put on the market by respondents were produced, showing similitude to the complainant's article of merchandise in such particulars that, on suggestion by the court, respondents adopted new labels; but this matter was not brought out clearly, and our adjudication must, of course, depend on what was exhibited to us. On consideration of those exhibits, it is clear that the learned judge of the circuit court was correct in holding, as we have already said, that the respondents' label is so different in appearance from complainant's that no relief can be granted on this phase of the case.

The decree of the circuit court is affirmed, and the costs of the appeal are awarded to the appellees.

SCHROEDER v. BRAMMER.

(Circuit Court, S. D. Iowa, W. D. January 8, 1900.)

1. PATENTS—CONSTRUCTION OF CLAIMS—UNCERTAINTY OF DESCRIPTION.

A claim may properly be restricted to a description of the exact improvement claimed as the invention, and, where it shows by its terms that it is so restricted, it is not invalid because, standing alone, it does not describe a complete and operative machine; but the specification, includ-

ing the drawings, may be looked to for the purpose of ascertaining the old, known, or unclaimed elements or features which are to be combined in operation with the improvement described in the claim, and if the specification and claim, read together, describe an operative machine which will include the invention described in the claim, the patent will not be held void for uncertainty and vagueness of description.

2. SAME—INFRINGEMENT.

Mere changes in the positions of the several parts of a combination in a patented machine, which do not change the mode of its operation or produce different results, will not avail to defeat a charge of infringement.

3. SAME—INFRINGEMENT—WASHING MACHINE.

The Schroeder patent, No. 535,465, for an improvement in washing machines which consists of a combination of mechanical devices by which the driving wheel, while being rotated continuously in the same direction, imparts a rotary, reciprocating motion to the operating shaft, discloses a patentable invention, and not merely an aggregation of old elements, and is valid. Also, *held* infringed.

Bill in equity to restrain alleged infringement of letters patent No. 535,465, issued to complainant under date of March 12, 1895. Submitted on pleadings and proofs.

Frank D. Thomason, for complainant.

W. J. Roberts, T. A. Murphy, and L. G. Susemibel, for defendant.

SHIRAS, District Judge. The complainant in this case on the 12th day of March, 1895, obtained the issuance of letters patent No. 535,465, it being stated in the specifications that the—

"Invention relates to an improvement in means for operating washing machines, and it consists in a shaft which is revolved continuously in one direction by the operator, combined with an angular revolving shaft, which is made to revolve first in one direction and then in another, and a vertically moving cylinder placed upon the angular shaft, and which is provided with a double row of teeth or cogs, which extend partially around the cylinder, and which mesh with the pinion upon the driving shaft for the purpose of causing the angular shaft to revolve, all of which will be more fully described hereinafter. The object of the invention is to provide a mechanism for reciprocating rotary washing machines, whereby when the driving shaft is revolved continuously in one direction a rotary reciprocating motion is imparted to the operating shaft; the latter being provided with a pronged head, which causes the clothes to move first in one direction, and then in the other, in the frame of the washing machine."

To the specification, which contains a full description of the several parts of the combination, there are attached several drawings for the purpose of making plain the invention claimed, and the mode of its combination with the ordinary form of washing machines. Attached to the specification are two claims, the first of which reads as follows:

"An operating shaft having a rotary, reciprocating motion; a cylinder placed upon the shaft, and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft; and a double row of teeth or cogs upon the cylinder, extending at an angle to the shaft, combined with a driving shaft having means for revolving it, attached to one end, and a wheel for engaging the teeth on the cylinder at the other, the driving shaft being driven continuously in one direction,—substantially as shown."

The bill charges that the defendant is engaged in the manufacture and sale of washing machines which are an infringement upon

the invention covered by the patent above described, and a decree for an injunction and accounting is asked against the defendant.

In substance, it is averred in the answer that the letters patent issued to complainant are void, in that the specifications and claims therein contained do not sufficiently describe the alleged invention of complainant; that the description in the specification would not enable one skilled in the art to construct an operative machine; and that the machines made and sold by the defendant do not infringe upon the patent owned by complainant, or any rights secured thereby. Thus, the first question presented for consideration is whether the letters patent issued to complainant are void for insufficiency and uncertainty in the description of the invention sought to be protected. In passing, it may be said that it is not seriously questioned in argument that the machines made by the complainant are fully operative, and embrace a novel and useful combination of parts, but the contention of defendant is that the letters patent do not in fact describe the machines manufactured by complainant. In support of this contention it is claimed that in order to make an operative machine, including the combination patented by complainant, it is necessary to give support to the cylinder, and check its downward motion upon the upright shaft, by prolonging the inner end of the driving shaft after it has passed through the driving wheel, and thus forming a projection upon which the upper rim upon the cylinder can rest and be supported; it being claimed on behalf of defendant that, unless the inner end of the driving shaft is thus extended so as to make it a support to the cylinder when the cogs thereon drop below the driving wheel, the cylinder will slide so far down on the upright shaft that the cogs on the cylinder will cease to mesh with the cogs on the driving wheel, and the cylinder will of necessity cease to move. There can be no doubt that, unless the downward movement of the cylinder upon the upright shaft is checked before the cogs on the cylinder cease to mesh with the cogs on the driving wheel, the driving wheel could not cause the upright shaft to revolve, and the machine would not operate; and there can be no question that, in the machine manufactured by complainant, provision is made for preventing loss of contact between the cogs on the cylinder and the driving wheel, by prolonging the inner end of the shaft, after it passes through the driving wheel, a distance sufficient to enable it to form a support for the cylinder when the cogs thereon pass below the driving wheel, and thus the cylinder is prevented from dropping out of connection therewith. The contention of the defendant, however, is not that the machines as manufactured by complainant are not operative, but that to make them operative it is necessary to use therein a feature not described in the claims or specification of complainant's patent, and therefore the patent is insufficient and void because it does not contain a description of all the elements or features essential to make an operative machine. In support of his contention defendant quotes from the decision of the supreme court in the Case of the Incandescent Lamp Patent, 159 U. S. 465, 16 Sup. Ct. 75, 40 L. Ed. 221, wherein it is said:

"It is required by Rev. St. § 4888, that the application shall contain a written description of the device, 'and of the manner and process of making, constructing, compounding and using it, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected to make, construct, compound and use the same.' The object of this is to apprise the public of what the patentee claims as his own, the courts of what they are called upon to construe, and competing manufacturers and dealers of exactly what they are bound to avoid. *Grant v. Raymond*, 6 Pet. 218, 247, 8 L. Ed. 376. If the description be so vague and uncertain that no one can tell, except by independent experiments, how to construct the patented device, the patent is void."

The contention of defendant is that the claim and specifications do not point out the need of extending the inner end of the shaft upon which is pinioned the driving wheel, so as to form a support for the cylinder when the cogs thereon drop below the driving wheel, so as to prevent the cogs on the wheel and on the cylinder from becoming disengaged; and it is urged that a person might construct a machine in exact accordance with the terms of the specification, and yet it would be inoperative, because the specifications do not call for a support to the cylinder such as is afforded in the machines actually manufactured by complainant, by the prolongation of the inner end of shaft, O. It will be kept in mind that the requirement of section 4888 of the Revised Statutes is that the description shall be in such full terms as to enable any person skilled in the art to which the invention appertains to construct an operative machine. The statement in the specifications is that the teeth of the driving wheel "are made to mesh with the two rows of teeth or cogs upon the side of the cylinder, I, and thus cause the cylinder and the shaft, B, upon which it is placed, to revolve first in one direction, and then in the other." Any person, whether a skilled mechanic or not, can readily see that in order to cause the upright shaft to revolve it is absolutely necessary that the cogs on the driving wheel and upon the cylinder should be kept engaged, or, as is stated in the specifications, they must be made to mesh together. It would be equally apparent to any one that, if so much play was allowed to the cylinder that when the cogs thereon passed below the driving wheel they would cease to mesh with the cogs on the wheel, the upright shaft would cease to revolve; and therefore to a skilled mechanic it would be self-evident that the movement of the cylinder upon the upright shaft must be so restricted as to prevent the cogs from becoming disengaged. This would be necessary in order to make the machine operative. It would be necessary in order to meet the requirements of the specifications, to wit, that the cogs in the cylinder and on the driving wheel must mesh together. He would be but a poor mechanic who would not perceive, from the description in the specifications, the need of keeping the different sets of cogs meshed together, and who could not readily supply the means necessary to that end. But the patent does not in fact omit to point out a ready means for compassing the requirements of the specification, to wit, that the cogs upon the cylinder and the driving wheel are to mesh together. In the drawings which are made part of the specification the prolongation of the inner end of the driving shaft, O, is shown, and its mode of

operation in preventing the cogs on the cylinder from ceasing to mesh with those on the driving wheel is made entirely plain. It is, however, strenuously argued on behalf of defendant that the drawings cannot be resorted to to supply an omission in the written specifications. It may be true, as contended, that the claim which is intended to set forth fully and clearly the matter which the applicant seeks to have protected to him by letters patent cannot be enlarged by matters shown in the drawings; but we are not now dealing with the language of the claim proper, but are considering the objection urged to the patent, that the description therein is so vague and uncertain that it would not enable one skilled in the art, by following the description, to produce an operative machine. The drawings in fact form part of the description contained in the specifications, and can be resorted to in determining whether the patentee has given in his application such a description of the old and new features intended to be combined in the completed machine that a person skilled in the art can, from the description given, construct an operative machine. In the written portion of the specifications the need of keeping the cogs upon the cylinder and the driving wheel meshed together is made plain, and in the drawings a ready mode for preventing them from becoming disengaged is provided for; and the patent issued to complainant cannot, therefore, be defeated and held void on the ground that it is so vague and uncertain in its description that a person skilled in the art cannot, by following the description, produce an operative machine.

It is also contended that complainant's patent should be held invalid because in the claims of the patent nothing is said about the prolongation of the inner end of the shaft, O, as a means for supporting the cylinder, and preventing the cogs thereon from ceasing to mesh with the cogs on the driving wheel. If it had been the purpose of complainant to claim this means of supporting the cylinder, as part of his invention, he should have included it in the claims; but, if he did not so purpose, then it was properly omitted. The office of the claim is to clearly point out that which the applicant asserts he has invented, and which he seeks to protect by securing letters patent therefor. In cases wherein the invention, to be of practical use, is intended to be combined with known means or features, it is requisite that, in the descriptive part of the application or specifications, reference should be made to the old or known matters, and the mode of combining the operation of the old and the new should be pointed out; for this is necessary to meet the requirement that the description must be such that one skilled in the art by following its provisions will be enabled to construct an operative machine; but, when the claim proper is formulated, it should be confined to that which constitutes the exact invention claimed by the applicant for a patent. A claim which shows by its terms that it is intended to be restricted to the exact improvement claimed as the invention will not be held invalid because, standing alone, it would not describe a complete and operative machine. We look to the specifications, including the draw-

ings, to ascertain the old, known, or unclaimed elements or features which are to be combined in operation with the improvement described in the claim; and if the specifications and claim, read together, describe an operative machine which will include the invention described in the claim, then the patent will not be held to be void for uncertainty and vagueness of description.

It must therefore be held in this case that the letters patent issued to complainant are not open to the objection urged, of being invalid for want of certainty either in the specification or the claims; and, as the invention patented is novel and useful, it must be held that the complainant is entitled to invoke the aid of the court against infringements upon the rights secured by the letters patent; and thus we reach the question whether it appears that the machines manufactured and offered for sale by defendant do in fact include the invention secured to complainant. In the argument before the court it was conceded by counsel for both parties that the question of infringement arose only under the terms of the first claim of complainant's patent. The ultimate purpose of the mechanism devised by complainant is, as stated in the specifications, to secure a rotary, reciprocating motion to the upright shaft which carries on its lower end prongs which cause the articles to be washed, when placed in the tub, to move first in one direction, and then in another. The first claim of the patent describes complainant's invention to secure this result; and, reading it in the reverse direction, it calls for a driving shaft to be driven continuously in one direction, with a wheel attached to the inner end, so constructed as to engage with a double row of teeth or cogs on the cylinder, which cylinder has a sliding motion on the upright shaft, but also communicates its reciprocating motion to the upright shaft, and thus causes the direct and reverse motion of the prongs attached to it. In the machines manufactured by defendant, a combination is used which is fairly described by the first claim of complainant's patent. Defendant's machines have the driving shaft operated continuously in one direction. Upon the inner end of this shaft is a wheel with teeth or cogs thereon intended to engage with the cogs on the cylinder. The cylinder has a sliding motion on the upright shaft, and has also a double row of cogs or teeth thereon; and by the engagement of these rows of cogs, which project in opposite directions, with the cogs on the wheel on the inner end of the driving shaft, the desired rotary, reciprocating motion is given to the cylinder, and through it to the upright shaft having the prongs attached to the lower end. The mechanism found in defendant's machines is thus fairly described in the first claim of complainant's patent, but it is said the machines, as actually manufactured by the parties, show differences which should be regarded in determining the question of infringement. The only difference observable in the machines, so far as the first claim of the patent is involved, is in the position of the double row of cogs upon the cylinders. In the machines made by complainant the two rows are placed back to back, and encircle the cylinder midway of its length. In the defendant's machines the two rows of cogs encircle the cylinder,—one

at the top, and the other at the bottom,—but this change in the position of the cogs produces no change in the mode of operation of the mechanism. In both machines the double rows of cogs are intended to engage with the cogs on the driving wheel in exactly the same manner, and to accomplish the same result; and mere changes in the position of the several parts of the combination, which do not change the mode of its operation, nor produce different results, cannot be availed of to defeat the charge of infringement. This change in the position of the double rows of cogs on the cylinder also caused a change in the position of the larger cogs, which in both machines serve the purpose of elevating and lowering the cylinder upon the upright shaft, and thus aid in producing the reciprocating motion of the cylinder; but, while these changes in position make some difference in the mere appearance of the machines, they do not in fact introduce any new element into the combination, nor do they omit any element found in complainant's machine. In substance, the invention covered by complainant's patent is found in the method of causing a rotary, reciprocating motion to the upright shaft by the engagement of the cogs on the wheel on the inner end of the driving shaft with the double rows of cogs on the sliding cylinder sleeved upon the upright shaft, and all these features are reproduced in defendant's machines for the purpose of accomplishing the same result.

From this it follows that defendant's machines do in fact infringe upon the invention secured to complainant by the letters patent No. 535,465, and the complainant is therefore entitled to the usual injunction, and decree for an accounting.

(On Rehearing.)

Counsel for the defendant in this case has filed a petition for a rehearing, based upon two grounds, which will be considered separately; the first being stated in the following terms:

"First. Because the evidence shows that claim No. 1 of plaintiff's letters patent sued on is for an entire combination, and includes as an element thereof an extension of the horizontal or driving shaft, O, inwardly beyond the pinion or wheel, R, so as to co-operate with the cylinder, I, and that defendant's machine or combination does not include such an element, but, on the other hand, employs a horizontal or driving shaft without any extension inwardly beyond the pinion or wheel thereon; the wheel thereon being placed at its extreme end. Defendant thus omits a claimed element of plaintiff's combination, and thereby avoids infringement."

It will be noticed that counsel no longer claim, as was most strenuously urged upon the original hearing, that the letters patent owned by complainant are void for uncertainty and insufficiency of description, in that in order to make the machines operate it was necessary to give support to the cylinder so that the cogs thereon would not drop out of engagement with the cogs on the driving wheel, and that in the specifications the need for so doing, and a mode for giving such support, were not pointed out and described. The position now taken is that plaintiff's letters patent are for an entire combination, and include as an element an extension of the

driving shaft, O, inwardly beyond the pinion or wheel, R, so as to co-operate with the cylinder, I, and that this element is wholly omitted from the combination found in the defendant's machines, and therefore the latter are not an infringement. In other words, it is now assumed that the need for giving support to the cylinder in order to prevent the cogs thereon from ceasing to mesh with the cogs on the driving wheel is so apparent that it must be held that the complainant intended to include in his combination the prolongation of the driving shaft as a means for furnishing this necessary support. For the sake of the argument, let it be assumed that the prolongation of the driving shaft, O, beyond the wheel, R, is part of the combination covered by complainant's patent. What purpose is subserved thereby? The prolongation forms a support for the rim of the cylinder, so as to prevent it from dropping so far down upon the upright shaft as to permit the cogs on the cylinder from ceasing to engage with those on the wheel. In other words, the projection of the driving shaft beyond the wheel serves to keep the cogs on the cylinder and those on the driving wheel meshed together. In the combination found in the machines made by the defendant, the same necessity exists of keeping the cogs on the cylinder meshed with those on the driving wheel. In plaintiff's machines, unless a proper support is given to the cylinder, the cogs thereon pointing upward will not mesh with the cogs on the underside of the driving wheel. In defendant's machines, unless a proper support is given to the cylinder, the cogs thereon pointing upward will not mesh with the cogs on the underside of the driving wheel. In both machines the need of giving support to the cylinder in order to secure the engagement of the upward pointing cogs on the cylinder with the underside of the driving wheel exists, and in both machines this needed support is furnished by a projection upon which the rim of the cylinder rests during the time when the upward-pointing cogs are engaged with the underside of the wheel. Therefore it is not true that the element of a support to the cylinder, in order to prevent a disengagement of the interacting cogs, which is found in complainant's machines, is omitted in those made by defendant. On the contrary, that element is found in the defendant's machines, and is as necessary to the successful operation thereof as it is in those made by complainant. In the one case the support is given by a projection of the driving shaft, and in the other by a projection attached to the upright elbow by which the driving shaft is supported at its inner end. These two supporting projections serve the same purpose or function in both machines, and the only difference therein is that they occupy different places in the two combinations, and this mere change in position will not defeat the charge of infringement.

The remaining ground upon which a rehearing is sought is stated as follows:

"Second. Because a combination, in the sense of the patent law, is a union of elements,—elements so united that their reciprocal influence on each other, or their joint action, produces a common result. A construction of claim No. 1 which excludes the inner extension of the shaft, O, inwardly beyond the pin-

ion or wheel, R, as an element thereof, so destroys the union (1) of the operation shaft with the cylinder placed thereon with (2) the driving shaft, having means for revolving it attached to one end, and a wheel for engaging the teeth on the cylinder at the other, that said elements have no reciprocal influence upon each other, nor a joint action to produce the common result claimed for plaintiff's invention. The said elements, without the said inner extension or prolongation of the shaft, O, beyond the pinion, R, are merely in mechanical juxtaposition, and not in vital union, and constitute a mere aggregation of devices. In order to make claim No. 1 a claim covering a patentable combination, it is necessary to read into it the means of union, to wit, the aforesaid inner extension of the shaft, O, beyond the pinion, R, described in plaintiff's letters patent; and the evidence shows that defendant does not employ such element in his combination, or any equivalent thereof."

The ultimate purpose sought to be accomplished by the complainant in setting up the machine manufactured by him was to give to the articles placed in the tub to be washed a reversing or reciprocating rotary motion. The articles in the tub are moved by the prongs attached to the end of the upright shaft, which passes downward through the cover or lid of the washtub. The motion of the prongs is governed by the motion of the upright shaft to which they are attached. If a reciprocating, rotary motion could be given to the upright shaft, the like movement would be given to the prongs, and through them to the articles in the tub. The complainant secured this reciprocating motion in the shaft by the method he devised for causing the cogs on the driving wheel, while being rotated continuously in one direction, to mesh or engage alternately with the double row of cogs on the cylinder, and in this method of alternating the engagement of the cogs on the wheel with those pointing in opposite direction on the cylinder is found the invention covered by complainant's patent. All the elements described in the first claim of the patent co-act in producing the desired result, and the contention of defendant that the machine presents a mere aggregation of old and known elements, within the rule laid down in *Hailes v. Van Wormer*, 20 Wall. 363, 22 L. Ed. 241, is wholly untenable. The alternating or reciprocating motion desired to be produced in the upright shaft is not the ordinary result produced by placing the cogs on the driving wheel in juxtaposition with the cogs on the cylinder. The continuous motion in one direction of the driving wheel would ordinarily give a continuous rotary motion to the cylinder, and through it to the upright shaft, and the reciprocating motion found in the machines manufactured by complainant is the result of the peculiar method therein employed for securing the alternate intermeshing of the two rows of cogs on the cylinder with the upper and under sides of the driving wheel, and, to secure this result, every element named in claim 1 of the patent co-acts with the others therein described; and therefore the invention cannot be defeated on the ground that the combination is a mere aggregation of known elements.

It is finally contended by counsel for defendant that claim 1 of the patent is void because it does not include the prolongation of the inner end of the driving shaft, O; the argument being that, without the support given to the cylinder by this prolongation of the driving shaft, the cogs on the wheel and cylinder would cease

to mesh, and the upright shaft would cease to move. The logical result of this contention would be the holding that a claim, in order to be valid, must include a description of everything necessary to accomplish the ultimate result aimed at. As pointed out in the opinion heretofore filed, in the specifications such a description must be given that one skilled in the art will be enabled thereby to construct an operative machine, but in the claim proper it is only necessary to describe that which it is sought to cover by the letters patent. The contention of the defendant is that, in order to the successful working of complainant's machines, it is necessary that the cogs on the driving wheel and cylinder should be kept engaged, and to accomplish this result the prolongation of the driving shaft is essential, in order to form a support to the cylinder. The need of keeping the cogs properly meshed is made plain on the face of the specifications. To accomplish this, it is not only necessary that a support should be given to the cylinder in order to prevent it slipping down on the upright shaft, but such support must be given to the driving shaft, the wheel thereon, and the upright shaft, that they will co-operate, and this is given by the elbow through which the driving shaft passes, and which elbow also forms the support for the upright shaft; and this elbow or its equivalent is just as necessary to secure the meshing of the cogs on the cylinder and wheel as is the support given to the cylinder by the prolongation of the shaft, O, or its equivalent. The means for placing and keeping in proper position the different parts of the mechanism are fully described in the specifications, and therefore the claim was properly restricted to the particular elements and combination which constitute the invention sought to be patented. The need for keeping the cogs enmeshed is fully shown in the specifications and claim, and a means for so doing is included in the descriptive part of the specifications. To keep the cogs enmeshed, it is not only necessary to prevent the cylinder from slipping too far down upon the upright shaft, but the shaft upon which the cylinder is sleeved must be kept in an upright position, and in such a relation to the driving wheel that the cogs thereon will engage; and this result is not secured by the prolongation of the driving shaft, but by the use of the elbow through which it passes, and which elbow holds the upright shaft in its proper place. The position and mode of operation of these necessary parts of the mechanism are made plain in the specifications and drawings, but are not included in the claim; yet, if the contention of the defendant is correct, they should all be embraced in the claim proper, because they are necessary to the successful operation of the machine as a whole. But this is certainly not the rule to be applied. The claims are properly restricted to a description of the exact invention sought to be protected by the letters patent, and as the invention therein described, when combined with the other parts of the mechanism which are fully set forth in the specifications, and which are treated as old and known, will produce the beneficial and novel result aimed at by the invention, the patent cannot be held void because each of the claims therein does not embrace a description of all the means employed

to make an operative machine; these means, however, being fully described in the specifications. The petition for a rehearing is therefore overruled.

NATIONAL MFG. CO. v. BLAKEY.

(Circuit Court of Appeals, Third Circuit. November 28, 1899.)

Nos. 15, 16.

PATENTS—INFRINGEMENT—THREAD PROTECTORS FOR IRON PIPE.

The Blakey patent No. 311,171, for a thread protector for wrought-iron pipe, which is made by rolling a flat iron bar of iron with longitudinal threads on one side, cutting the same into suitable lengths, and bending each piece into a ring or annulus with the threads on the interior surface, discloses invention, and is valid. Also held infringed by two protectors, made and sold by defendant, having rolled threads, and not infringed by a third, in which the threads are made by tapping.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit in equity for infringement of a patent. Both parties appeal.

In the circuit court the following opinion was rendered by Buffington, District Judge:

In this case Mildred Blakey, by virtue of patent No. 311,171, of January 27, 1885, seeks to enjoin the manufacture and sale by the respondents of pipe protectors represented by Exhibits 1, 2, and 3. Pipe protectors have been considered by this court in *Kurtz v. McDowell*, No. 19, May term, 1896, and by the circuit court of appeals of this circuit, *McDowell v. Kurtz*, 23 C. C. A. 119, 77 Fed. 206, while this particular patent was before us in *Blakey v. Kurtz*, No. 7, November term, 1896. In view of these cases, and the details of the art therein stated, no general account is here needed. The invalidity of the patent and noninfringement are now relied on. As to the first defense, we see nothing in the record to successfully assail the patent. Of the various patents cited it is sufficient to say that none of them disclose Blakey's invention. He seems to have been the first to show a thread-rolled, as distinguished from a thread-tapped, ring protector. This defense, therefore, is not sustained. In *Blakey v. Kurtz*, *supra*, we had occasion to pass on a question of infringement of this patent. The alleged infringing device had two threads at the outer edge of the ring, and the flanked an open, intermediate channel. Such channel constituted a material and functional departure from the full thread-faced device disclosed in Blakey's patent, and the device was held not to infringe. Types 2 and 3, now before us, have no such open channel or web, and therefore present a question different from the one then before the court. Whatever general language was used in discussing the then question, the present infringement was not involved, and we regard the question of infringement of said two types as still an open one. In both of them the threads are initially formed by rolling, and in neither is found what in this art is to be functionally regarded as an open web or channel. In form, it is true, they differ from the full-faced, thread-rolled annulus of the Blakey ring, in that certain threads are omitted at regular spaced distances across the entire face; but in substance they are the same. No functional difference or purpose is secured by these intermediate narrow breaks in thread continuity. The mode of initial attachment is the same. After attachment they protect the pipe in the same way. It would, therefore, seem they are left out for no purpose but to avoid literal and exact identity with Blakey's device. Such being the case, it would seem they should be adjudged to infringe, unless the

patentee has so narrowly restricted his claim as to limit him to an exact, literal copy thereof. We are free to say in our opinion in *Blakey v. Kurtz*, supra, we made use of general language which gives countenance to such a view, but such language must be considered with reference to the question then before the court. The open web or channel, placed there for a new functional purpose, constituted a different functional device from Blakey's invention, and we therefore held that the flanking threads on either side of a functional channel did not constitute "a series of parallel independent threads," as claimed by Blakey. But it by no means follows that an infringer who omits here and there a few threads, not for any functional purpose,—who changes exact form, but retains substantial substance,—should thereby escape. Now, it is true types 2 and 3 do not have a single, continuous thread, extending through the entire ring surface; but wherever the thread appears it is in the line of the regular spiral path, and the occasional break of thread continuity makes no difference in functional effect from that of a continuous thread; nor is it either of such size or position as to secure the functional effect of an open channel. To allow an infringer to escape infringement by such an omission would be to make substance of shadow. The addition of an outer shoulder or flange on No. 3 simply serves as a cap or lock, and in no way affects the thread function. Being of opinion, therefore, that types 2 and 3 are, in substance and effect, the Blakey ring, they will be held to infringe. Type No. 1 presents a different question. In it a strip is first rolled, having four flat-faced projections, one at each edge and two in the middle space. These projections are not rolled threads, and are not, and from their width and rectangular shape cannot be, used as threads. The strip is bent into a ring, after which it is tapped, and threads cut on the surface of the projections, viz. four threads on the outer one and two on each of the others. In form and substance this is but the full-threaded, old-styled tapped coupler of the art, with some intermediate threads left out to lessen the wear, tear, and expense of tapping. It has no threads "formed on its inner surface, substantially as and for the purpose described," as in the Blakey patent. It has no rolled threads whatever, and in no way embodies the invention disclosed by Blakey. It simply uses channeled-rolled, flat-faced, projections as seats for tapping threads. We are, therefore, of opinion the charge of infringement is not sustained in type No. 1. Let a decree be prepared in accordance with this opinion.

Marshall H. Christy, for plaintiff Mildred Blakey.

Edward A. Lawrence, for defendant National Mfg. Co.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. By the decree of the court below it was declared that the patent sued upon, namely, patent No. 311,171, dated January 27, 1885, issued to Mildred Blakey, for a thread protector for wrought-iron pipe, is good and valid, and it was thereby further found and adjudged that the defendants had infringed that patent by constructing and selling thread protectors for wrought-iron pipe, substantially identical, respectively, with the complainant's exhibit defendants' ring No. 2, and the complainant's exhibit defendants' ring No. 3, but that the manufacture and sale by the said defendants of thread protectors for wrought-iron pipe, substantially identical with the complainant's exhibit defendants' ring No. 1 did not constitute an infringement thereof. Accordingly the bill was sustained, and the usual relief awarded with respect to ring No. 2 and ring No. 3, but as to ring No. 1 the bill was dismissed. Thereupon the respondents appealed from so much of the decree as was adverse to them, and the complainant from so much thereof as related to complainant's exhibit defendants' ring No. 1.

But after full examination of the record, and upon careful consideration of the arguments of counsel, we have reached the conclusion that the action of the court below was right in every particular; and this conclusion, we think, is sufficiently supported by the opinion which was filed by the learned district judge. The decree of the circuit court is in all things affirmed, and it is now further ordered and decreed that the costs of the respective appeals shall in each instance be paid by the party appellant.

NUTTER et al. v. BROWN et al.

(Circuit Court of Appeals, First Circuit. January 2, 1900.)

No. 307.

1. PATENTS—INFRINGEMENT—CONSTRUCTION OF CLAIM.

Where a patentee does not show what are the real use and extent of his alleged improvements, so as to enable the court to see that they have made a substantial advance in the art, it cannot broaden the claims of the patent as to equivalents to cover anything which does not respond precisely to the form and letter of the patent.

2. SAME—COMMERCIAL SUCCESS.

Where the public use of a patented article shown relates to an indiscriminate use, rather than to use by manufacturers and other persons engaged in the art, it is not of especial value to the court in a suit upon the patent.

3. SAME—INFRINGEMENT—BICYCLE BELLS.

Claims 1 and 8 of the Ericson patent, No. 491,012, for a bicycle bell, which is sounded by bringing a friction roller into contact with the tire of the wheel, *held* limited, under the evidence, to the precise construction shown, and not infringed by the bell of the Barker patent, No. 608,146.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

James E. & William Maynadier, for appellants.

Charles L. Burdett, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This appeal relates to a patent issued to Lewis E. Ericson on January 31, 1893, on an application filed on April 25, 1892. Claims 1 and 8 are the only ones in issue. Claim 1 is as follows:

"In a bell for bicycles and other velocipedes, an oscillatory plate or disk mounted to turn in the rear of the gong, and complementary striking mechanism carried by said plate, and adapted by the movement thereof to be thrown into and out of action by contact with and removal from the bicycle or velocipede wheel."

As to claim 8, the complainants, now the appellants, say correctly that it is a combination of the first claim with certain other described mechanism. Therefore, if the alleged infringing device does not infringe the first claim, it cannot infringe claim 8.

There is a lack of anything in the record showing what is the pith of the alleged invention covered by claim 1, or what was the real advance in the art, if any, which it accomplished. All that appears in the patent about it is as follows:

"My invention relates to that class of bells for bicycles and other velocipedes in which the sounding of the bell is due to the frictional contact of the wheel of the machine with power-transmitting connections. My invention consists essentially in an oscillatory plate or disk carrying the striker and operating mechanism therefor, said plate or disk, by its movement, being adapted to throw its striker-operating mechanism into and out of engagement with the bicycle wheel, to actuate it or to allow it to remain at rest. It also consists in the novel constructions, combinations, and arrangements hereinafter fully described and specifically pointed out in the claims. The object of my invention is to provide a simple, compact, and effective bell for bicycles and other velocipedes, which can be readily adjusted to the machine, and which can be thrown into and out of action with ease and rapidity."

The appellants, at the hearing, said:

"The main novelty of the bell described in the patent in suit is that it is the only bell of its class in which the friction roller can be brought into and out of contact with the bicycle wheel by simply swinging a disk or lever, all the parts except those carried by the disk or lever being carried by the rigid bracket which is rigidly secured to the frame of the bicycle."

This, however, must relate to the device as shown by the entire patent, including all the claims. However this may be, the proposition contains nothing which, of itself, involves invention. The prior art in this class of bells, as the complainants maintain, put the movable point so as to oscillate the whole bell; the complainants changed it so that only the striking mechanism oscillated; and the respondents put it still further from the bicycle frame. Whether these changes cover anything of a substantial character, or whether they relate to mere detail of form, or to mere convenience, or to mere matter of fancy, the proofs in this record do not show. In *Manufacturing Co. v. Holtzer*, 15 C. C. A. 63, 67 Fed. 907, decided by us on April 16, 1895, it was said, at page 64, 15 C. C. A., and page 908, 67 Fed., that "the right to improve on prior devices, by making solid castings in lieu of constructions of attached parts, is so universal in the arts as to have become a common one, so that the burden rests on any one who sets up this improvement in any particular instance as patentable to show special reasons to support his claim." So, by parity of reasoning, it is so common in the arts to shift the movable point, when there is a movable point, that the mere statement that it is shifted will not enable the court to pronounce that there has been a substantial advance in the arts.

Therefore, so far as claim 1 is concerned, we are left without anything beyond what is presumed from the issue of the patent, in favor of either novelty or invention. Consequently, we are governed by the rule applied by us in *Masten v. Hunt*, 5 C. C. A. 42, 55 Fed. 78, and in *Ball & Socket-Fastener Co. v. C. A. Edgerton Mfg. Co.*, 37 C. C. A. 523, 527, 96 Fed. 489, 493, as follows:

"The patentee did not show the court what were the real use and extent of his alleged improvement, and therefore the court was unable to find infringement in anything which did not respond precisely to the form and letter of the patent."

Applying this rule, we find, among the elements expressly stated in claim 1, "an oscillatory plate or disk, * * * and complementary striking mechanism carried by said plate"; and it becomes impossible for us to hold that anything is an infringement which does not strictly embody these two elements, or to broaden out the claim so as to accept as equivalents what we might have been justified in accepting, if it had been shown by the record that the improvements had made a substantial advance in the art. Instead of "an oscillatory plate or disk," carrying the striking mechanism, we find that the respondents' "plate or disk" is rigidly secured to the frame, and that all which oscillates is the friction wheel, with its incidental parts. Therefore, on any construction which we can give the claim in view of what we have said, it is impossible to hold that the respondents' device infringes.

The appellants, however, lay stress on the word "complementary," found in the claim, and they maintain that, by force of this word, the claim is satisfied if any portion of the mechanism required to be operated in sounding the gong is mounted on an "oscillatory plate or disk"; and, further, that the oscillatory lever, which, in the respondents' device, carries the friction wheel, is such "oscillatory plate or disk." There is no doubt that the oscillatory lever might be regarded as the equivalent of the complainants' "plate or disk"; but, whatever meanings can be given to the word "complementary," no reasonable construction of claim 1, in view of the fact that it must be limited, as we have said, to the mere matters of detail shown by it, can have any relation to an "oscillatory plate or disk" which does not carry the substantial portions of the striking mechanism, but only what sets the striker in motion.

The appellants urge upon us the very common argument based on extensive public use. Public use, so far as any is shown, may have relation to other elements of their device than those covered by claim 1; and, as it relates to an indiscriminate use rather than to use by manufacturers and other persons engaged in the art, it can, in no event, be that kind of public use which the courts regard as of especial value in patent suits. This topic is disposed of by the limitations which we have put on the application of propositions of this character in *De Loria v. Whitney*, 11 C. C. A. 355, 63 Fed. 611, 621; *Manufacturing Co. v. Holtzer*, 15 C. C. A. 63, 67 Fed. 907, 908; *Bates v. Keith* (C. C.) 82 Fed. 100, 104, affirmed 28 C. C. A. 638, 84 Fed. 1014. The court below held correctly that there was no infringement as alleged in the bill.

The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellees.

AMERICAN ELECTRICAL NOVELTY & MANUFACTURING CO. v. ACME
ELECTRIC LAMP CO. et al.

(Circuit Court, S. D. New York. December 6, 1899.)

PATENTS—INFRINGEMENT—LAMPS.

The Hitzelberger patents, design patent No. 29,939, for a design for a portable lamp body, and No. 617,592, for an electric device for the lamp, as to claims 1 and 3, *held* valid, and infringed.

This was a suit in equity for infringement of certain patents. On final hearing.

Thomas Ewing, for plaintiff.

George B. Lester, for defendants.

WHEELER, District Judge. This suit is brought upon design patent No. 29,939, dated January 3, 1899, and patent No. 617,592, dated January 10, 1899; one for the design for a portable lamp body, and the other for an electric device for the lamp. The case has been submitted on pleadings and proofs by the plaintiff, but without argument or brief on behalf of the defendant. Upon examination of the record, the design patent and claims 1 and 3 of the other appear to be valid, and to have been infringed. Decree for plaintiff.

THE MARY ADELAIDE RANDALL.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 58.

SHIPPING—CONSTRUCTION OF TIME CHARTER—TIME FOR DISCHARGING CARGO.

A charter party for as many voyages between given ports as can be made between the date of the charter and a future date, and which contains stipulations for lay days in loading and discharging, for customary dispatch, and for the payment of wharfage by the charterer, is a time contract for as many voyages as can be performed within the time specified, including the necessary detention upon each voyage for loading and discharging cargo; and the vessel is not bound to enter upon a voyage which it is reasonably certain cannot be completed and the cargo discharged before the expiration of the charter limit.

Appeal from the District Court of the United States for the District of Connecticut.

For opinion in district court, see 93 Fed. 222.

Chas. C. Burlingham, for appellants.

Samuel Park, for appellee.

Before WALLACE, IACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The charter party, for a breach of which the action was brought, by its terms entitled the charterer to the use of the vessel "for as many voyages as the vessel can make from Fernandina, Florida, to New York between the date of this charter [November 8, 1897] and June 30, 1898." The vessel had com-

pleted four round voyages, and was in readiness May 18, 1898, to commence another; and the alleged breach was the refusal of the master to make another round voyage. The defense was that the vessel could not make another voyage and discharge her cargo within the charter period. The average time of the previous voyages ($28\frac{1}{2}$ days), including discharge ($15\frac{1}{4}$ days), was $43\frac{3}{4}$ days; and the proofs justify the conclusion that the vessel could not have completed another voyage, if, within the meaning of the contract, the voyage includes the discharge as well as the trip from port to port.

We agree with the court below that the charter party was a time contract, and that its meaning was to charter the vessel for as many voyages as could be performed within the time specified, including the necessary detention upon each voyage for loading and unloading. If this was not the intention, the parties would have stipulated for a specified number of voyages. They undoubtedly took into consideration the number of voyages that the vessel could probably complete between the date of the instrument and the ensuing 30th day of June, and this could not have been done without estimating the time to be consumed in loading and discharging.

The learned district judge points out in his opinion that the parties could not have used the term "voyage" in the strict sense, signifying the actual transit of the vessel from port to port, because the various stipulations of the contract providing for receiving merchandise on board during the voyage, for lay days in loading and discharging, for customary dispatch, and for the payment of wharfage by the charterers, indicate the contrary, and denote that the voyages meant are those in which receiving and discharging cargo and lying at the wharf are incidents. We concur in his observations.

The only adjudged case which seems to be in point is *Poland v. Coal Co.*, 14 Blatchf. 519, Fed. Cas. No. 11,245. In that case the vessel was chartered "for a series of voyages," from and to certain ports, "from the 2nd day of May until the 1st day of November"; and the question was whether the charterer was bound to furnish her with a cargo in the latter part of October. The court (Chief Justice Waite), deciding that the charterer was not bound to furnish the cargo, said:

"The charter party being for 'a series of voyages,' the libellant could not be required to receive, or the respondent to furnish, a cargo under the charter, unless there was reasonable cause to believe that the voyage could be completed in the usual and ordinary way by November 1st. * * * After allowing the respondent such time as it was entitled to under the charter for loading the vessel, there was no reasonable probability that a voyage to Boston could be completed by November 1st."

The decree is affirmed, with costs.

J. C. HUBINGER CO. v. QUINCY HORSE-RAILWAY & CARRYING CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 588.

CIRCUIT COURT OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTION.

A suit brought to have ordinances granting a franchise to construct and operate a street railroad annulled on the ground that they impair the obligation of a contract made by an act of the legislature and a prior ordinance, by which plaintiff claims to have been granted an exclusive franchise, and deprive plaintiff of property without due process of law, necessarily involves a constitutional question, and the circuit court of appeals is without jurisdiction of an appeal therein.¹

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

John E. Craig, for appellant.

J. F. Carrott, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge. The motion to dismiss the appeal herein because this court lacks jurisdiction to entertain it must be sustained. Constitutional questions are involved, and under section 5 of the judiciary act of 1891 the right of appeal given to the supreme court is exclusive. The bill was brought by the appellee, the Quincy Horse-Railway & Carrying Company, alleging an "exclusive right and privilege to establish and operate upon and over the streets of the city of Quincy railways for carrying persons and things for the term of fifty years from the passage" of the act of February 11, 1865, by authority of which, and of certain ordinances of the city, the right was obtained; and also alleging the invalidity of a certain ordinance, No. 31, passed on the 7th day of April, 1898, and a later ordinance, No. 39, purporting to grant to the appellant, the J. C. Hubinger Company, "the right to establish and maintain an electric street railway over certain streets and avenues in the city of Quincy," on the constitutional grounds that the last-named ordinances, if enforced, would impair the obligation of the complainant's contract with the state and city, would violate the fourteenth amendment to the constitution of the United States by depriving the complainant of property without due process of law, and by denying to the complainant within the jurisdiction of Illinois the equal protection of the laws. The answer of the appellant denied that the rights and franchises acquired by the complainant were exclusive, or constituted property rights, within the meaning of the fourteenth amendment; and asserted the right of the city council of Quincy to grant to any other corporation the privilege of occupying any street of the city not already occupied by the complainant. By its decree the court adjudged the right of the complainant to be exclusive, as alleged, and the ordinances in favor of the appellant to be wholly null and void as against

¹ As to jurisdiction of circuit courts of appeals in general, see notes to *Lau Ow Bew v. U. S.*, 1 C. C. A. 6; *Emigration Co. v. Gallegos*, 32 C. C. A. 475.

the appellee; and error is assigned upon each of these provisions of the decree.

The response of the appellant to the motion to dismiss is, in substance, this: The mere averment of it in the bill does not raise a constitutional question. The appellant did not take issue on that proposition, but simply denied that a constitutional question was raised. The decree shows that the court determined the question solely upon a construction of the act of February 11, 1865, in respect to the right of the complainant to claim within its grant all of the streets of the city, whether it had occupied them or not. No question involving the construction or application of the federal constitution was involved at any stage of the proceedings. The appellant never claimed that the legislature of the state had no power to pass an act giving the appellee an exclusive right to operate a horse railway on such streets as it used. No attempt was made in the case to argue that the federal constitution had any connection with the matter in controversy. The appellant asked and obtained the right to operate an electric street railway on streets not occupied by the appellee at the time of the application. The sole question in this respect was whether the word "railways," as used in the act of 1865, meant only horse railways, and did not prevent granting to the appellant the privilege of constructing and operating an electric railway on streets not occupied by the appellee. The court did not, in its decree, declare the ordinances in favor of the appellant null and void because they impaired contract rights, or were otherwise in violation of the federal constitution; and, granting that the legislature of the state had power to grant an exclusive franchise to the appellee for the operation of a railway by any motive power it desired to employ, "it does not follow that a constitutional question is involved because another seeks (and obtains leave of the city council) to engage in the same business."

It is sufficiently clear, on this argument alone, that a constitutional question was involved. The disputed point was not, what would be the effect of the constitution if found applicable? That was well enough understood without discussion. But the question was, was any provision of the constitution applicable? The court might have concluded, on consideration of the statute of the state and of the city ordinances alone, that the franchise of the appellee was in no manner infringed or impaired by the ordinances in favor of the appellant, and that conclusion would have disposed of the case without the necessity of express reference to the constitution of the United States; and yet that would have been a decision that the provisions of the constitution, the benefit of which the bill had invoked, had no application to the case. But, on the other hand, when, on consideration of the statute and ordinances, the court reached the conclusion that the franchise asserted by the appellant was inconsistent with that of the appellee, it was only by application of one or the other of the provisions mentioned of the federal constitution that the court could have declared null and void the ordinances in favor of the appellant. The appeal is therefore dismissed, at the costs of the appellant.

MERRIHEW v. FORT.

(Circuit Court, N. D. Georgia. October 20, 1899.)

No. 1,080.

1. JURISDICTION OF FEDERAL COURTS—SUIT TO FORECLOSE LIEN—SERVICE ON NONRESIDENT DEFENDANT.

Under section 8 of the federal judiciary act of 1875, continued in force by the acts of 1887 and 1888, a federal court is given jurisdiction of a suit to foreclose a mortgage on real estate within the district, although the defendant is not an inhabitant of the district, nor found therein, where personal service is made upon him in another district.

2. MORTGAGE—DEED GIVEN AS SECURITY—FORECLOSURE.

Under Code Ga. 1895, § 2771 et seq., a deed to real estate, given to secure a debt, may be foreclosed by the grantee as a mortgage, notwithstanding a provision therein that it is to be construed as a deed passing title, and not as a mortgage, such provision being one for the benefit of the grantee, which he may waive at his election.¹

This is a suit in equity for the foreclosure of a mortgage. On objection to jurisdiction.

C. P. Goree, Geo. Westmoreland, and Goodwin & Hallman, for plaintiff.

J. M. Terrell, Geo. L. Bell, and Spencer R. Atkinson, for defendant.

NEWMAN, District Judge. Subject to certain informalities, which will be hereafter mentioned, this is a suit to foreclose a mortgage on real estate in the city of Atlanta, in the Northern district of Georgia, and to remove a cloud upon the title to the same; the complainant being a citizen and resident of the state of New York, and the defendant a citizen and resident of the Southern district of Georgia. Service was perfected by serving the defendant personally with a copy of the subpoena in Macon, in the Southern district.

The first question is as to the jurisdiction of the court to entertain the suit. Section 8 of the act of March 3, 1875 (1 Supp. Rev. St. [2d Ed.] p. 84), is as follows:

"That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain, to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks," etc.

By the act of March 3, 1887, as corrected by the act of August 13, 1888 (1 Supp. Rev. St. [2d Ed.] p. 614), it is provided that nothing in this last-named act shall be held, deemed, or considered to affect the section of the act of 1875 referred to. So that there can be no ques-

¹ As to foreclosure of mortgages in federal courts, see note to *Seattle L. S. & E. Ry. Co. v. Union Trust Co.*, 24 C. C. A. 523.

tion whatever as to the jurisdiction of the circuit court of this district to entertain this case.

Another question is raised by the defendant. The instrument sought to be foreclosed as a mortgage in this case is a deed given to secure a debt, conformably to the provisions of section 2771 et seq. of the Code of Georgia of 1895. While it is decided by the circuit court of appeals for this circuit in the case of *Ray v. Tatum*, 18 C. C. A. 464, 72 Fed. 112, that the deed given in such case may be foreclosed as a mortgage, it is contended that, under the peculiar language in this deed, that decision is not applicable. The language referred to is this:

"This conveyance is to be construed as a deed passing title, and not as a mortgage, and is intended to secure the payment, principal and interest, and all costs of collection, including ten (10%) per cent. attorney's fees, as therein provided, of the promissory note for the sum of five thousand dollars, this day lent to said first party by said second party," etc.

This stipulation is evidently for the benefit of the vendee, and the title is placed in him for the purpose of avoiding certain claims against the property in the event of the vendor's death, which might exist if it were simply a mortgage under the Georgia law. As it is only an instrument to secure a debt, and that is the effect of the whole transaction, the vendee may clearly elect, instead of asserting title in himself, to treat the deed as a mortgage, and proceed to foreclose the same as such in a court of equity. To what extent, in view of the pleadings, relief can be granted as to some of the matters set up in the bill, it is unnecessary at present to determine. The bill clearly shows that it was intended to be a proceeding to foreclose the deed given to secure the debt as a mortgage. This language is used: "And the complainant asserts his right to file this bill in your honor's court, and collect the same and foreclose his said lien." The prayer, however, for foreclosure is informal, and probably insufficient, but, as the bill contains sufficient allegations to show that its purpose was foreclosure, complainant may have leave to amend in this particular.

CLEAVER et al. v. TAYLOR et al.¹

(Circuit Court of Appeals, Fifth Circuit. January 9, 1900.)

No. 844.

SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—LACHES.

Complainants purchased certain lands, and received conveyances therefor, from commissioners appointed in a partition suit between the heirs of the deceased owner, and went into possession and made improvements thereon. Some 12 years later an action was brought against them by the heirs to recover the lands, pending which they made an agreement with the attorney and agent to purchase the lands from such heirs, and in consequence of such agreement a judgment was rendered for the plaintiffs in the action without contest. Complainants made a partial payment, which was accepted; but the conveyance made, which was not executed by the heirs themselves, did not give them a title upon which they could negotiate a loan, by which means it was understood that they were to procure

¹ Rehearing denied February 13, 1900.

the money to complete the payment. No better title was offered, and no further payment was made; but complainants continued in possession for eight years longer, when a writ of possession was issued on the judgment, to restrain the enforcement of which, and to compel a specific performance of the agreement of sale, complainants filed their bill in equity. *Held*, that having accepted and retained the payment made under the agreement made by their agent, and having sought to avail themselves of the benefit of the judgment permitted to be taken in reliance thereon, the defendants could not repudiate such agreement, which must be regarded as having been partially performed, and of which complainants were entitled to the full performance, by such conveyance or decree as would vest them with title to the land on their payment of the purchase money; the delay having been as much through the laches of defendants as of complainants.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

J. A. Martin and John G. Winter, for appellants.
Felix H. Robertson, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and PARLANGE, District Judge.

PARDEE, Circuit Judge. This is a suit in equity instituted in November, 1897, by the appellants, A. W. Cleaver and T. L. Criswell, against Isaac Taylor et al., appellees, to enjoin the execution of a writ of possession issued out of the United States circuit court at Waco, Tex., at the instance of the appellees, upon a judgment at law entered in that court on the 15th day of April, 1889, in cause No. 393, styled, "John D. Taylor et al. v. W. B. McAlister et al." Under the writ mentioned, the appellees sought to oust the appellants from certain lands possessed by them,—200 acres by said Cleaver, and 331 acres by said Criswell,—which land the appellants claim under an agreement of sale with the appellees, which agreement they seek in their bill to enforce. The cause came on to be heard at the May term, 1899, on the bill, answer, and replication, and the evidence adduced thereunder; and there was a decree dismissing the complainants' bill, and dissolving an injunction theretofore granted.

It appears that in 1876 a certain grant or survey of land in Falls county, containing 1,476 acres, and designated upon the map of said county as the "Josiah Taylor $\frac{1}{3}$ League," was owned by the heirs of Isaac Taylor, all of whom resided in the state of Tennessee. In that year the said heirs instituted a suit in the chancery court of White county, in that state, for partition among themselves of the lands belonging to the estate of their ancestor, the said Isaac Taylor, among which lands was included the above-noted one-third league. In this chancery proceeding the court appointed two of the heirs, Isaac Taylor and John D. Taylor, special commissioners to sell the lands in Texas, including said one-third league, belonging to said estate. Shortly thereafter, in the same year, the said Isaac and John D. Taylor came to Texas, and, as such commissioners, sold several tracts of land out of said third league. Of the lands so sold, the complainants, T. L. Criswell and A. W. Cleaver (appellants here), purchased, and by mesne conveyances acquired and went into possession of, the

several tracts of land by them respectively claimed in this suit,—Criswell, 331 acres; Cleaver, 200 acres. So stood the title, claim, and possession of the appellants when the Taylor heirs instituted their aforementioned ejectment suit against them in 1889 (No. 393), in which they recovered judgment April 15, 1889. It further appears that, after the aforementioned conveyances by John D. and Isaac Taylor, nothing was done concerning the lands involved in this suit until eight years afterwards, when the said Taylor heirs filed a suit in the district court of Titus county, Tex., for partition among themselves of the lands in Texas belonging to the estate of the said Isaac Taylor. This suit was numbered 2,060 on the docket of the Titus county court. This suit No. 2,060 seems to have been between the same parties and for the same object as the hereinbefore mentioned chancery proceedings in Tennessee in 1876; i. e. partition among the heirs. Among the lands so described to be partitioned is the Joseph Taylor one-third league (1,476 acres), located in Falls county, Tex., parts of which had been conveyed in 1876 by the commissioners of the Tennessee chancery court, John D. and Isaac Taylor, as hereinbefore set forth. November 8, 1884, the Titus county court entered a decree in No. 2,060 determining the respective interests of the heirs in the lands in Texas, and appointing commissioners to partition the same. April 16, 1887, the said court entered a further order in No. 2,060 reciting that an agreement, signed by all the parties, had been filed in the cause, asking a modification of the previous decree; and it was thereupon ordered, "in accordance with said written agreement," that the lands then unsold be sold at private sale, subject to the approval of the court; and appointed F. H. Robertson, of Waco, McLennan county, Tex., "agent to sell all of said lands situated in the counties of Falls and Limestone." The land involved in this suit is a part of lands which said Robertson was so constituted agent to sell. April 28, 1888, the court made a further order in said cause No. 2,060, under which order the agents appointed by previous orders of the court were authorized to make sales "without the approval or confirmation of the court being required to give validity to such sales; and trustees or agents are hereby empowered to make such sales final, and to make good and valid conveyances without the intervention of the court." The said F. H. Robertson, as agent for the Taylor heirs, under the agreement mentioned in and decreed in the above-noted orders of court, and under direct employment by said heirs to so represent them, undertook the business of the supervision and sale of the land embraced in the aforementioned Josiah Taylor grant claimed by the heirs, including the land here in controversy. He found appellants in possession of, and holding title to, the several tracts of land conveyed to them as hereinbefore set forth. Thereupon, in 1889, in the name of the Taylor heirs, and as their attorney, he instituted the suit No. 393 hereinbefore mentioned.

The appellants, Cleaver and Criswell, unquestionably had strong equities to urge in their defense, and they employed lawyers to protect their interests. The evidence shows that on the 8th of April, 1889, the following memorandum in writing was made, to wit:

		"Waco, April 8th, 1889.	
E. H. Criswell-Brock note.....		\$	869 40
Criswell land.....			797 87
Excess of 8½ acres.....			85 00
			\$1,752 27
Deduct \$47.50.....			47 50
			\$1,704 77
240	A. W. Cleaver		
	Hammond land.....	\$	945 00
Excess			55 00
			\$1,000 00
McAlister		\$	1,025 79

"Gen'l Robertson agrees to make title to Cleaver for the Hammond land, 200 acres, for \$1,000.00, cash, and agrees to make T. L. Criswell a title to the W. H. Brock and E. H. Criswell tracts, containing 331 acres, for \$1,704, cash. It is understood that this proposition shall stand open for a month from next Friday, 12th April, '89. The matter as to whether he will take judgment by default left open till Friday, 12, '89. To make such title as is given by decree of U. S. court in No. 393, J. D. Taylor et als. vs. W. B. McAlister et als.
"Robertson & Davis, Attorneys for Plaintiffs."

Indorsed on the back are the names of A. W. Cleaver and Felix H. Robertson.

Following this, on April 12th, the plaintiffs filed their first original petition, and on the same day the defendants filed their first original answer, and on April 15th the plaintiffs filed their first supplemental petition, by which pleadings the legal title of the parties was placed in controversy; the defendants relying solely upon the title as conveyed by the commissioners of the Tennessee court. An agreed statement of facts, limited to the strict legal titles of the parties, was entered into, a jury was waived, the case submitted, and there was a judgment for the plaintiffs. It is not disputed that this judgment was obtained through and by reason of the agreement to sell as set forth in the written memorandum, but both sides claim verbal agreements and understandings in addition. The bill herein charges:

"That, pending the hearing of said suit at law for the recovery of said lands as aforesaid, it was discussed and agreed between orators and said defendants, acting through their respective attorneys aforesaid, and particularly through and between the said Patrick and the said Robertson, that if orators would not assert and prosecute their defenses to said suit at law, and permit and consent to a judgment against them for the recovery of said land involved in said suit, that said plaintiffs, through their said attorneys, or through and by the said Robertson, would sell to orators a portion of said land, to wit, 531 acres thereof, then occupied by orators, and designated by metes and bounds as hereinafter set forth, at the price of five dollars per acre, to be paid when the said plaintiff made good title thereto to your orators. * * * Orators aver and say that, while said judgment recites appearance of parties defendant, in truth and in fact said judgment was agreed upon between said Patrick and Rice and said Robertson and Davis, and was in truth and in fact in all respects a consent judgment, based upon the contract, agreement, and considerations hereinbefore set forth."

It is alleged by the defendants in answer:

"The said Robertson then agreed to sell to said Cleaver 200 acres of said land and to said T. L. Criswell about 331 acres of said land, for the sum of

five dollars per acre, cash; the money to be paid as soon as the complainants could secure a loan from some mortgage company to pay for the same. The said Robertson agreed to aid said complainants by turning over to the attorney of complainants such original papers as might facilitate the negotiations to be carried on between said complainants and such mortgage or loan companies as the complainants might see proper to negotiate with. Said Robertson further agreed to make deeds for such tracts of land to such persons as the complainants might direct, but never agreed to perfect any titles."

B. H. Rice, attorney for Cleaver and Criswell in suit No. 393, testifies herein:

"It was further understood and agreed then and there between Messrs. Robertson & Davis, in behalf of their clients, and Patrick and myself, representing Cleaver and Criswell, that Messrs. Criswell and Cleaver should retain their respective tracts of land, making a good and sufficient title thereto, for the sum of \$5 per acre, and that Criswell and Cleaver would purchase same from plaintiffs in said cause for said sum of \$5 per acre. It was understood at the time that neither Cleaver nor Criswell, although this transaction was upon a cash basis, had any money with which to pay for their respective tracts of land. And it was upon the faith and basis of this agreement that our answers were not prepared and filed, setting up our defenses of title, etc., under purchase from the Taylor heirs, and contest made thereon; relying upon this agreement of Messrs. Robertson & Davis, acting for their clients, the plaintiffs in cause No. 393."

W. A. Patrick, another attorney for the same parties, testifies:

"On the day before appearance day we went up to Waco, with the view of filing answer from Cleaver and Criswell; and, after reaching Waco, we (Judge Rice and I) went to the office of Robertson & Davis, who were representing the plaintiffs; and, after talking with Robertson & Davis for awhile, there was a proposition made of settlement. From which side it came, I do not now remember. At any rate, it was agreed between Judge Rice and myself, for Cleaver and Criswell, and Messrs. Robertson & Davis, for the plaintiff, that we would make no fight, or file any answer, but allow them to take judgment for the land, with the understanding that Cleaver and Criswell were to have their respective tracts of land at the price of \$5 per acre. At the same time it was understood and agreed that I would go to work and negotiate a loan on the lands for Cleaver and Criswell, in order that Robertson & Davis' people might receive cash for the land from Cleaver and Criswell. My recollection is that it was also understood and agreed that evening that I would take the deed in my name in trust for Cleaver and Criswell, and that I would then sell to them, taking their notes for the purchase money, and that I would then negotiate the notes, and realize the money to pay the plaintiffs for the land."

F. H. Robertson himself testifies:

"In said verbal agreement it was agreed between myself and Patrick and Rice, acting for Cleaver and Criswell, that I would make deeds to such persons as they would indicate, conveying to such persons as they should select the land claimed by Cleaver and Criswell, respectively, for which I was to be paid at the delivery of the deeds one thousand dollars by Cleaver, and sixteen hundred and sixty-five dollars by Criswell. Those deeds were to be made by me as commissioner of the district court of Titus county, and in execution of the power conferred upon me by said court in said cause No. 2,060. Messrs. Rice and Patrick at that time represented that their clients had no money with which to pay said amounts, but promised that it should be paid within 30 days from the date of making that agreement, which was on the 12th day of April, 1889."

John W. Davis, law partner of Robertson, testifies:

"As I have before said, this was a matter in the hands of Gen. Robertson before our partnership, and I took no active part in anything pertaining to it; but I heard conversations between Gen. Robertson and B. H. Rice and W. A. Patrick, representing some of the defendants in said suit, and remember dis-

tinety that Gen. Robertson stated to them that, if he recovered judgment for said land in said suit in the United States court, he would sell it to the parties in possession at some stipulated price, which I do not now remember, provided they would take such title as he could give them under authority of his appointment as commissioner by the district court of Titus county, Texas, and that the other parties agreed to take such title, and pay the price agreed on. Gen. Robertson agreed to make such deed as he was authorized to make as commissioner appointed by the district court of Titus county, to such parties as they should indicate."

On the 20th of May following the judgment in No. 393, Cleaver and Criswell paid Robertson & Davis, attorneys for the Taylor heirs, \$300 on the contract of purchase, as shown by the following:

"\$300.00. Received of W. A. Patrick three hundred dollars on account of the purchase money of the A. W. Cleaver and T. L. Criswell tracts of land out of Josiah Taylor one-third league, in Falls county, Texas; the Cleaver tract consisting of 200 acres, and the Criswell tract about 331 acres.

"[Signed]

"May 20, 1889.

Robertson & Davis,
Attys. for the Taylor Heirs."

On the 20th of April, 1889, Robertson, as commissioner appointed by the district court of Titus county, with authority to sell, signed deeds conveying to W. A. Patrick, one of the attorneys of Cleaver and Criswell, the lands in controversy, and acknowledged the same before a notary on the 15th of May, 1889. Thereupon negotiations were entered into with loan companies to borrow money, but the title was rejected by the loan companies. Negotiations were then had between Robertson, attorney for the Taylor heirs, and Patrick, attorney for Cleaver and Criswell, looking to the procuration of a power of attorney from all the Taylor heirs, and in relation to the expense attending the same. These negotiations continued for nearly 12 months, and thereafter proceedings were had, as Robertson testifies:

"After that certified copy had been recorded in the deed records of the county clerk's office of Falls county, Texas, I turned over to W. A. Patrick that certified copy of the judgment, together with all the certified copies of the orders made by the district court of Titus county, Texas, so far as said orders related to my authority to make sales of the land in controversy. In order that Patrick could make his arrangements at less expense with the loan company, a writ of possession was issued in 1889; but, in the hope of completing the sale to Cleaver and Criswell, I did not have those defendants dispossessed. April 16, 1890, another writ of possession was issued and placed in the hands of the United States marshal, but not executed. December 5, 1893, another writ of possession was issued, but not executed. May 29, 1894, an execution was issued for costs, and collected from Cleaver and Criswell. October 22, 1897, an alias writ of possession was issued, returned not executed; it having been ascertained upon going upon the ground described in this writ that the W. B. McAlister named as one of the defendants had died since the rendition of the judgment. After that another writ of possession was issued, the execution of which was enjoined in this court; being No. 138, equity."

From the beginning until now the appellants, Cleaver and Criswell, have been in peaceable, if not quiet, possession, as owners of the land in controversy; occupying, improving, clearing, and cultivating the same. In the view we take of the case, we do not find it necessary to harmonize the conflicting evidence found in the transcript, nor determine the precise details as to the understanding between the parties in regard to the matters in hand. It is sufficient to find, as we do, considering the written memorandum, and the evidence of the attorneys who carried on the negotiations, as well as the other undisputed evidence in the case, that there was a valid contract of

sale by the Taylor heirs, and purchase by Cleaver and Criswell, of the lands in controversy; that as the Taylor heirs not only received the benefit of the part payment of \$300 made on behalf of Cleaver and Criswell, but are now seeking to enforce the judgment obtained in their favor in No. 393, they cannot be heard to say that their agents in obtaining the judgment had no authority to make the agreement to sell; and that, as a payment was made on this contract, and as the vendees were in possession of the land, making improvements on the same, we must hold that the contract of sale has been partly performed. The vendees are now before the court, asking a decree for specific performance. They show that all the vendors are in court, and they offer full payment for a good title. Is there any good reason why specific performance should not be ordered according to the time-honored usages of courts of equity? The vendors say that the improvements made have been more than paid for by the revenues of the property. This may be true, but it furnishes no good reason why the contract should not be carried out. The occupancy and use of the property were undoubtedly contemplated by the parties to the contract. The vendors further claim that the payment of the \$300 was not made in good faith, but was a trick resorted to, under advice of counsel, to enable the vendees to hold onto the land indefinitely without paying full price. The money was paid and received, and has not been returned or tendered. The vendees had a right to pay, and the vendors had a right to receive. That the payment was intended to ratify the contract and bind the parties is probable, but it was a legitimate transaction. The vendors further contend that the vendees have not in good faith endeavored to carry out the contract, but have for many years refused and neglected to settle up the matter, in the meantime holding on to the land as a matter of speculation, and are therefore guilty of laches. Our conclusion as to this is that the delays have been as much the fault of the vendors as of the vendees. At any time after May 20, 1889, the vendors could have tendered a good title to the property, and demanded full payment, and thus put the vendees in direct default. The enforcement of payment or the surrender of the land would have easily followed such a default. The writs of possession issued from time to time were not served for good reasons pertaining to the appellees, and it appears that, aside from the difficulty of getting a good title direct from the heirs of Taylor, the heirs themselves were in litigation for a number of years; and as to this we again quote from Robertson's testimony:

"It appearing that some of the parties to said agreement were married women, and that they could not lawfully sign such an agreement without an acknowledgment by them in the manner required by the laws of Texas for the execution of deeds for lands by married women, I continued to mention that business to Mr. Patrick from time to time; and he told me finally that the parties could not borrow the money necessary to make their payments, as I remember. Patrick did not finally give up hope of borrowing the money, according to his statements to me, until some time in the summer of 1890. During all that time I took no steps to dispossess any one, as Patrick continually led me to believe that some arrangement might be effected by which his client would be enabled to raise the money he had promised to pay me, and about that time I was informed that the Taylor heirs were again in litigation in the state of Tennessee concerning a partition of their property. I therefore took no further steps in the matter until about the year 1895."

The relative situation of the parties has not been changed during the delay, and time was not of essence to the contract. A case very similar to the instant one is *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405. In that case specific performance was decreed after a delay of 13 years, and in the opinion of the court will be found a full elucidation of the rules and principles which are applicable to the matters involved here. See, also, *Gunton v. Carroll*, 101 U. S. 426, 25 L. Ed. 985; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 38 L. Ed. 818. In our opinion, it would now be inequitable to enforce a surrender of the land from the appellants, and deprive them of the moneys paid originally and under the present contract, and of the improvements made, without first tendering a good title, and giving a short time in which to pay the full price. We understand that a decree in this case, as all the parties are before the court, will give a good title; and, of course, the decree can be so framed that the vendors shall have full payment, principal and interest, and the rights of all parties be fully protected.

The motion of appellees to dismiss this appeal because the assignments of error do not comply with rule 11 of this court (31 C. C. A. cxlvi., 90 Fed. cxlvi.) must be denied. The assignments are sufficiently specific to inform opposite counsel and the court of the real grounds of complaint against the decree appealed from. The decree of the circuit court is reversed, and the cause is remanded, with instructions to enter a decree in accordance with the views herein expressed, and otherwise proceed as equity may require.

GENERAL ELECTRIC RY. CO. v. CHICAGO, I. & L. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 567.

STREET RAILROADS—RIGHTS OF ABUTTING PROPERTY OWNERS—JURISDICTION OF EQUITY TO GRANT INJUNCTION.

An abutting property owner, who would suffer a special and irreparable injury from the construction and operation of a street railroad upon the street under an ordinance alleged to be invalid, may invoke equitable relief by injunction. The rule declared by the supreme court of Illinois that a court of equity will not enjoin the construction of a railroad upon a street at the suit of a private property owner, upon an allegation that the ordinance authorizing its construction is illegal, is placed upon the ground that for any injury to the plaintiff's property he has an adequate remedy at law, and cannot be applied to a case where irreparable injury is shown, which would be to deny to the complainant any adequate remedy.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This appeal is from an interlocutory order, forbidding the appellant, the General Electric Railway Company, to enter upon 14th street at Dearborn street, and upon Custom House Place (Fourth street) between 14th street and Polk street, in Chicago, for the purpose of constructing thereon a street railway. The order was sought and granted on the ground that the presence and operation of the proposed railway would so interfere with access to the freight house and track yard of the appellee, abutting on the west line of Custom House Place between Polk and 14th streets, and with the use of its tracks therefrom to 14th street, that it would cause to the appellee special injury, for which an adequate remedy at law could not be had; and that the ordinance by virtue of which the appellant was asserting the right to construct the proposed railway was void because passed without the requisite petition of the owners of

one-half of the abutting properties. The order was granted, after argument by counsel, upon a consideration of the bill and affidavits in support of its averments. The bill is long, and a statement of its contents is not necessary to an understanding of the case. The scope of the discussion, which has been elaborate, is shown by the positions asserted and authorities cited in the briefs.

For the appellant the following:

(1) The facts well pleaded in the bill do not authorize equitable relief by injunction. *Doane v. Railroad Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97.

(2) The use of a public street in the city of Chicago for the purpose of furnishing additional facilities for travel or transportation by a street-railway company will not be enjoined at the suit of an abutting owner.

(a) The remedy for the unlawful use of a public street in the city of Chicago is by information in chancery by the attorney general, or by bill in chancery by the city. *Moses v. Railway Co.*, 21 Ill. 516; *Railway Co. v. Schertz*, 84 Ill. 135; *Corcoran v. Railroad Co.*, 149 Ill. 291, 37 N. E. 68; *Doane v. Railway Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97; *Bond v. Pennsylvania Co.*, 171 Ill. 508, 49 N. E. 545; *Blodgett v. Railway Co.*, 26 C. C. A. 21, 80 Fed. 601; *Coffeen v. Railway Co.*, 28 C. C. A. 274, 84 Fed. 46; *Henry Gauss & Sons Mfg. Co. v. St. Louis, K. & N. W. Ry. Co.* (Mo. Sup.) 20 S. W. 658, 18 L. R. A. 339; *Hobart v. Railroad Co.*, 27 Wis. 194.

In addition to these points it was urged in argument that, confessing in the bill the existence of an ordinance, the complainant is not in a position to question its validity, or deny the jurisdiction of the common council to pass it. *Commissioners v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Bissell v. City of Jeffersonville*, 24 How. 287, 16 L. Ed. 664; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Mowry v. Whitney*, 14 Wall. 434, 20 L. Ed. 858; *U. S. v. American Bell Tel. Co.*, 128 U. S. 315, 9 Sup. Ct. 90, 32 L. Ed. 450; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; and *City of Chicago v. Ramsey*, 87 Ill. 348.

From the brief for the appellee the following:

(1) Cases brought by abutting owners for injuries to their abutting property, caused by intrusion of street cars and tracks upon streets, are divided into two classes: First. Cases wherein the abutting owner, as plaintiff, complains of an injury suffered in common with other abutting owners or with the public. In this class of cases the complaining abutting owner has adequate relief at law, and to this class the cases cited by counsel, and their argument, exclusively apply. Second. Cases in which the abutting owner is shown to suffer a special injury to his property or its use not common to other abutting owners or to the public. When it appears that plaintiff will suffer a special and irreparable injury, equity never refuses to furnish the remedy here granted by the court below. This distinction between these two classes of cases is clearly defined in *Doane v. Railroad Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97. In *Chicago & W. I. R. Co. v. General Electric Ry. Co.*, 79 Ill. App. 569, the distinction was recognized, and relief by injunction granted. The same distinction in *Cincinnati & S. G. A. St. Ry. Co. v. Village of Cummingsville*, 14 Ohio St. 523; *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406; *People v. General Electric Ry. Co.*, 172 Ill. 129, 50 N. E. 158; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696; *Central City H. Ry. Co. v. Ft. Clark H. Ry. Co.*, 81 Ill. 523; *Li Gare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934; *Frizell v. Rogers*, 82 Ill. 109; *Rigney v. City of Chicago*, 102 Ill. 72; *Ninth Ave. R. Co. v. New York El. R. Co.*, 7 Daly, 174; *Bridge Co. v. Summers*, 13 W. Va. 476; *Dubach v. Railway Co.*, 89 Mo. 483, 1 S. W. 86; *McElroy v. Kansas City (C. C.)* 21 Fed. 257; *Pappenheim v. Railway Co.*, 128 N. Y. 436, 28 N. E. 518, 13 L. R. A. 401.

(2) If the injury amounts to a destruction of the total or substantial use of the property, it is equivalent to an actual taking, and the question is one of compensation, and not consequential damages, and in such case equitable jurisdiction may be invoked for injunction. *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557; *Dodson v. City of Cincinnati*, 34 Ohio St. 276; *Cooley, Const. Lim.* 677; *Railway Co. v. Mills*, 85 Mich. 624, 48 N. W. 1007.

(3) A city, by valid ordinance, could not thus destroy the use of Custom House Place for access by the shipping and teaming public to the freight house

of a common carrier. *Li Gare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934; *Pappenheim v. Railway Co.*, 128 N. Y. 436, 28 N. E. 518, 13 L. R. A. 401; *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176.

(4) The compromise contract ordinance of 1883, and its acceptance by the Western Indiana Company, vested in it absolute property rights in the streets, which cannot be divested by the city, or by appellant as its alleged subsequent grantee. By the acceptance of this compromise ordinance by the Western Indiana, and its compliance with the terms therein recited, it became a contract between the parties, which cannot be changed, impaired, or abrogated by any subsequent ordinance without the consent of the Western Indiana. *Carter v. City of Chicago*, 57 Ill. 283; Const. Ill. art. 2, § 13; Const. U. S. Amend. art. 5; *Chicago & W. I. R. Co. v. General Electric Ry. Co.*, supra; *Cicero Lumber Co. v. Town of Cicero*, supra. The validity of this contract ordinance has been adjudged by the supreme court of Illinois. *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 122; *Same v. Illinois Cent. R. Co.*, 113 Ill. 156; *City of Chicago v. Chicago & W. I. R. Co.*, 105 Ill. 73.

(5) An ordinance attempting to give the right of a street for a street railroad without the consent of the majority of street frontage is wholly void. *Hunt v. Railway Co.*, 121 Ill. 638, 13 N. E. 176; *Chicago & W. I. R. Co. v. General Electric Ry. Co.*, 79 Ill. App. 569. If a street-car track is laid in the street without such consent, it is a public nuisance. *McCartney v. Railway Co.*, 112 Ill. 611; *North Chicago City Ry. Co. v. Town of Lake View*, 105 Ill. 207; *Metropolitan City Ry. Co. v. City of Chicago*, 96 Ill. 620; *Railway Co. v. Loeb*, 118 Ill. 216, 8 N. E. 460. The threatened construction of such a nuisance may be enjoined at the suit of an abutting owner, if such construction and continuance of the nuisance would inflict substantial and material injury to his property or its use. *Rainey v. Herbert*, 5 C. C. A. 183, 55 Fed. 443; *Kavanaugh v. Railway Co.*, 78 Ga. 803, 4 S. E. 113; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395; *Smith v. McDowell*, 148 Ill. 68, 35 N. E. 141; *Cicero Lumber Co. v. Town of Cicero*, supra; *Chicago & W. I. R. Co. v. General Electric Ry. Co.*, supra.

(6) An alleged ordinance may be attacked for want of power or jurisdiction in the city council to pass, in any proceeding where it is offered to justify a trespass. *Hurd's Rev. St. Ill. 1898*, c. 24, par. 90; *Hunt v. Railway Co.*, 121 Ill. 638, 13 N. E. 540; *Roberts v. Easton*, 19 Ohio St. 78; *Hayes v. Jones*, 27 Ohio St. 219; *Mulligan v. Smith*, 59 Cal. 206; *Ogden City v. Armstrong*, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; *Ziegler v. Hopkins*, 117 U. S. 687, 6 Sup. Ct. 919, 29 L. Ed. 1019; *Page v. Mayor*, etc., 34 Md. 558; *Mayor*, etc., v. *Radecke*, 49 Md. 217; *Town of Covington v. Nelson*, 35 Ind. 532; *Phil. Ev.* (1st Ed., Cowen & H. Notes) 801; *New Orleans Waterworks Co. v. City of New Orleans*, 164 U. S. 481, 17 Sup. Ct. 161, 41 L. Ed. 518; *Metropolitan City Ry. Co. v. City of Chicago*, 96 Ill. 620; *Damp v. Town of Dane*, 29 Wis. 419; *Dows v. City of Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Sharpe v. Speir*, 4 Hill, 76; *Bonaparte v. Railway Co.*, 1 Baldw. 205, Fed. Cas. No. 1,617; *Erwin v. Fulk*, 94 Ind. 235.

Thomas A. Moran, for appellant.

E. C. Field and G. W. Kretzinger, for appellee.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge, after stating the facts as above.

In the Doane Case there was no question of irreparable injury. After a review of earlier cases it was there said:

"The principle is that, the abutting property owner having a complete remedy at law, a court of equity will not, upon his allegation that the ordinance authorizing the construction is illegal, enjoin the defendant from proceeding until the question of illegality can be litigated and determined, but will remit him to his action at law."

This does not say, and manifestly does not imply, that there may not be cases in which the remedy at law would be inadequate. That must always be a question of fact, which it is inconceivable that the

court would undertake to determine once for all, as if it were matter of law; and that the court had no such intention is demonstrated by the quotations made from the opinions in *Osborne v. Railroad Co.*, 147 U. S. 253, 13 Sup. Ct. 299, 37 L. Ed. 155, and *Railroad Co. v. Prudden*, 20 N. J. Eq. 530, where the right to equitable relief in such cases if the remedy at law be in fact inadequate is distinctly recognized. Such is unquestionably the well-established doctrine, and no decision, not explicit in its terms, should be made by construction or interpretation to declare the contrary. Only when the remedy at law is clearly adequate can it be justly said, as in the *Doane Case* it was said of the rule there declared, "And this, it seems to us, is a just and reasonable rule, the enforcement of which will protect the rights of all parties interested." In the same context it was added: "While, therefore, the private owner is entitled to have all his property rights fully protected, that right should be accorded him, if possible, by a remedy which will not unnecessarily injure others, and render impossible the construction and operation of necessary facilities for public travel." The plain implication from this is that, if full protection of all property rights is not possible in an action at law, the remedy may be sought in equity, though at the expense of delay or defeat of a project prosecuted under a pretense of authority not in fact possessed. In none of the earlier cases referred to in the *Doane* opinion was there a showing; though in one case, perhaps, there was an allegation, of irreparable injury. In the *Patterson Case*, 75 Ill. 588, to which special importance was given, the damage, alleged to be one-half the value of the property, was, of course, recoverable at law, and in that respect the bill was declared demurrable according to the decision at the same term in the *Stetson Case*, Id. 74. The further ground of complaint that the railway company had not been granted power by the common council to cross the street upon which the lot and house of the complainant fronted was treated separately, and in respect thereto it was deemed "sufficient to say that the fee of the streets is in the city, and it has power to control and regulate their use, and any such excess of authority in the use of a street as is here claimed must be left to be redressed by the public authority; and equity should not, in such a case, at the suit of a private individual, enjoin the operating of a railroad." It was with reference to this expression that it was said in the *Doane Case*: "If, as contended, the abutting owner can also maintain a bill on the same ground,—that is, the building of the road is without the valid consent of the city,—then the language of the *Patterson Case* [quoting it] must be overruled, and the authorities above cited as to the remedy by the attorney general or city qualified." This, it is clear, has no application when the ground of the action is irreparable injury, and the averment of an invalid ordinance is made—as in equity pleading it must be—for the purpose of anticipating and avoiding a defense or justification under the ordinance.

But it is said that in *Coffeen v. Railway Co.*, 53 U. S. App. 673, 28 C. C. A. 274, 84 Fed. 46, this court has declared the doctrine of the *Doane Case* applicable to a state of facts essentially the same as that now presented. The resemblance between that case and this is only superficial, and there was no real ground for the suggestion made be-

low of an apparently "contradictory state of the law in this circuit." The bill in the Coffeen Case, after alleging the facts, charged an irreparable injury, but in the statement of the case it was treated as showing "that the construction and use of the proposed switch will cause special injury," and the facts disclosed did show a case of special, and therefore actionable, injury, but not of a character which could not be determined and compensated in an action at law. The proposed switch was to be located, not in the middle of the street, but on the opposite side from the premises of the complainant. It was called a private switch, and was to be used only for the purposes of a single establishment, and those purposes there was no reason to believe might not be accomplished at such hours and in such a manner as to cause little interference with the customary uses of the premises of the complainant. The dispute in the case was not in respect to the character or amount of the damages, further than to show an actionable injury, but whether, the switch being for private uses, the city, under any circumstances, could authorize it to be laid in the street. The holding was that it was so far of a public character as to be "a proper subject of municipal regulation," and the case therefore within the doctrine of the Doane Case, and the validity of the ordinance questionable "on the ground alleged [want of a petition by abutting owners] only by information brought by the attorney general or other officer acting in the name of the people of the state, or by a bill for injunction brought by the city." While it is added "that the construction and use of the switch cannot be restrained at the suit of an owner of abutting property," that is to be understood as qualified by the preceding words in the same sentence, "on the ground alleged," and has no bearing upon the right to equitable relief in favor of one who is threatened with an irreparable mischief. Any suggestion that one so threatened may seek aid through the attorney general, besides being in itself impracticable, is foreclosed by the decision of the supreme court of the state that a suit prosecuted by the attorney general for private or individual benefit should be dismissed on that ground. *People v. General Electric Ry. Co.*, 172 Ill. 129, 50 N. E. 158. If, therefore, the resort of the individual to equity for relief against an irreparable wrong is forbidden in such cases, then there is no remedy whatever beyond what may be recovered in an action at law,—confessedly inadequate in any event, and in supposable cases of insolvent or otherwise irresponsible defendants totally unavailing.

The contention that the ordinance partakes of the nature of an adjudication, and therefore its validity cannot be denied in such a suit, is only another way of asserting the inadmissible proposition that the injured party shall have no means of relief. The citations in favor of the proposition do not support it, and the precedents to the contrary, as well as the necessity for just and convenient, not to say possible, modes of procedure, warrant its rejection. It is true that the injury here complained of is consequential, but that, instead of being also remote and therefore not actionable, it is so far immediate, direct, and special as to be the subject of relief, either at law or in equity, according to the circumstances, is clear (*Rigney v. City of Chicago*, 102 Ill. 72; *City of Chicago v. Baker*, 58 U. S. App. 569, 30 C. C. A. 364, 86 Fed. 753; *Id.* [this term] 98 Fed. 830); and that, under

the circumstances shown, relief at law would be inappropriate and inadequate is sufficiently clear, and is not understood to be disputed. Leaving the questions involved open for further consideration at the final hearing, the order below is affirmed.

In re WESTERVELT et al.

(Circuit Court of Appeals, First Circuit. January 18, 1900.)

No. 311.

MANDAMUS TO COURT—REMEDY BY APPEAL.

The circuit court having refused to enter a decree, and having permitted defendant to answer, its action cannot be reviewed by mandamus to compel it to sign a decree, and to order the answer to be stricken from the files, there being full remedy by appeal, and this, independently of any question as to the general power of circuit courts of appeal to issue special writs.

Thomas A. Connolly, for petitioners.

W. K. Richardson and F. L. Emery, for Library Bureau.

Before PUTNAM, Circuit Judge, and BROWN and LOWELL, District Judges.

PUTNAM, Circuit Judge. This is a petition asking that we issue a writ of mandamus to the circuit court. It alleges that the petitioners are the complainants in a certain cause in equity pending in the circuit court, in which the Library Bureau of Massachusetts is defendant; that the defendant pleaded in bar, on which plea an issue of fact was joined, and that the issue was determined for the complainants. Thereupon the complainants moved the court to enter a final decree in their favor, but the court permitted the defendant to answer over. Therefore the petition prays that a writ of mandamus may issue to the circuit judge commanding him to sign a decree in the cause, and to order that the defendant's answer be stricken from the files. It does not, in its terms, ask that the court below should enter a final decree; but evidently such a decree was claimed in the circuit court, and is asked as the result of this petition. The action of the circuit court in refusing to enter a decree and permitting the defendant to answer preceded the filing of this petition. Therefore the proposition is not merely that a writ of mandamus issue, requiring the court below to do an act which it has not done, or to entertain jurisdiction which it has refused to entertain, as in *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1121, but it in effect asks us to revise the proceedings of the circuit court in a matter as to which the petitioners, at the proper time, will have full remedy by appeal. Without considering to what extent this court has the same power to issue writs of mandamus with reference to cases not pending before it that the supreme court has (*U. S. v. Judges of U. S. Court of Appeals*, 29 C. C. A. 78, 85 Fed. 177), it is plain, in accordance with the rule stated in *Re Rice*, 155 U. S. 396, 403, 15 Sup. Ct. 149, 39 L. Ed. 198, and in *Re Atlantic City R. Co.*, 164 U. S. 633, 635, 17 Sup. Ct. 208, 41 L. Ed. 579, that this petition cannot be successfully substituted for the ordinary method of removing a question into this court. The petition is denied, with costs for the Library Bureau of Massachusetts.

KING v. WATKINS et al.

(Circuit Court, W. D. Virginia. September 19, 1899.)

1. EVIDENCE—ANCIENT DOCUMENTS.

The fact that an instrument is an ancient document does not affect its admissibility in evidence further than to dispense with proof of its genuineness, where it is otherwise admissible.

2. BOUNDARIES—ESTOPPEL—PRIVATE SURVEY BY REMOTE GRANTOR.

A private survey made at the instance of a remote owner of lands, through whom a plaintiff in ejectment claims title, does not constitute an estoppel against such plaintiff, to prevent him from claiming in accordance with his true boundaries, in favor of strangers to such title who claim adversely thereto, and who at the inception of their claims had no knowledge of such title or of the survey.

3. SAME.

The fact that a report of a private survey of a grant of lands was filed among the papers in a chancery suit involving a portion of such grant, and through the decree in which a plaintiff in ejectment derives his title, does not render such survey conclusive on him as to his boundaries, where it does not appear for what purpose it was introduced in evidence, or that it was recognized as accurate by the court, but where, on the contrary, the decree adjudged to plaintiff's predecessors in title a much greater quantity of land than, according to the survey, was embraced in the entire tract.

4. SAME—EVIDENCE—DECLARATIONS OF DECEASED PERSON.

A report made by a surveyor of a private survey of a tract of land made by him at the instance of the owners is not admissible, under the law of Virginia, to establish the boundaries of the tract, in litigation after the surveyor's death, on the ground that it constitutes the declarations of a deceased person.

5. SAME—SURVEY OF OTHER TRACTS.

Under the law as established by decisions in Virginia, another survey, made by a different surveyor at a different time, is not admissible to show the boundary lines of a survey in controversy.

6. SAME—DEED OF OTHER TRACTS.

To render a deed admissible in evidence upon the question of the boundary of a tract or grant other than the one described therein, it must contain a call for a corner or boundary line common to the two tracts, and, in the absence of such call, it cannot be rendered admissible by parol evidence that the two tracts had in fact a common corner or boundary.

7. SAME—DECLARATIONS OF ADJOINING OWNER.

The declarations of a deceased person are only admissible to prove the boundary line of a tract of land, on the ground that when they were made he was the owner of an adjoining tract, where his conveyance calls for such line as a common boundary; hence proof that he was in possession under a verbal contract cannot render such declarations competent.

8. SAME—CONSTRUCTION OF SURVEY.

The rule that calls for monuments in a survey prevail over courses and distances does not apply to mistaken or false calls; and where it is shown that the greater portion of the boundary of a grant of 500,000 acres was not run on the ground, but was platted in, and that the surveyor was mistaken or ignorant as to the true location of the monuments called for, so that, if they are taken as marking the boundary, the tract would contain but little over 100,000 acres, while as platted, according to the courses and distances given, it contains the quantity called for by the grant, the courses and distances must prevail, as being in accordance with the intention of the parties.

Action of ejectment to recover the Virginia portion of a grant of 500,000 acres lying in Virginia, West Virginia, and Kentucky. See *King v. Campbell* (C. C.) 85 Fed. 814.

The subjoined diagrams will aid an understanding of the opinion. Fig. 1 is a plat of the Robert Morris 500,000-acre tract, returned by surveyor Taylor, with his certificate of survey. Fig. 2 represents the locality of the grant according to actual survey, the plaintiff contending for the location shown by the exterior lines, A, P, H, I, J, M, A, and the defendants contending for the location shown by the lines included therein, and indicated by the letters A, P, Q2, ZZ, MO, M2, A.

Figure 1.

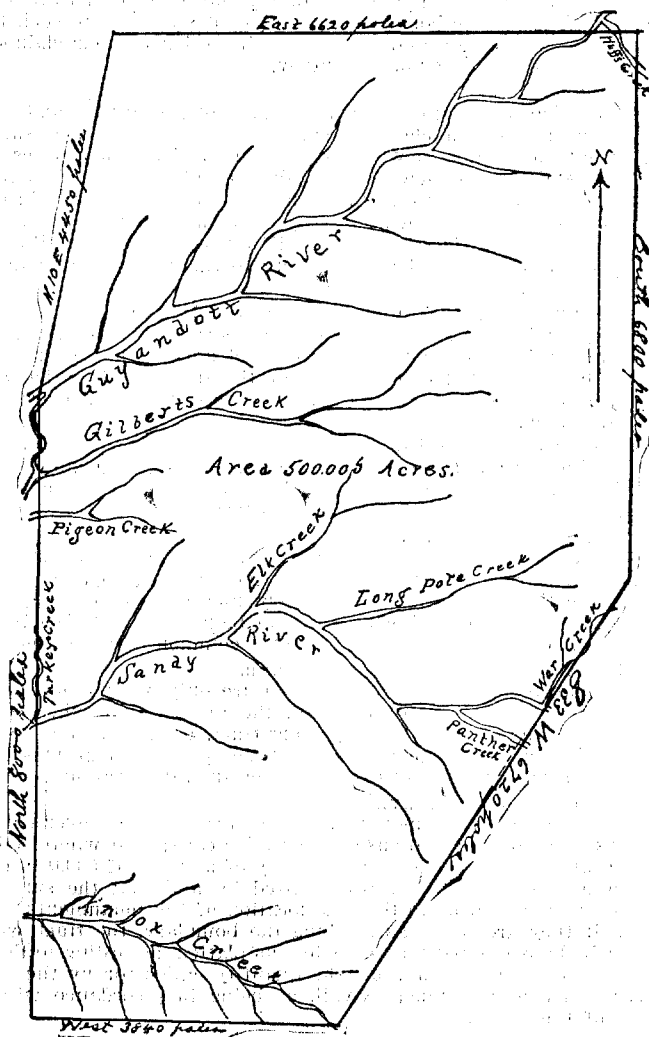
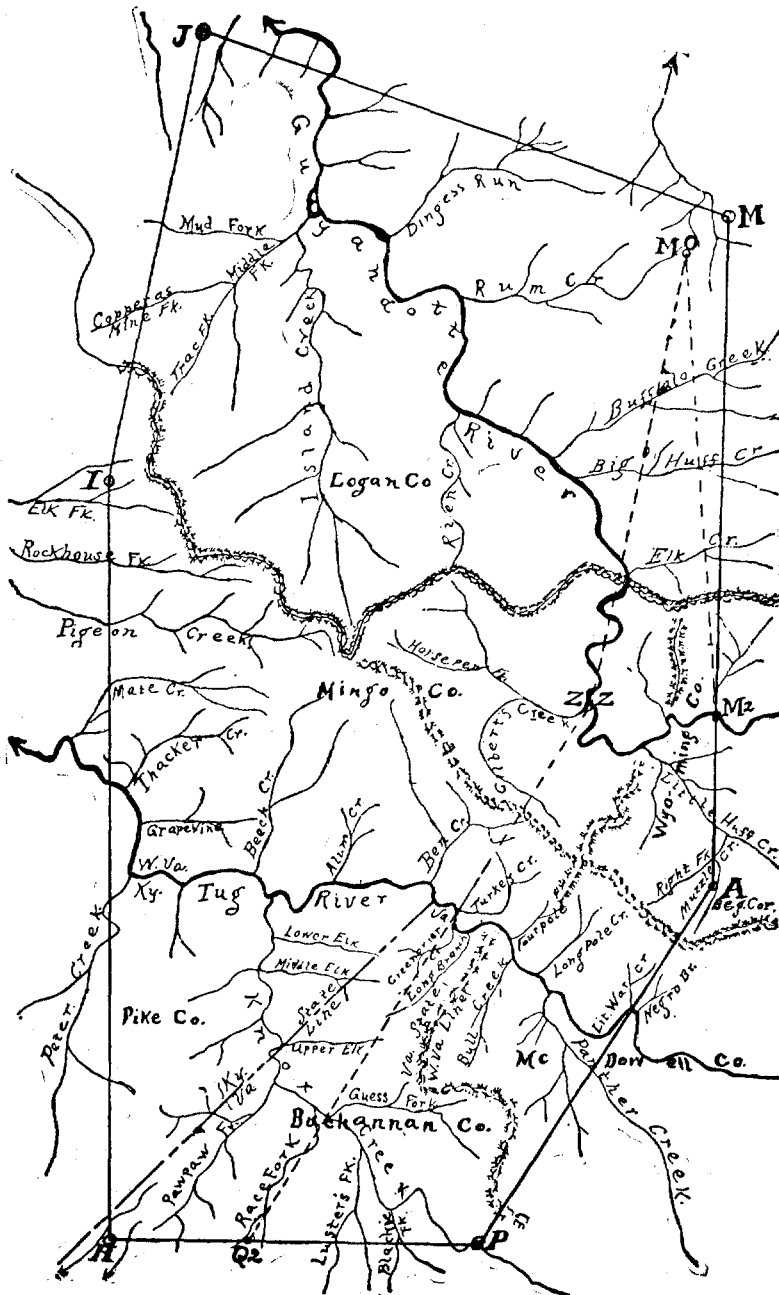


Figure 2.



Rulings of the court during the trial.

Maynard F. Stiles, Daniel Trigg, and S. L. Flournoy, for plaintiff.

R. R. Henry, W. E. Burns, Maurice G. Belknap, and John A. Shepard, for defendants.

PAUL, District Judge. In this action the plaintiff asserts title to a tract of 500,000 acres of land lying in the states of Virginia, West Virginia, and Kentucky, under a grant of the commonwealth of Virginia to Robert Morris dated June 23, 1795. The defendants, J. N. Watkins and others, claim to hold certain lands in Buchanan county, Va., under patents from the commonwealth junior to the grant of the plaintiff. They further claim that the lands which they hold under their grants are not within the boundaries of the lands to which the plaintiff claims title. The question of boundary, therefore, becomes an important one. The plaintiff, King, has introduced evidence to trace his title from the original grantee to himself. It is not necessary, for the purpose of deciding the question now before the court, to state here in detail the various conveyances and transfers on which he asserts his title. One of them, however, vests the title in John Peter Dumas, trustee. Plaintiff having introduced evidence tending to locate the boundaries of his grant according to his contention, the defendants offer in evidence a deed from Dumas, dated September 29, 1846, conveying to John Joseph Mary Schmit Thornfield 300,000 acres, to be cut off from the 500,000-acre tract, containing and reserving therein a mortgage for the purchase money; a deed dated October 1, 1846, from said Thornfield to Aguste Marie Francois Fermin Noverre De Sericourt and Louis Antoine Desverges De Maupertuis for the same land, subject to said mortgage; a power of attorney dated October 15, 1846, from said Sericourt to Louis Chitti, to manage said land; a power of attorney, of same date and of like nature, from Dumas to Chitti; a power of attorney dated February 23, 1847, from Sericourt and Maupertuis to Adolphe Julian Lafferriere, said Chitti having declined to act further as such attorney in fact; a decree of the circuit court of Kanawha county, then in Virginia, rendered January 21, 1859, in certain consolidated chancery cases affecting the Swan estate, and in which the trustees of said estate, through whom plaintiff claims, were appointed, which decree, among other things, declared that the said deed of September 29, 1846, from Dumas to Thornfield, "conveyed to him 300,000 acres of the Swan lands, lying in Logan and Tazewell counties, and that the same is now vested in A. D. De Maupertuis, subject to the mortgage, for the purchase money due to said trust," and decreed that said Maupertuis "hold the said 300,000 acres, situate in Logan and Tazewell counties, in fee simple, subject to the mortgage contained" in the deed aforesaid; a contract dated December 1, 1846, between said Chitti and one H. B. Harman, a surveyor, whereby said Harman agreed, for a stipulated price, to survey four lines of said 500,000-acre tract, and one line of the adjoining 480,000-acre tract; and a survey and report made by said Harman of the tract of land claimed to contain 500,000 acres, but which, according to said survey, contains 111,000 acres,—the offer

of the preceding documents being preliminary to the offer of the survey and report, to which report is attached the receipt of Harman to Lafferriere for the contract price. To the introduction of this survey and report the plaintiff objects. The defendants insist that they are admissible for the purpose of showing the true boundary of the land in controversy. It is claimed that the report, including the survey, is admissible in evidence—

First. Because it is an ancient document. The doctrine of admitting ancient documents in evidence, without proof of their genuineness, is based on the ground that they prove themselves, the witness being presumed to be dead. The doctrine goes no further than this. The questions of its relevancy and admissibility as evidence cannot be affected by the fact that it is an ancient document. It is no more admissible on that ground than if it were a newly-executed instrument. Greenl. Ev. §§ 21, 142, 144, 576. Besides, the genuineness of this document has been proved by calling a witness to prove the signature of H. B. Harman, the surveyor, and the doctrine touching ancient documents does not apply.

Second. It is claimed that this evidence is admissible by way of estoppel. The court is unable to see how the doctrine of estoppel can be applied by the defendants in this case, based on the survey made by Harman, so as to estop the plaintiff from asserting his title to the land otherwise than as the boundaries are ascertained by the survey of Harman. Bigelow on Estoppel says, of the kind of estoppel sought to be asserted here, that it consists of "facts in pais," acts, admissions, or conduct, which have induced a change of position in accordance with the real or apparent intention of the party against whom they are asserted. Again, the same writer, speaking of estoppel by conduct, says (page 543): "In its most common phase, this estoppel is founded upon deceit, and has its justification in the duty of courts to prevent the accomplishment of it." The principle thus announced can have no possible application in this case. Nor can we invoke the doctrine of estoppel by agreement. That King, a remote purchaser of a tract of land sold and the sale approved in a pending chancery cause, whether it be a public or private sale, can be bound by the survey made by Harman, as to the boundaries of the land in question, and that the defendants can plead the survey as an estoppel, does not seem to demand discussion. The survey was an unofficial, ex parte, and purely private proceeding, and though the report and plat of the survey are produced by the defendants from the papers in chancery causes pending in Kanawha county, in which some of the affairs of the claimants of the land were settled, and in which the sale to plaintiff's grantor was made, they produce nothing to show through whom or for what purpose they got there, or that any action whatever was had with reference to them. On the contrary, it appears from the decree offered by defendants in this connection, from the same court and cases, that more than 11 years after this Harman survey was reported, according to which the tract contains but 111,000 acres, that court held that the deed from Dumas to Thornfield for part of the tract in question "conveyed to him 300,000 acres of the Swan lands," and decreed "that the said A. D. De Maupertuis hold

the said 300,000 acres." There is no contract between plaintiff, or those under whom he claims, and defendants, concerning said survey, or any other matter, and no privity whatever between them, nor is there any claim of any representations relative to the same. Indeed, the defendants have laid stress upon their assertion that, when they acquired their claims of title, they had never heard of the Morris grant or of its claimants. Hazardous, indeed, would it be to make an experimental survey of one's own land, or to purchase land of which some remote owner or claimant had chanced to make such survey, if, as contended by defendants, that survey, however erroneous, could afterwards be invoked, even by a stranger, to estop the owner from asserting title according to his true boundaries. There is wanting in the present case every element of estoppel.

Third. It is further claimed that this Harman survey was filed in the papers in said chancery cause in Kanawha county, and was notice to the plaintiff, King, and that he is therefore bound by it, and estopped from questioning the boundaries established thereby. It will be noted that King purchased from Le Moyne, Le Moyne from Armstrong, and Armstrong from Reed, the trustee, who sold by direction of a court of chancery. The court is at a loss to see how a purchaser of the 500,000-acre tract of land, whether at a public or private sale, whether judicial or not, could possibly be bound by such a survey, whether he had notice of it, either actual or constructive. Notice could have no effect, unless it created an estoppel.

Fourth. The remaining ground upon which it is insisted that this survey should be admitted as testimony is that it is competent evidence to prove the declarations of a deceased person as to the boundary lines of the land in question. The doctrine relied upon has been so frequently and thoroughly discussed on other evidence offered during the trial of this case that the court finds no difficulty in applying it in this instance. *Harriman v. Brown*, 8 Leigh, 697, is a leading case on the subject, and has been cited in numerous decisions, and frequently quoted by text writers. It is thus stated as the rule in Virginia:

"Evidence is admissible to prove declarations as to the identity of a particular corner, tree, or boundary, made by a person who is dead, and had peculiar means of knowing the fact, as, for instance, the surveyor or chain carrier upon the original survey, or the owner of the tract or of an adjoining tract calling for the same boundary, and also tenants, processioners, and others whose interest or duty should lead them to diligent inquiry and accurate information as to the fact; always excluding those declarations which are liable to the suspicion of bias from interest."

Without discussing the question whether this doctrine applies to written statements of deceased persons, or is confined to verbal declarations (and the latter seems to be the case), it is very clear that the written statements of Harman do not fall within the principle just stated. He was not the surveyor or chain carrier in making the original survey, he was not the owner of this tract nor of an adjoining tract, nor had he any interest in the land which rendered his declarations admissible as proof of any corner or boundary line. It should be remembered that this kind of evidence, which is hear-

say, is only admitted from the necessity of the case. It is admissible where no better evidence can be had. So far as the evidence has been developed in this case, the parties interested have as good opportunities to make surveys of the lands in controversy for the purpose of ascertaining the true boundaries of the same as Harman had. The survey and report are not admissible.

In the further progress of the case, the defendants offer to prove by a witness, R. P. Spratt, and avow that they can and will prove by him and other witnesses, "that Isaac Spratt, now deceased, the grandfather of the witness Spratt, many years ago, and when the witness was about 12 or 14 years of age, pointed out to the witness three sugar-tree stumps, then about 20 poles below the mouth of Gilbert's creek, in a bottom of Guyandotte river, and stated to the witness that they were the stumps of the three sugar tree corner of the big survey, and that the tract of land claimed by the plaintiff is the same one referred to as the big survey, or the French survey; that at the time the declaration was made by Isaac Spratt he was the owner and in the actual possession of that portion of a tract of 7,800 acres granted by the commonwealth of Virginia to Gordon Cloyd on the 2d day of July, 1796, which lies adjoining, and calls for as a common corner and line the three sugar trees, 20 poles below the mouth of Kettle creek, which has been shown to be Gilbert creek, and with the line of the plaintiff survey, which calls for north, 10 east, from the three sugar trees; and, for the purpose of proving said declarations, the defendants offer in evidence the survey of the Gordon Cloyd 7,800 acres, bearing date on the 21st day of December, 1795, and the grant issued thereon to Gordon Cloyd, and also a deed from Kent and others, sole heirs of Gordon Cloyd, to James P. Christian; and further offer to prove by the witness R. P. Spratt and others, and avow that they can and will prove, that Isaac Spratt purchased the portion of the Cloyd survey referred to, and took and held possession thereof, and afterwards caused the same to be conveyed by deed from James P. Christian to John Stafford, a son-in-law of Isaac Spratt the declarant;" and offer also the deed from James P. Christian to John Stafford, dated the 5th day of April, 1841; and that, at the time of the declarations aforesaid, the said Isaac Spratt was in possession of the land, claiming the same, co-extensive with the boundaries mentioned in the deed from Christian to Stafford, up to the common corner and line, and was cultivating the same. Plaintiff, by counsel, objects to the introduction of the proposed evidence on the following grounds: First. The proffer does not claim that Spratt ever had any paper title to any land calling for the same boundary as plaintiff's grant, and the evidence is not competent and proper to prove title in said Spratt in contradiction of the deeds offered vesting title in John Stafford. Second. The alleged declaration, if made, was made, according to the proffer, when the declarant Spratt was asserting a claim of title without color to part of the Cloyd tract, which is junior and inferior to the Morris grant, and which would be overlapped and included in, and made invalid by, the elder Morris grant, unless the declarant could establish and confine the Morris grant at the point

indicated by him, making said declarations clearly in the interest of the declarant. Third. Because the Cloyd grant, being based upon a survey junior to the survey upon which the Morris grant is based, and not made or reported by the same surveyor, is not competent evidence of the location of boundary of the elder Morris grant. The Cloyd survey shows upon its face to be an office survey, not made upon the ground, the survey being completed only two days after the entry; and the surveyor who reported the same could not have had any reliable information concerning the Morris grant, and any call for the same, or boundary thereof, could give Spratt no more certain or reliable information concerning the location of the boundaries of the Morris grant than the surveyor himself, who was not upon the ground, could have. Fourth. Because Spratt is not alleged to have pointed out the stumps as a corner or boundary of any land owned or claimed by himself, to which boundary his knowledge is presumed to be limited, but to have pointed them out as the corner of a survey or tract to which it is not asserted he made any claim, or about which it appears or can be presumed that he had or could have any reliable personal knowledge or information. Declarations of the character proposed are confined to the boundaries claimed by the declarant. Fifth. The deed from Kent to Christian, according to which defendants claim Spratt was in possession and claiming title, does not call for plaintiff's boundary, and declarant's declaration did not purport to relate to any alleged corner of declarant's land.

Relative to the introduction of other surveys in the trial of title to land, the Virginia decisions state the doctrine as follows:

"In a controversy concerning the location or boundary of a tract of land patented by the commonwealth pursuant to a survey, the calls and descriptions of another survey, made by the same surveyor, about the same time or recently thereafter, of a coterminous or neighboring tract, upon which last-mentioned survey the commonwealth issued a grant, whether to a party to the controversy or to a stranger, is proper evidence upon such question of location or boundary, unless clearly irrelevant." *Overton's Heirs v. Davisson*, 1 Grat. 211; *Clements v. Kyles*, 13 Grat. 475; *Hutch. Land Titles*, § 518; *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347.

The survey which is offered in evidence was not made by the same surveyor about the same time or recently thereafter. The cases cited above all use the language employed by the court in *Overton's Heirs v. Davisson*. The court knows of no decision which holds that a survey made by a different surveyor and at a different time from the surveyor and the time stated in the survey in controversy is proper evidence upon the question of boundary or locality in fixing the boundary lines of the survey in controversy. The decisions of the courts and the statements of text writers being uniform in stating that a survey made at the same time or recently thereafter by the same surveyor is admissible to show the boundaries of another survey, and the court finding no decision, nor the statement of any text writer, and being referred to none by counsel, that a survey made by a different surveyor, at a different time, is admissible to show the boundary lines of a survey in controversy, the court holds that the survey, and the grant issued thereon, of

ferred by the defendants in this case, are not admissible in evidence.

As to the two deeds offered in evidence, the grantors in the deed from Kent and others to Christian, dated the 30th day of January, 1838, do not in any way in the deed show themselves to be the heirs of Cloyd, the grantee in the patent of July 2, 1796. This deed does not call for any corner or boundary line in the patent under which the plaintiff claims. It is proposed to show by oral testimony that the grantors in this deed were the sole heirs of Cloyd, the grantee in the patent of July 2, 1796, and that the land conveyed was bounded by a common corner and line of the survey of the plaintiff. The deed from Christian to Stafford, dated April 5, 1841, contains no call for a common corner or boundary line of the survey or grant of the plaintiff, but it is proposed, as in case of the deed from Kent and others to Christian, to prove such corner or boundary line by oral evidence.

But the most important facts which the defendants offer to prove by the witnesses R. P. Spratt and others are that, when the witness R. P. Spratt was 12 or 14 years of age, his grandfather Isaac Spratt pointed out to the witness three sugar-tree stumps, then about 20 poles below the mouth of Gilbert's creek, in a bottom of Guyandotte river, and stated to the witness that they were the stumps of the three sugar tree corner of the big survey, and that the tract of land claimed by the plaintiff is the same referred to as the big survey or the French survey; that, at the time of the declarations made by Isaac Spratt, he was the owner and in actual possession of that portion of the tract of land granted to Cloyd which lies adjoining and calls for a common corner and line of the plaintiff's grant. The doctrine as to the admissibility in evidence of the declarations of a deceased witness, in the trial of title to land, has been several times referred to during the consideration of this case, but, for a clearer application of it to the facts under consideration, the court will restate it. It is thus announced in *Harriman v. Brown*, 8 Leigh, 697:

"Evidence is admissible to prove declarataions as to the identity of a particular corner, tree, or boundary made by a person who is dead, and who had peculiar means of knowing the fact; as, for instance, the surveyor or chain carrier upon the original survey, or the owner of the tract, or of an adjoining tract calling for the same boundary, and also tenants, proccessioners, and others, whose interest or duty would lead them to diligent inquiry or accurate information as to the fact, always excluding those declarations which are liable to the suspicion of bias from interest."

In order to lay the foundation for the admission of the declarations of Isaac Spratt, it is proposed to prove by oral testimony that he was at some time between the execution of the deed from Kent and others to Christian, in 1838, and the making of the deed from Christian to Stafford, in 1841, the owner of the land conveyed in the deed to Stafford, and that the same had a corner and boundary line in common with a corner and boundary line in the grant under which the plaintiff traces title. It is not claimed by counsel for the defendants that his purchase is shown by deed or other writing, such as ordinarily evidences the transfer of ownership of real estate in Virginia. It is proposed to prove by verbal testimony that he

was invested with ownership of the land referred to by oral agreement or contract. The witness is offered for the purpose, not only of proving the declarations of Isaac Spratt, but to go beyond that, and prove ownership in the declarant, in order that his evidence may be admitted as evidence. So guarded is the law of Virginia touching contracts for the sale of real estate that it is provided by statute that no action shall be brought upon any contract or agreement for the sale of real estate, or the lease thereof for more than a year, unless the contract be in writing, and signed by the party to be charged thereby or his agent (section 2840, Code Va. 1887); and this was the law in Virginia when the alleged contract of purchase was made by Isaac Spratt. It is unnecessary to discuss the question of an equitable title in land, as where the purchaser has paid the purchase price, and taken possession of the land or exercised other act of ownership. In proving declarations of the owner of land, he must be the owner of the tract in controversy, or of an adjoining tract calling for the same boundary. There cannot be a call for a common corner or boundary line in a verbal contract for the sale and purchase of land. The meaning of calling for a corner or boundary is well understood in law. It is necessarily applicable to written instruments, such as entries, surveys, patents, grants, and deeds. This is shown by the definition of the term "call." It is thus defined in Brown's Law Dictionary: "In American land law, the designations in an entry, patent, or grant of land of visible natural objects as limits to the boundary." Webster, under the head of "American Land Law," gives the following definition: "A reference to, or statement of, an object, course, distance, or other matter of description, in a survey or grant, requiring or calling for a corresponding object, etc., on the land." To sustain the contention of the defendants would be to give to the doctrine of the admission of the declarations of a deceased witness a latitude that has never received the sanction of any court, and would be an invasion of the rules of evidence that would render the best-settled land titles insecure.

The court excludes the survey and grant offered in evidence because the survey was not made by the same surveyor, about the same time or shortly thereafter, as the survey made under which the plaintiff claims. The deeds from Kent and others to Christian, and from Christian to Stafford, are not admissible, because neither of them calls for a common corner or boundary line in the grant under which the plaintiff claims. The evidence of the witness R. P. Spratt is not admissible for the purpose of establishing ownership of land and calls for a corner or boundary by oral testimony.

In this case the plaintiff contends that the 500,000-acre tract of land involved should be bounded by the lines represented on the trial map by the letters A, P, H, I, J, M, A. The defendants contend that it should be bounded by the lines represented by the letters A, P, Q2, ZZ, MO, M2, A. The first line, and the first and second corners, A and P, are thus agreed upon, or, if not agreed upon, are established by indisputable evidence. The corner trees at A were found by the official surveyor in this case, and those called for

at P were proved by Daniel Harman, an old surveyor, who saw them for many years. The evidence of the official surveyor and of the other surveyors, examined as experts, shows that none of the other lines were actually run, but were platted lines. The defendants, to sustain their theory as to the true boundary of the survey, insist on running the lines according to the calls for certain monuments, as to the true location of which the surveyor is shown by the evidence to have been mistaken or ignorant. These monuments are Knox creek, Sandy river, Turkey creek, Buffalo creek, Guyandotte river, and three sugar trees at the mouth of Gilbert's creek. As to the evidence offered by the defendants to prove the former existence of three sugar trees below the mouth of Gilbert's creek, it is wholly insufficient to establish the identity of any such trees as trees marked by Taylor as a corner of the tract; but, assuming them to have been such, not having been marked in the process of running any line to or from them, as shown by the expert testimony and admitted by the defendants, they could only have been called for through the same mistake and confusion as to locality that characterize the other random calls for monuments, and are entitled to no greater consideration. These monuments mentioned in the survey are placed by the original surveyor at locations widely different from the positions they are shown to occupy by the actual surveys in this case. That the surveyor, Taylor, was mistaken in the location of these calls, or was ignorant of their true location relative to the lines laid down on the plat accompanying his survey, is shown by the testimony of the expert surveyors, and by the papers, grant, survey, and plat in the case, when applied to the actual geography of the country. On this ground the plaintiff asks the court to instruct the jury that these mistaken or false monuments are to be disregarded, and that the boundary lines, except the line from A to P, shall be established by the courses and distances stated in the survey and grant. The contention of the defendants that the boundary lines shall be run according to the calls for these mistaken or false monuments, instead of by the courses and distances, is based on the familiar principle that natural or reputed boundaries or lines of marked trees ought to be established in preference to mere course and distance. The reason for the rule is thus stated in *Hutch. Land Titles*, § 529:

"Monuments are facts visibly indicating the extent of the land and the direction of the boundary lines. The courses or distances laid down in the deed or plat are merely descriptive of the facts. They are necessarily based upon measurement, estimation, and calculation. Their accuracy depends upon the skill of the surveyor, and they may not be in accord with subsequent surveys. The monuments, however, actually found or placed upon the ground, are always, as long as they exist, in the same direction and at the same distance from each other."

Again:

"The controlling influence of a monument, natural or artificial, arises upon the supposition that it is more certain than course and distance. But, if in a given case it should prove less certain, the rule would fail, with the reason for it. Where the manifest intention of the parties requires the rejection of a call for one or more monuments in order to uphold the deed, the intent

must prevail." *White v. Luning*, 93 U. S. 514, 23 L. Ed. 938; *Hutch. Land Titles*, § 535.

The rule that monuments prevail over course and distance does not apply to mistaken or false calls, as in a case like this, where the evidence conclusively shows that the surveyor was mistaken or ignorant of the location of the monuments called for, and of the local geography of the mountainous territory in which he was locating the survey. *Cattle Co. v. Thomson*, 83 Tex. 169, 17 S. W. 920, is a case that received the approval of the court of appeals of Virginia in *Clarkston v. Iron Co.*, 93 Va. 258, 24 S. E. 937. In that case the court said:

"There are but two controlling questions in this case: (1) Whether the call for Devil's river, made in the original surveys of Keuchler, should be extended so as to cross the river, or should yield to course and distance. (2) * * * Keuchler intended to place the surveys on Devil's river, but in his attempt to do so he evidently mistook the true course of the river, and was misled by a dry cañon and the general course of the river as he found it when he established the southwestern corner of survey No. 26, in block C of the surveys, and the northeast corner of No. 84, in block I. It is true that the remaining surveys were not run upon the ground, but were platted in upon the map. They were platted in, however, from initial points fixed and clearly defined upon the ground. Keuchler may have intended to appropriate the land up to and across the river, but, as he did not know where the river actually was, no random call therefor will control course and distance, when there is a clearly-defined starting point. It would be utterly at variance with all rules upon the subject to so hold. These surveys must be run out as platted in accordance with the field notes, the call for Devil's river yielding to the calls for course and distance."

The calls for monuments relied on by defendants in the case at bar are clearly random calls, and the rule which holds that monuments must prevail over course and distance does not apply to such calls. To hold differently would give the rule an extension that has not received the sanction of any court, and that cannot be sustained by the reasons given for its adoption. An attempt to locate the survey according to the defendants' contention, and in harmony with natural monuments, disregarding the given courses and distances, gives results that could only come from the gravest mistakes in the calls for natural objects. The courses and distances are shown to be right by the fact that, when platted out, they plat back exactly to the beginning point, in the form shown by the original plat, and embrace the precise quantity called for; but if we adopt defendants' method, and run by natural objects, more than four-fifths of the area is sacrificed, the shape of the tract is destroyed, the upper half of the tract is reduced from a minimum width of more than 20½ miles, and a maximum width of 25 miles, to a minimum width of nothing, and a maximum width of about 5 miles, the southern end being reduced almost as much, and some of the streams called for that should be partly within the tract are left entirely outside, others are found flowing almost opposite to their supposed course, and others are missing altogether, while the distances are reduced from 20 miles to 5 miles, and courses varied more than 70°. Such errors in the location of and call for natural objects could not occur in the case of actual survey, but are such as

would almost inevitably result from an attempt to lay down so large a tract of land by protraction in a wilderness country, of which there was no established geography, and of which the surveyor, as shown by the evidence, had no correct knowledge. "The general rule, that the intention of the parties is to be ascertained in determining the proper construction of the contract, applies with the same effect to matters of description, in deeds and other conveyances, as to covenants and condition therein." Hutch. Land Titles, § 527. That it was the intention of the commonwealth to grant 500,000 acres of land to Robert Morris, and of Robert Morris to acquire title to that quantity, cannot be questioned by the documentary evidence, such as the plat, survey, and grant. That this intention would be defeated by adopting the construction contended for by the defendants does not admit of discussion. For the reasons stated, the monuments on which the defendants must rely to establish their theory of the true boundary of the survey in controversy must be disregarded by the jury, and the boundaries must be ascertained by courses and distances. And the court will instruct the jury accordingly.

Verdict for the plaintiff.

SUN PRINTING & PUBLISHING ASS'N v. SCHENCK.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 79.

1. LIBEL—OTHER PUBLICATIONS.

Evidence of previous publications by others of other or the same libelous matters charged by defendant is not admissible in reduction or mitigation of damages.

2. SAME—DEFENSES IN MITIGATION.

Defenses, though called by the pleader "defenses in mitigation of damages," are not such, no matter pleaded having a tendency to show that defendant had acted in good faith in making his publication, believing it to be true, or under an honest misapprehension or inadvertence.

3. SAME.

A defense to publication of libel, charging indictment of plaintiff with his partner, B., for forgery, alleging that plaintiff and B. had been guilty of forgery, and that on the day of publication of the libel B. was indicted, is not good in mitigation, it not being alleged that defendant was led by error to suppose the indictment against B. was against plaintiff, and that the publication was on that supposition.

4. SAME—DEFENSES.

It is no defense to a libel that plaintiff has been guilty of offenses other than those imputed to him, though of a similar character.

5. SAME—MITIGATION.

Only facts known to the defendant at the time of the publication, and which might have influenced him in making the statements, are available in mitigation of damages.

6. SAME—AGGRAVATING DAMAGES.

The interposition in bad faith of defenses not proved to a libel may be considered in aggravation of damages.

7. SAME—MALICE.

A plea that the publication was substantially true, not being sustained, is evidence of actual malice.

8. SAME—EVIDENCE.

Defendant, in action for libel for publishing statement that plaintiff had been indicted for forgery, having pleaded that plaintiff and his partner, B., had been previously indicted for a misdemeanor, and that on the day of publication B. was indicted for forgery, and having introduced the indictments in evidence, plaintiff may show that before the answer, though after the publication, the first indictment was dismissed, and that there was a verdict of not guilty on trial of the second; it, while in one view merely tending to disprove worthless "acts which defendant had attempted to establish, in another view tending to discredit the good faith of the pleader, and therefore to aggravate damages.

9. DAMAGES—REVIEW.

The amount of damages or the denial by the trial court of motion for new trial on the ground of excessive damages cannot be reviewed by the circuit court of appeals.

In Error to the Circuit Court of the United States for the Southern District of New York.

Franklin Bartlett, for plaintiff in error.

Sumner B. Styles, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment entered upon the verdict of a jury for the plaintiff in an action of libel. The defendant was the proprietor of the Evening Sun newspaper, and in the issue of January 29, 1895, published of and concerning the plaintiff the following paragraph:

"The regular grand jury to-day handed up two additional indictments for forgery against Col. H. C. Beecher and Vincent R. Schenck, of the defunct American Casualty Insurance & Security Company."

The defendant, in its answer, admitted the publication of the paragraph, and pleaded several defenses in mitigation of "any damages to which the plaintiff might otherwise appear to be entitled." Among these defenses the answer alleged that the paragraph was substantially true, and that the plaintiff, having formerly been a member of the firm of Beecher, Schenck & Co., composed, besides himself, of Henry B. Beecher, John W. Taylor, and William E. Midgley, which firm was the agent and business manager of the American Casualty Insurance & Security Company, was, in the month of January, 1895, prior to the publication of the article complained of, indicted with Beecher, Taylor, and Midgley, by the grand jury of the city and county of New York, for a misdemeanor; and that the misdemeanor for which the plaintiff was so indicted consisted in having knowingly concurred in making and publishing a written report and statement of the affairs and pecuniary condition of the said company containing divers material statements which were then and there wholly false and untrue, as he well knew. Another defense so pleaded was that, being a member of said firm of Beecher, Schenck & Co., Beecher, with the knowledge and complicity of the plaintiff, did feloniously falsify certain entries or applications made in the application book of said Casualty Insurance & Security Company, which the plaintiff knew to be false and untrue; and two certain indictments were found

on the 29th day of January, 1895, against the said Beecher for forgery in the third degree therefor by the grand jury of the city and county of New York. Another defense so pleaded was that prior to the publication of the paragraph complained of the defendant had published various articles in the Evening Sun concerning the plaintiff in reference to his connection with the said American Casualty Insurance & Security Company, to wit, in the issue of January 24, 1895, two separate paragraphs, entitled, respectively, "Beecher Surrenders" and "Four Under Indictment," and in the issues of January 24 and 25, 1895, paragraphs entitled "Rumored Indictments" and "Four Indicted Financiers"; and after the publication of such former articles the plaintiff had no reputation, character, or standing in the community which could have been damaged by the publication of the article complained of. Another defense so pleaded was that, prior to the publication of the libelous article, certain publications had been made in other newspapers, stating that the plaintiff had been indicted for misdemeanor in making a false report of the affairs of the American Casualty Insurance & Security Company, and that, after said publication, the plaintiff had no reputation or character which could have been damaged by the publication of the article complained of.

Several of the assignments of error impugn the rulings of the trial judge in respect to the sufficiency and effect of these defenses. Upon the motion of the plaintiff, he struck out the last defense. In his instructions to the jury he charged them that, if they found that defenses set up in the answer had not been proved, and were set up in bad faith, that circumstance could be considered in aggravation of damages; and he declined to charge the contrary, as requested by the defendant. He also instructed them that the answer of the defendant might be considered by them upon the question of exemplary damages as tending to show actual malice in the publication of the paragraph.

A defendant in an action of libel is responsible in damages for his own wrong, and not for the wrongful acts of others, who have published similar libels of the plaintiff; and the libels by the others neither add to nor detract from the wrong of the defendant. Consequently, it cannot be material whether these other wrongful acts have been committed previously or subsequently to that of the defendant, unless the proposition can be maintained that the reputation of the aggrieved party, having already been shattered by the previous libels, is less susceptible of further injury, and therefore that the evidence should be admitted as tending to reduce the damages. The answer to this proposition is that it is purely hypothetical, and is without any sanction in practical experience. No one can say which of many defamations has destroyed or materially impaired a reputation; or whether, but for the last, the earlier ones would have made any grave impression upon the opinion of the public. It would be idle to submit such an inquiry to a jury. Moreover, iteration, if long enough persisted in, will at last accomplish its result; and every repetition of a slander adds to its malign effect. "It is the successive repetitions that do the work. A falsehood often repeated gets to be believed."

Kenney v. McLaughlin, 5 Gray, 5. Proof of the bad character of the plaintiff, and, according to some of the authorities, proof of his bad reputation in respect to the matters which are charged in the libel, is competent. Such evidence is received because one whose character is bad is not entitled to the same measure of damages as one of unblemished fame. The principle, however, does not countenance the admission of previous rumors of his guilt of the offenses charged in the libel. *Wright v. Schroeder*, 2 Curt. 548, Fed. Cas. No. 18,091; *Root v. King*, 7 Cow. 613; *Inman v. Foster*, 8 Wend. 602; *Peterson v. Morgan*, 116 Mass. 350; *Scott v. Sampson*, 8 Q. B. Div. 491; *Wolcott v. Hall*, 6 Mass. 518. Evidence of previous publications by others of the libelous matters charged by the defendant is, upon principle, clearly inadmissible in reduction, or, standing alone, in mitigation, of damages; and it was so held in *Tucker v. Lawson*, 2 Times Law Rep. 593, and *Gray v. Publishing Co.*, 89 N. Y. St. Rep. 35, 55 N. Y. Supp. 35. It is inadmissible even when coupled with evidence that on such former occasions the plaintiff did not sue the publisher, or take any steps to contradict the charges made against him. *Rex v. Holt*, 5 Term R. 436; *Ingram v. Lawson*, 9 Car. & P. 333. The defense stricken out by the trial judge alleged only incompetent and irrelevant matters, and his ruling was correct.

None of the foregoing defenses set up in the answer of the defendant were defenses in mitigation of damages. It matters not that they were labeled as such by the pleader. None of them set up any matters having a tendency to show that the defendant had acted in good faith in publishing the paragraph, believing it to be true, or under an honest misapprehension, or inadvertently. The libel stated in terms that the plaintiff had been indicted on the day of the publication by the grand jury for forgery, and also by implication that a previous indictment had been found against him. The paragraph did not purport to charge that the plaintiff was guilty of the offense for which he had been indicted. The paragraph was libelous because it stated a fact tending to prejudice him in his good name and reputation, and to bring him into discredit. The finding of an indictment by a grand jury implies that sufficient evidence has been collected and adduced against the accused, in the absence of explanation, to make it proper and expedient that he should be placed on trial for the offense; in other words, that his guilt has been established *prima facie* to the satisfaction of the grand jury. But it does not necessarily imply that the accused is guilty. The imputation that a man has been indicted is a far less venomous attack upon his character than one which asserts his guilt, and, in legal contemplation, is less injurious. The defense alleging that at some previous time the grand jury had indicted the plaintiff, jointly with his co-partners, for a misdemeanor, was a justification *pro tanto* of the libel. If proved, the facts would have established that the statement by implication in the paragraph was not libelous, because it was true. If the defense alleging that the plaintiff and one of his partners had been guilty of forgery, and that his partner, on the day of publication of the libel, was indicted by the grand jury for forgery, had been supplemented by averments stating that the defendant was led by error to suppose the

indictment found against the plaintiff's partner was an indictment against the plaintiff himself, and had published the paragraph on that supposition, it would have set up proper matter of mitigation. The observations in respect to the defense stricken out by the trial judge are equally applicable to the defense alleging that the defendant had, previous to the publication of the libel, published other incriminating paragraphs concerning the plaintiff, by reason of which his reputation was valueless when the libel was published. If the facts set up in these defenses were true, they would not have had the remotest bearing upon the conduct of the defendant in publishing the libel complained of, as the averments were irrelevant to any issue which could properly be tried. The only office they could serve was to besmirch and befoul the reputation of the plaintiff.

It is not a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character; and such facts are not competent in mitigation of damages. The only tendency of such proof is to show, not that the plaintiff's reputation is bad, but that it ought to be bad. The strictness with which this rule is applied is shown in the ancient case of *Smithies v. Harrison*, 1 *Ld. Raym.* 727, and in the modern cases of *Andrews v. Van Duzer*, 11 *Johns.* 38, and *Parkhurst v. Ketchum*, 6 *Allen*, 406. It is also settled by law that only such facts are available in mitigation of damages as were known to the defendant at the time of the publication, and which might have influenced him in making the defamatory statements. *Bush v. Prosser*, 11 *N. Y.* 347; *Hatfield v. Lasher*, 81 *N. Y.* 246. Even a plea in mitigation, setting up competent defensive facts, if interposed in bad faith, may be considered by the jury in aggravation of damages, and is not protected by the Code of Civil Procedure of this state (section 535), according to the decision of the highest court of the state. *Cruikshank v. Gordon*, 118 *N. Y.* 178, 23 *N. E.* 457. Applying these considerations, as there was evidence upon the trial sufficient to authorize the jury to find that the defenses were not interposed in good faith, the trial judge was justified in instructing them that they might consider that circumstance in aggravation of damages.

By averring, as it did in one of the defenses of its answer, that the paragraph published was substantially true, the defendant assumed full responsibility for the libel. Such a plea, if untrue, and not maintained by the evidence, is an aggravation of the original charge, and "evinces continued and express malice." *Hil. Torts*, 445. The trial judge did not err in his instructions to the jury that this averment might be considered by them upon the question of actual malice. *Kennedy v. Gifford*, 19 *Wend.* 296; *Williams v. Miner*, 18 *Conn.* 464; *Stearns v. Cox*, 17 *Ohio*, 590; *Baldwin v. Soule*, 6 *Gray*, 321; *Robbins v. Fletcher*, 101 *Mass.* 115.

Another assignment of error is based upon the admission of evidence. The defendant having introduced in evidence the two indictments mentioned in its answer,—one for misdemeanor against the plaintiff and his partners, and the other for forgery against Beecher,—the plaintiff was allowed, against the objection of the defendant, to show by the indorsements of the first indictment that upon the mo-

tion of the district attorney it had been dismissed by the court having jurisdiction to try it, and to show by the record that there was a verdict of not guilty upon the trial of the second. These proceedings took place after the publication of the libel, but before the commencement of the action, and nearly three years before the interposition of the answer. If, in allowing the plaintiff to controvert the proof offered by the defendant to support issues which were extraneous to any legitimate controversy, the trial judge admitted incompetent evidence, the error was harmless, as the evidence merely tended to disprove worthless facts which the defendant had attempted to establish. In another view the evidence was relevant, and we think competent. The answer was interposed long after these judicial proceedings had taken place. They were a part of the history of the incriminating transactions which the defendant had set up in its answer as defensive matters. Common justice required the defendant to acquaint itself with the result of the criminal proceedings before interposing such matters in its answer. If it did not do so, or if it interposed the answer after it was informed, the circumstance tended to discredit the good faith of the pleading, and to weigh in aggravation of damages.

This court has no power to review the amount of damages when the proper rule of damages has been given to the jury, and we therefore cannot consider the assignment of error which alleges that the verdict was excessive. It is proper, however, to observe that, if the defendant had contented itself with pleading and proving that it was led by the error of its reporter to suppose that the indictment found against Beecher included the plaintiff, and published the paragraph upon that supposition, the case would have been a comparatively trivial one. It was made a serious one by injecting into it issues which were wholly foreign to the real controversy, and which could serve no purpose but to disparage the character of the plaintiff. Although the verdict was a large one, the result was undoubtedly due, in part at least, to the character of the defense.

The denial of the defendant's motion for a new trial because of the excessiveness of damages is not subject to review here. *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151; *Railway Co. v. Heck*, 102 U. S. 120, 26 L. Ed. 58.

The judgment is affirmed.

HUBBARD v. MUTUAL ACC. ASS'N.

(Circuit Court, E. D. Pennsylvania. June 25, 1897.)

ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—DEATH FROM CONCURRENT CAUSES.

Under an accident policy which expressly stipulates against liability for death from accident unless the accident is the proximate and sole cause, there can be no recovery where the death of the insured resulted from a rupture of the heart caused in part by its diseased condition, and in part from a fall, neither cause in itself being sufficient to cause death.

On Motion for New Trial.

Joseph L. Tull, for plaintiff.

Read & Pettit, for defendant.

BUTLER, District Judge. The only material question raised by the rule for new trial is—did the court misconstrue the policy? When the policy was first presented for consideration the inclination of my mind was with the plaintiff. It seemed at first blush that a different construction might, and probably would, render a majority of such policies valueless, inasmuch as a large proportion of the insured are, probably, affected with some disease, which in case of accident might contribute to the fatal consequences which ensue; and that the language might receive a construction which would support the plaintiff's view. A careful reading of the policy however and a cursory examination of the authorities during the trial, satisfied me that my first impression could not be sustained. The company defendant very carefully stipulates against responsibility for death from accident where the accident is not the proximate and sole cause of death. The case is not distinguishable from *Association v. Shryock*, 20 C. C. A. 3, 73 Fed. 774. The similarity of the two cases in all particulars is very remarkable; the language of the policy, the nature of the accident, (a fall), and the insured's previous bodily disease are the same. And while the trial judge held as I was at first inclined to do, the court of appeals construed the policy as I eventually did—the one before me; and held that the plaintiff could not recover if the disease entered into the cause of death—in other words, if the fall would not have produced death but for the disease. The court might have avoided this question, it is true, inasmuch as a reversal was necessary on another account; but it did not choose to do so, probably, because as it is said (page 5, 20 C. C. A., and page 776, 73 Fed.) the question "had been lately discussed and decided in the same way by the court" in several instances, citing eight cases. In *Association v. Fulton*, 24 C. C. A. 654, 79 Fed. 423, the United States court of appeals for the Second circuit under similar circumstances held the same way. The English courts, as may be seen by the following cases, have construed similar policies in the same manner: *Cawley v. Association*, 1 Cababe & E. 597-599; *Whitehouse v. Insurance Co.*, 7 Ins. Law J. 23, 31, Fed. Cas. No. 17,566; *McCarthy v. Insurance Co.*, 8 Biss. 363, 365-367, Fed. Cas. No. 8,682. While such provisions in policies may be unreasonable, or seem so, the court must give them effect as they are written. If the assured chooses to bind himself to such a stipulation he must bear the consequences; the court cannot relieve him.

HUBBARD v. TRAVELERS' INS. CO.

(Circuit Court, E. D. Pennsylvania. December 30, 1899.)

ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—DEATH FROM CONCURRENT CAUSES.

An accident policy insured against death only when resulting from bodily injuries through external, violent, and accidental means, "independently of all other causes," and provided that the insurance did not cover death "resulting wholly or partly, directly or indirectly, from any of the following causes: * * * Disease or bodily infirmity, hernia, fits, vertigo, sleepwalking." *Held*, that the phrases, "all other causes," and "disease or bodily infirmity," were not limited by the subsequent enumeration of specific diseases or infirmities, and that the policy did not cover death resulting from a rupture of the heart caused in part by its diseased condition, and in part by a fall on a slippery pavement.

On Motion for New Trial.

Samuel P. Tull and Geo. T. Bispham, for plaintiff.
Frank P. Prichard, for defendant.

MCPHERSON, District Judge. The insured died from a rupture of the heart caused in part by a diseased condition of that organ, and in part by a fall upon a slippery pavement. It is conceded that the fall would not have killed him if his heart had been sound, and also that the diseased heart would not have killed him, at the time when the accident happened, if the fall had not occurred. The question of remote and proximate cause need not be discussed, for the policy expressly provides that the company is only to be liable in case of death "resulting from bodily injuries * * * through external, violent, and accidental means, * * * independently of all other causes," and provides, also, that "this insurance does not cover * * * death * * * resulting, wholly or partly, directly or indirectly, from any of the following causes: * * * Disease or bodily infirmity, hernia, fits, vertigo, sleepwalking." It is undeniable that the death of the insured did not result from external, violent, and accidental means, independently of all other causes, but was caused in part, and at least indirectly, by a disease, namely, fatty degeneration of the heart. The sole question, therefore, is one of construction, and may be stated thus: Taking the foregoing provisions together, do they mean that the phrase, "all other causes," and the phrases, "any of the following causes: * * * Disease or bodily infirmity, hernia, fits, vertigo, sleepwalking;"—are limited to the diseases or bodily infirmities named,—hernia, fits, vertigo, and sleepwalking?

I think this question must be answered in the negative. If the four diseases or infirmities just named had been omitted, the meaning of the language quoted would scarcely admit of doubt. But it seems to me just as clear that their insertion does not limit the preceding phrase, "disease or bodily infirmity." They were probably used to prevent dispute concerning the true nature of these four varieties of perils, and to make it certain that, however they might be classified, the policy did not cover death resulting from either.

Other clauses follow, specifying additional risks against which the policy does not insure; and, if these clauses are examined, I think it will appear plainly that each is separated from the others, and stands by itself. I am unable to distinguish the case from *Association v. Shryock*, 20 C. C. A. 3, 73 Fed. 774; *Association v. Fulton*, 24 C. C. A. 654, 79 Fed. 423; and *Hubbard v. Association* (C. C.) 98 Fed. 930,—the last citation being a suit growing out of the accident now in controversy, and decided by Judge Butler more than two years ago (No. 62 of October sessions, 1895).

A new trial is refused.

VILLAGE OF WESTERN SPRINGS, ILL., v. COLLINS.

(Circuit Court of Appeals, Seventh Circuit. January 24, 1900.)

No. 638.

1. DECLARATION—OYER OF DEED.

Production by plaintiff of a deed mentioned in the declaration, on defendant craving oyer thereof, makes it part of the declaration.

2. MARRIED WOMAN—LIABILITY ON COVENANT.

Starr & C. Ann. St. Ill. (2d Ed.) p. 2122, § 6, declaring that "contracts may be made and liabilities incurred by a wife, and the same enforced against her * * * as if she were unmarried," does not make her liable on covenants in a deed of her husband's land, in which she joins to release dower or homestead rights.

3. CONFLICT OF LAWS.

Liability of a wife on covenants in deed of her husband's land, in which she joins to release dower or homestead rights, is governed by the laws of the state in which the land is situate and the deed is delivered, though the deed is acknowledged in another state.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This suit was brought by the village of Western Springs, Ill., the plaintiff in error, against Ruth S. Collins to recover upon a covenant, in her deed to the plaintiff in error of certain described premises, to pay and discharge at maturity a certain described trust deed or mortgage, with apt allegations in the declaration of failure on her part, and of payment of the incumbrance by the plaintiff in error, and making profert of the deed. Thereupon the defendant craved oyer of the supposed instrument in the declaration mentioned, and, it being produced by the plaintiff, it was read to her, and she thereupon demurred generally to the declaration. The deed produced purported to be dated the 29th day of April, 1892, and to be made by Charles C. Collins and Ruth S. Collins, his wife, who, as grantors, convey and warrant to the plaintiff in error the premises therein described, situated in the county of Cook and state of Illinois. The deed also contained this covenant: "Said deed subject to a certain trust deed or mortgage on said property, which said grantors, for themselves, their heirs, administrators, executors, and assigns, assume and agree to pay or have released from said property when the said trust deed or mortgage becomes due." The deed was acknowledged by Mr. Collins in the county of Cook, state of Illinois, on the day of its date, and by Mrs. Collins, in the county of Jefferson, state of Kentucky, on the 3d day of May, and is alleged in the declaration to have been delivered to the plaintiff in error in the county of Cook, state of Illinois. The demurrer was sustained by the court below, and the suit dismissed, to review which decision this writ of error is sued out.

W. P. Quinby, for plaintiff in error.

Hatch & Ritsher and Bennett H. Young, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

We take it that the production of the deed upon the prayer of the defendant made the instrument produced a part of the plaintiff's declaration, to the same extent as though it had been set out in *hæc verba* in, and made part of, the declaration. 1 Chit. Pl. 433. It therefore appears on the face of the declaration that the covenant sued on was that of a married woman, which at common law was inoperative because of her inability to contract. *Jackson v. Vanderheyden*, 17 Johns. 167. The statute of the state of Illinois with respect to the rights and liabilities of married women, which governs the case before us, was passed in the year 1874 (2 Starr & C. Ann. St. [2d Ed.] p. 2122, § 6), and is as follows: "Contracts may be made and liabilities incurred by a wife, and the same enforced against her, to the same extent and in the same manner as if she were unmarried." Within the last 50 years many of the states of the Union have enacted laws removing, in large measure, the common-law disability of married women, and decisions in the different states upon the various statutes have not been at agreement. It would be unprofitable here to review the various decisions, for the supreme court of the state of Illinois has passed upon this statute, and its decision is controlling. In *Snell v. Snell*, 123 Ill. 403, 14 N. E. 684, the court held that where a married woman had, for the purpose of releasing her dower, joined with her husband in a deed of certain premises, which were therein wrongly described, a bill in equity would lie, as against her, to reform the deed, although it was conceded that the contract of conveyance was that of the husband, and that such a bill would not lie prior to the statute. The judge delivering the opinion of the court below indulges in strong and general language with respect to the supposed emancipation of married women by the statute quoted, in respect of her right to contract as though she were a *feme sole*. The actual point decided, however, was as stated. In the case of *Sanford v. Kane*, 133 Ill. 199, 24 N. E. 414, 8 L. R. A. 724, decided two years later, the court ruled that a married woman, joining with her husband in a deed for the purpose of releasing her dower or homestead rights, was not estopped by her covenants in the deed, and that a title subsequently acquired by her did not inure to the grantee in the deed of her husband and herself by virtue of the covenants of that deed; otherwise, however, as we understand the decision, if the property conveyed was her separate estate. It would seem, therefore, that the construction placed upon this statute by the supreme court of the state of Illinois is that a married woman may contract, and will be bound by her contract, with respect to her separate estate, but not so with respect to covenants in a deed conveying the estate of the husband, and in which she joins merely to effectuate a release of dower and homestead rights.

It was stated at the hearing by counsel for the defendant in error that it was conceded below that the estate here conveyed was that of

the husband. That concession is here but mildly, if at all, disputed. Since at common law this covenant would be wholly inoperative, the plaintiff, in order to establish by the declaration legal liability on the part of the defendant, must exhibit a case within the statute which under certain circumstances creates liability, and must show that the covenant was executed by the married woman under conditions which by the statute made the covenant binding upon her.

The question was suggested whether this instrument was to be governed by the law of the state of Illinois, or by the law of the state of Kentucky, so far as concerns the liability of the defendant in error, because of the acknowledgment of the deed by her in the latter state. It may be that the law of Kentucky governs with respect to the manner of the execution of the instrument, but of that we have heard no complaint; but as the deed was to be operative upon land in the state of Illinois, and the deed was delivered in that state, and the covenant was to operate with respect to incumbrances upon land in that state, it is clear that the law of the state of Illinois governs with respect to the interpretation and the validity of the covenant. *Phipps v. Harding*, 34 U. S. App. 148, 17 C. C. A. 203, 70 Fed. 468. The judgment is affirmed.

NORTHERN NAT. BANK v. HOOPES.

SAME v. SMYTHE.

(Circuit Court, E. D. Pennsylvania. January 11, 1900.)

Nos. 18, 19.

1. PLEADING—AFFIDAVIT OF DEFENSE.

While an affidavit of defense need not be framed with the technical accuracy of formal pleadings, it must disclose all the elements of a substantial defense, and cannot be strengthened by intendment.

2. SAME—ALLEGING BREACH OF WARRANTY.

An affidavit of defense does not sufficiently aver a breach of a contract of warranty that certain machinery to be furnished for a dredge should be of ample strength and good construction, and should perform the work specified, without breaking down, if properly handled, by alleging that the "dredge and machinery" failed to perform the work, and broke down, and which fails to allege that the machinery was properly handled.

3. PROMISSORY NOTES—CONTRACT OF INDORSER—PAROL EVIDENCE TO VARY.

By the uniform decisions of the United States courts, the contract created by the indorsement and delivery of a negotiable note cannot be contradicted, added to, or varied by proof of a contemporaneous parol agreement; and, the question being one of general commercial law, such rule governs in all federal courts.

On Rule for Judgment for Want of Sufficient Affidavits of Defense.

Sharpe & Alleman and Geo. E. Johnson, for plaintiff.

Charles H. Burr, T. B. Harned, and John A. McCarthy, for defendants.

DALLAS, Circuit Judge. These cases have been argued together upon the plaintiff's rule for judgment for want of a sufficient affidavit of defense in each of them. They present the same questions, and may both be disposed of in a single opinion.

The actions are brought upon a promissory note, as follows:

\$3,100.

Philadelphia, 1st April, 1899.

Four months after date, I promise to pay to the order of Vulcan Iron Works Co. thirty-one hundred dollars, at Northern National Bank, Toledo, Ohio, without defalcation, for value received.

[Signed]

John McGill White.

No. ———. Due, ———.

[Indorsed]

Frank C. Smythe.

Herman Hoopes.

Pay to the order of Northern National Bank of Toledo, Ohio.

The Vulcan Iron-Works Co.,

By Alex. Backus, Prest. & Tr.

Alexr. Backus.

The affidavit avers facts which, it is contended, show that the defense alleged is as available against the actual plaintiff as it would be against the Vulcan Iron-Works Company; but this point need not be decided, because I am of opinion that, even as against the Vulcan Company, no valid defense has been sufficiently exhibited.

It is not necessary that an affidavit of defense should be framed with the technical accuracy of formal pleadings, but it must disclose all the elements of a substantial defense. It ought to aver distinctly, either upon knowledge or information and belief, every necessary fact. Nothing should be left to mere inference. It is altogether probable that the statement of the defendant will in all cases present the nature and character of his defense as strongly as the facts will justify. It cannot be strengthened by intendment. The court has a right to expect a clear and distinct averment of the facts on which the defense must turn. If the defendant has not been able to set up a *prima facie* case for himself, it cannot help him by inference drawn from obscure language which he by a word or two might have made plain. "If a defendant, when he has the stand to himself, cannot make out a case in his favor, it must be because he has none, and he ought not to ask the court to patch up a case for him." *Comly v. Bryan*, 5 Whart. 265; *Bardsley v. Delp*, 88 Pa. St. 420; *Peck v. Jones*, 70 Pa. St. 84. But, upon construing the present affidavit as favorably for the defendant as is reasonably possible, it appears that the defense relied upon is simply this: That the note in suit is one of several notes which were given by John McGill White, who was treasurer of the Boise Dredging Company, indorsed by Frank C. Smythe and Herman Hoopes, who were directors of that company, "upon an express oral agreement that said notes were to be paid at maturity if the aforesaid guaranty of the Vulcan Iron-Works Company was satisfactorily performed, otherwise an offset for damages was to be allowed; and in no event was payment to be made until full test was made." The "guaranty" referred to in "the express oral agreement" thus set up to defeat the plaintiff's right to recover is stated to be contained in a certain contract made by the Vulcan Iron-Works Company with the Boise Dredging Company, a copy whereof is annexed to the affidavit. By this contract the Vulcan Company agreed to furnish to the dredging company "certain machinery for one elevator bucket dredge, as per specifications," and "to assist in the setting up

of our machinery on board your dredge"; and the "aforesaid guaranty," as expressed in the contract, is in these words: "We will guaranty ample strength and good construction in every part, and that the material and workmanship shall be first-class. We will guaranty the machinery we furnish to perform the work specified, without breaking down, if properly handled." The only averment that this undertaking was not "satisfactorily performed" is "that the Vulcan Iron-Works Company has wholly failed to carry out said contract with said Boise Dredging Company; that said dredge and machinery have failed to perform the work called for by said contract, having broken down repeatedly, and have never been able to work at the rate of sixteen buckets per minute, owing to defects in workmanship." If this averment had ended with the general assertion that the Vulcan Company has failed to carry out its contract, it would, under all the authorities, have been clearly defective, as lacking specification and definiteness, and this defect is not remedied by the statements which follow. There is no guaranty that the dredge and machinery would perform the work called for. The guaranty related, of course, only to the machinery which the Vulcan Company was to furnish; and that the dredge and machinery have broken down repeatedly, and have never been able to work at the rate of speed specified, because of defects in workmanship, might well be true, and yet not have been due to any lack of strength and good construction in the material and workmanship of the machinery supplied by the Vulcan Company. Furthermore, there is no allegation that the machinery supplied by that company, or even any other part of the general construction, broke down when being properly handled, although the proper handling of the machinery was made an express condition of the guaranty. *Brick v. Coster*, 4 Watts & S. 494; *Rising v. Patterson*, 5 Whart. 320; *Wilson v. Lyle* (Pa. Sup.) 16 Atl. 861. So much for the alleged guaranty and its breach. But with respect, also, to the consequence which it is said was to result from failure to perform it, the affidavit contains no adequate statement. It alleges the express oral agreement to have been that, if the guaranty was satisfactorily performed, the note should be paid, but "otherwise an offset for damages was to be allowed, and in no event was payment to be made until full test was made." Yet no information is given as to whether the defendant claims an "offset for damages," and, if so, for what amount, either exact or approximate, or whether, on the other hand, he proposes to insist that payment of the note is not presently demandable, because no full test has been made.

Apart, however, from the particular defects which have been pointed out, this affidavit is, I think, radically insufficient, because the issue which it tenders is a wholly inadmissible one. The oral agreement alleged is in direct contradiction of the absolute obligation incurred by the defendant's indorsement of the note sued on, and it cannot be received to annex a condition to that obligation. *Bank v. Dunn*, 6 Pet. 51, 8 L. Ed. 316. Although the note appears to have been drawn in Pennsylvania, it was made payable in Ohio, and seems to have been, after indorsement, delivered in that state; but I do not deem it necessary to determine the place of contract, for the question with

which I am now dealing is one, not of local, but of general, commercial law. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Watson v. Tarpley*, 18 How. 517, 15 L. Ed. 509; *Brooklyn City & N. R. Co. v. National Bank of Republic of New York*, 102 U. S. 29, 26 L. Ed. 61. In Pennsylvania it has, it is true, been decided that the contract evidenced by the blank indorsement of a promissory note is not subject to the rule which excludes oral evidence to alter or vary the terms of a written agreement. *Ross v. Espy*, 66 Pa. St. 482. But the distinction upon which this decision was based seems to me to be unwarranted. The contract of indorsement is not an "implied" one. An implied contract, in the legal sense of the term, is one which has no existence in fact, but which the law, for the furtherance of justice, imposes upon a party who, under the circumstances of the case, ought to be held as if he had contracted, though in truth he never contracted at all. It is founded upon legal obligation, but is actually nonexistent, whereas the contract of indorsement is a veritable one, in which the element of consent is always present. "It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants, and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation, so that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full." *Martin v. Cole*, 104 U. S. 37, 26 L. Ed. 647. It may well be doubted whether the doctrine of *Ross v. Espy* would now be maintained even in Pennsylvania. *Phillips v. Meily*, 106 Pa. St. 536. The tendency of the recent decisions of its supreme court (too numerous to be conveniently cited) has been towards a more strict enforcement of the parol-evidence rule; and certain it is that the peculiar departure from that rule which was made (not for the first time) in *Ross v. Espy* has not been generally sanctioned by the courts of the other states. See *Chaddock v. Vanness*, 35 N. J. Law, 517, overruling *Johnson v. Martinus*, 9 N. J. Law, 144, and *Allen v. Furbish*, 4 Gray, 506. But the decisions of the courts of the United States are, for this tribunal, of paramount authority; and by them it has been uniformly held that the terms of the contract created by the indorsement and delivery of a negotiable note may not be contradicted, altered, added to, or varied by proof of a contemporaneous parol agreement. The ruling of Mr. Justice Washington in the case of *Bank Co. v. Evans*, 4 Wash. C. C. 480, Fed. Cas. No. 13,635 (not 4 Wall., as cited in *Ross v. Espy*), was expressly rejected by the supreme court of the United States in the case of *Bank v. Dunn*, 6 Pet. 51, 8 L. Ed. 316, and is in direct conflict with the judgment of that court in *Bast v. Bank*, 101 U. S. 93, 25 L. Ed. 794, and in *Martin v. Cole*, 104 U. S. 30, 26 L. Ed. 647. In each of the cases mentioned at the head of this opinion the plaintiff's rule for judgment for want of a sufficient affidavit of defense is made absolute.

RANDOLPH v. TANDY.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1900.)

No. 865.

1. GARNISHMENT—JURISDICTION—WHEN ACCOUNTING IS REQUIRED.

A federal court is not without jurisdiction at law to render judgment against a garnishee on the ground that an accounting between the garnishee and the debtor is involved, which can only be had in a court of equity, where the only question to be determined is the amount due from the garnishee to the debtor under a contract by which they were to share the net profits of a business transaction which has been fully closed, and it does not appear that such determination involves an accounting of the complicated nature which is essential to give a court of equity jurisdiction, but it merely requires a finding of the amounts advanced and the expenses paid by the garnishee under the contract, all of which are shown by his undisputed evidence.

2. SAME—SCOPE OF GARNISHEE'S LIABILITY—TEXAS STATUTE.

Under the garnishment statute of Texas (Rev. St. Tex. 1895, arts. 226, 227), which is applicable to proceedings in the federal courts in that state, and which provides that a garnishee shall not make any payment to, nor deliver any effects to, the defendant after service of the writ upon him, the rights of a plaintiff are not fixed by the status of the parties at the time the writ is served, but if the garnishee then owes any debt to, or has in his possession effects of, the defendant, to which the garnishment can attach, the court may include in its determination any further indebtedness accruing, or property coming into possession of the garnishee, by virtue of the same contract or transaction, between the time of such service and the final hearing, requiring the garnishee to file a supplemental answer, or to answer additional interrogatories, in accordance with the local practice, when necessary.

In Error to the Circuit Court of the United States for the Northern District of Texas.

On February 5, 1887, L. V. F. Randolph obtained a judgment against W. T. Hudson and others in the United States circuit court for the Northern district of Texas for \$52,926.60. On June 26, 1897, Randolph's agent made affidavit in due form to obtain a writ of garnishment to A. H. Tandy. The writ was issued on June 26, 1897, and was duly served on June 29, 1897. A. H. Tandy, as garnishee, answered the writ, denying any indebtedness to Hudson, and denying that he had in his possession any of the property or effects of Hudson. He also specially answered, setting up a contract between him and Hudson by which Hudson was to purchase cattle for him with money which he was to furnish on terms as shown in the evidence hereinafter stated. On January 27, 1898, Randolph's agent made affidavit controverting the answer. Issues were tendered and joined, and on the trial the evidence tended to show that prior to June 29, 1897, a contract was entered into between the defendant, A. H. Tandy, and W. T. Hudson, by which it was agreed that said Hudson should purchase cattle for the defendant, which should be the property of the latter, with money furnished by the defendant; that the cattle should be held by the defendant until such time as he should see fit to sell the same; that all expenses of keeping and handling the cattle should be paid by the defendant; that when any of the cattle should be sold the proceeds of the sale should be devoted to the payment to the defendant of all moneys expended by him in the purchase of the cattle sold, and for their care, together with 10 per cent. interest on the same; that, if there should remain a profit, it should be divided equally between the defendant and W. T. Hudson, and, if there should be a loss, one-half of the loss should be borne by the defendant and one-half by said Hudson (the latter's part of such loss to be made good out of any subsequent profit he might become entitled to under the contract, he being insolvent); that in making said contract the defendant and Hudson did not intend

to become partners; that, at the time the writ of garnishment was served on the defendant, he held about 221 head of cattle purchased under the contract, and before the answer was filed he purchased other cattle under said contract; that some of the cattle had been sold prior to the filing of the answer in garnishment, and all of the cattle had been sold prior to the trial; and that, after making the deductions provided for under the contract, there remained a profit, Hudson's share of which under said contract would amount to several thousand dollars,—there having been no losses, and the transactions under said contract having been closed. The testimony which the plaintiff offered on these points consisted of the answers and depositions of the defendant, Tandy, whose evidence was the only proof offered tending to show his advances, and the expenses paid by him, and the amounts realized from the cattle. No specific item of the account between the defendant and Hudson was in conflict under the evidence. Plaintiff further offered evidence tending to show that at the time the garnishment was sued out and served he was, and at the time of the trial remained, the judgment creditor of W. T. Hudson, by virtue of a judgment obtained in the circuit court, which is still unsatisfied, to an amount of over \$25,000. At the conclusion of the testimony the defendant suggested orally to the court that the evidence introduced by the plaintiff was insufficient to support an action in garnishment, on the ground that the same involved the settlement of an account in partnership, and was a controversy exclusively of equitable cognizance, which would not be adjudicated in a suit at law. The court held that the action did not involve the settlement of a partnership account, but did involve an accounting, and was therefore equitable in its nature, and could not be entertained in a suit at law. The plaintiff excepted to this action of the court. At the conclusion of the testimony the court instructed the jury peremptorily to find for the defendant. To the charge of the court instructing the jury to find for the defendant, the plaintiff excepted. The jury, as directed, returned a verdict for the defendant, A. H. Tandy, garnishee. L. V. F. Randolph brings the case to this court for review on writ of error. It is assigned as error that the court erred in instructing the jury to find for the defendant.

J. M. McCormick and Wendel Spence, for plaintiff in error.

A. T. Watts and A. J. Booty, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This case was determined in the court below on a question of equitable jurisdiction. The case was on trial at law, and the court was of opinion that it "involved an accounting, and was therefore equitable in its nature, and could not be entertained in a suit at law." It is true that in the United States courts the distinction between common law and equity is maintained. This distinction must be observed, even if it be abolished by the code procedure of the state in which the federal court is sitting. In *re Sawyer*, 124 U. S. 200, 209, 8 Sup. Ct. 482, 31 L. Ed. 402; *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198. Many cases of accounting arise of which an equity court alone has jurisdiction. But, if the case is one of accounting only, it will be found that the complicated nature of the accounts constitutes the ground for going into equity. *Kirby v. Railroad Co.*, 120 U. S. 130, 134, 7 Sup. Ct. 430, 30 L. Ed. 569. The bill which invokes this jurisdiction is insufficient if it only alleges that the accounts are of an intricate and complicated nature. It must descend to particulars, and state the facts showing the intricate and complex nature of the accounts. 3 *Daniell, Ch. Pl. & Prac.* (4th Am. Ed.) p. 1929, and note 1. It cannot be maintained that a court of

equity has jurisdiction of every action for goods sold or money advanced, where partial payments have been made, or of every contract, express or implied, where different sums of money have become due, and different payments have been made. In *Fowle v. Lawrason*, 5 Pet. 495, 503, 8 L. Ed. 204, Marshall, C. J., said, "Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted." In the absence of other matters of equitable cognizance, the unquestioned rule is that courts of equity will not take jurisdiction unless great complexity exists in the accounts. There was no evidence in the case showing any complication in the account between Tandy and Hudson. The account consisted only of amounts advanced and expenses paid by Tandy. The only other matter to be considered in the accounting is the amount realized from the sale of the cattle, and the bill of exceptions shows that Tandy's statement on this subject was accepted without other evidence. The record before us shows no such intricate and complex account as requires the interposition of a court of equity.

When the writ of garnishment was served on Tandy, he held about 221 head of cattle bought under the contract. Hudson, the purchaser, had a contingent interest in them, for he was to have one-half of the profits from the sale of the cattle. Other cattle were purchased before the garnishee answered. It is important to note that some of the cattle had been sold before the garnishee answered. One-half of the proceeds of such sale, after deducting moneys advanced by Tandy, with interest and expenses, belonged to Hudson. This was the status when the answer was filed. Before the trial all the cattle were sold. The evidence showed that after deducting advances, interest, and expenses, there remained a profit, and that under the contract Hudson's share was several thousand dollars. The transactions under the contract had been closed. Clearly, Hudson, the defendant in the judgment, could have maintained an action at law for his share of the profits remaining in Tandy's hands, for their joint trading venture was ended. This being true, the garnishee, Tandy, is indebted to Hudson in the sense of the statute authorizing garnishment. Rev. St. Tex. art. 219; Rood, Garnish. § 57. The general rule is that the liability of the garnishee is determined solely with reference to the facts as they existed when the writ was served. *Id.* § 49. This doctrine, however, is modified in some of the states by the garnishment statutes, and in others the courts have limited its application. "Some liability," said Chief Justice Shaw, "must exist at that time, in order to charge him; but that liability may be greatly modified, and even discharged, by subsequent events." *Smith v. Stearns*, 19 Pick. 20, 23. In *Edgerton v. Martin*, 35 Vt. 116, it was held that by the service of the writ "the plaintiffs gained the right that the goods, effects, and credits of the defendants then in the trustee's hands, as well as all collections which he should afterwards make on the demands turned out to him, should be applied on his liabilities for them, in accordance with the contract between them existing at the time the process was

served." In *Insurance Co. v. West*, 8 Watts & S. 350, it was held that a claim uncertain at the time of the service of the writ, but rendered certain at the time of the answer, was embraced in the levy. The Texas statutes, we think, do not confine the investigation to the status existing when the writ was served. The garnishee is to be discharged, should it appear from his answer that he is not indebted to the defendant, and was not so indebted when the writ of garnishment was served on him, and that he has not in his possession any effects of the defendant, and had not when the writ was served. Rev. St. Tex. 1895, art. 227. On and after the service of the writ of garnishment, it is not lawful for the garnishee to pay to the defendant any debt, or to deliver to him any effects. *Id.* art. 225. These statutes are applicable in the United States courts. Rev. St. U. S. §§ 915, 916; *Railroad Co. v. Hart*, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226. Construing the Texas statutes cited above, the supreme court of that state has held that a writ of garnishment appropriates whatever the garnishee owes at the time of his answer, as well as that owing at the service of the writ. *Gause v. Cone*, 73 Tex. 239, 11 S. W. 162. When necessary, we think the court can so control the making up of the issues in the case as to settle the controversy relative to the entire fund in the hands of the garnishee. Where the garnishee, after answering, receives additional funds on a contract in force when the writ was served, there can be no objection to requiring the garnishee to file a supplemental answer, or to answer additional interrogatories, as the local practice may be, so that the whole matter may be determined. The judgment of the circuit court is reversed, and the cause remanded.

FRANKFORD REAL-ESTATE, TRUST & SAFE-DEPOSIT CO. v. JACKSON COUNTY.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 600.

MUNICIPAL CORPORATIONS—POWER OF ILLINOIS COUNTIES TO ISSUE INTEREST-BEARING WARRANTS.

The Illinois statute of May 31, 1879 (Hurd's Rev. St. c. 146a, §§ 1, 2), providing that warrants "payable on demand" shall be issued upon the treasurer of the state or any county or municipality only when there shall be sufficient money in the appropriate fund to pay the same, except that, when there shall be no money to meet the ordinary and necessary expenses, warrants may be authorized and issued in anticipation of taxes levied, does not affect the power of a county, existing under prior statutes, and recognized by the decision of the supreme court of the state, to issue interest-bearing orders, payable at specified times in the future, in payment of contractors for the building of a jail; nor are such orders rendered invalid because they are negotiated by the county, and the proceeds used to pay the contractors.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

This is an action of assumpsit on six warrants drawn by the clerk upon the treasurer of Jackson county, Ill., each for five hundred dollars, upon interest.

coupons attached thereto, and upon coupons cut from other warrants of the same tenor and origin. The warrants bear date February 1, 1895, are made payable two and three years after date, and otherwise are alike. The board of supervisors of Jackson county, at their July term, 1894, adopted a resolution instructing the building committee to proceed to contract for the building of the jail as per plans and specifications adopted, and directing further that "the committee, in advertising for bids in this work, will designate the manner in which the same shall be paid for, namely, in interest-bearing county orders, said orders to draw interest at the rate of 5 per cent. per annum from date, interest payable annually,"—naming here times of payment for specified sums, commencing at five and ending with ten years after date, and concluding: "The clerk is hereby authorized to draw these interest-bearing orders as the work progresses, and in accordance with the contract as made by the said committee." Later, at the same term, the committee's report of bids received and those accepted was approved, and on motion "the superintendent was empowered to purchase all lumber, paints, iron, etc., as needed for the building." At the ensuing September term the committee reported the work progressing satisfactorily, but "the contractors finding some difficulty in realizing on their orders." At a called term, on January 23, 1895, correspondence with Eastern capitalists was reported, and resolutions offered and adopted to the effect that for the payment of the orders issued and to be issued the sum of \$2,500 be set apart each year from the levy of seventy-five cents on the one hundred dollars valuation, levied for county expenses; that said orders be made payable \$1,500 each year for two years from date, \$2,000 each year thereafter to and including the ninth year from date, "or so much as may be needed to complete the jail"; that the orders shall bear five per cent. annual interest, payable semiannually; that anything to the contrary in the resolutions of July 12th and September 14th is repealed so far as it relates to said orders, and that the form of the orders and coupons be as follows:

"\$———. Jackson County, Illinois. No. ——.
"Treasurer of said County. "———, 189—.

"On or before —— years from date pay to ——, or bearer, the sum of five hundred dollars, with interest at the rate of five per cent. (5%) per annum, payable semiannually (as per coupon attached), out of funds collected under the levy for county expenses of seventy-five (75) cents on one hundred dollars (\$100) valuation in accordance with the resolutions of the board of supervisors adopted Jan. 23d, 1895. This order is issued in part payment for building county jail.

"By Order of County Board.

"Countersigned by

"———, Treasurer.

"———, Clerk.

"No. ——.

\$———.

"Date ———, 18—.

"The treasurer of Jackson county, Illinois, will pay the bearer twelve and 50/100 dollars, being six months' interest on county order of above number, due on above date. ———, Clerk.

"Attest:

"———, Treasurer."

And thereupon the record proceeds: "On motion Mr. Hartman, the clerk be, and is hereby, authorized to issue thirteen thousand dollars (\$13,000) in jail orders, as stated in the resolutions just adopted, with semiannual interest coupons at five per cent. (5%) interest, the same being in five hundred dollar (\$500) orders. Four thousand dollars (\$4,000) of said orders, which is held by the First National Bank of Murphysboro, Ill., to be exchanged by the clerk, if said bank so desire. The remaining nine thousand dollars (\$9,000) to be sold to Edward C. Jones & Co., of New York, at ninety-four (94) cents on the dollar, and, if the said Edward C. Jones & Co. decline to take them, to then sell to any party or parties who desire to purchase them at that rate (ninety-

four [94] cents on the dollar) or better." On the ensuing March 4th the committee reported as follows: "That in pursuance of an order of this board made January 23, A. D. 1895, relating to the issuance of county orders in the sum of (\$9,000) nine thousand dollars, and which was ordered to be sold at 94 cents on the dollar to Edward C. Jones and Company, of New York, we herewith submit that, after a very elaborate amount of correspondence between Edward C. Jones and Company and your committee, we finally succeeded in securing an order that was acceptable to them. The committee, not being bonded officers of the county, had a delicacy in handling any fund belonging to the county obtained on sale of said orders, and therefore requested the county clerk, J. L. Ozburn, to forward said orders to New York, which was done, and a draft forwarded through the First National Bank of Carbondale. Upon the arrival of said draft in the sum of eight thousand four hundred and sixty dollars (\$8,460), the county clerk gave his check to the said bank, and took up the orders held by that bank as collateral for funds advanced to the contractors and superintendent of construction in the following sums: Three orders of one hundred dollars each, payable to Hayden & Prickett; one order of four hundred dollars, payable to Hayden & Prickett; six orders of five hundred dollars each, made payable to Hayden & Prickett; one order of one hundred dollars, payable to J. S. Hartman; one order of two hundred dollars, made payable to J. S. Hartman. * * * Said orders were canceled by the clerk, and are herewith presented. We recommend that the same be canceled on the books, and that they be destroyed by fire, in the presence of this board." At the July term, 1895, the committee reported: "The building is virtually completed. * * * \$2,700 in orders have been issued in payment of the work of building. It will take \$6,000 more orders to pay all claims and complete the building in all its details. We therefore recommend that the county clerk be instructed to issue the above amount in a routine series on the order of the building committee;" and later a further issue to the amount of \$2,500 was authorized.

A transcript of these and other relevant proceedings of the board of supervisors was admitted in evidence, but the warrants and coupons were excluded on the ground that their execution was not authorized by law. The plaintiff in error asserts authority therefor in section 26, c. 34, p. 655, 1 Starr & C. Ann. St., which provides: "It shall be the duty of the county board of each county, first, to erect or otherwise provide, when necessary and the finances of the county will justify it, and keep in repair a suitable court house, jail and other necessary county buildings, and to provide proper rooms and offices for the accommodation of the several courts of record of the county, and for the county board, county clerk, county treasurer, recorder, sheriff and the clerks of the said courts, and to provide suitable furniture therefor. But for counties not under township organization, no appropriations shall be made for the erection of public buildings without first submitting the proposition to a vote of the people of the county, and said vote shall be submitted in the same manner and under the same restrictions as provided for in like cases in section 27 of this act." The contention of the defendant in error is that the act quoted is limited by the following provisions of the act of 1879 (chapter 146a, Rev. St. Ill. [Hurd's Revision]): "(1) That warrants payable on demand, shall hereafter be drawn and issued upon the treasurer of this state or of any county, township, city, school district or other municipal corporation, or against any fund in his hands, only when at the time of drawing and issuing of such warrants, there shall be sufficient money in the appropriate fund in the treasury to pay said warrants. (2) That whenever there is no money in the treasury of any county, township, city, school district or other municipal corporation to meet and defray the ordinary and necessary expenses thereof, it shall be lawful for the proper authorities of any county, township, city, school district or other municipal corporation, to provide that warrants may be drawn and issued against and in anticipation of the collection of any taxes already levied by said authorities for the payment of the ordinary and necessary expenses of any such municipal corporation, to the extent of seventy-five per centum of the total amount of any said tax levy: provided, that warrants drawn and issued under the provisions of this section shall show upon the face that they are payable solely from said taxes when collected, and not otherwise,

and shall be received by any collector of taxes in payment of the taxes against which they are issued, and which taxes, against which said warrants are drawn, shall be set apart and held for their payment."

George A. Sanders, for plaintiff in error.

Samuel P. Wheeler, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The warrants in question are not payable on demand, were not issued in order to raise money "to meet and defray the ordinary and necessary expenses" of the county, and therefore do not come within the scope of either section of the act of 1879. It was so decided by the circuit court of Jackson county on an application for an injunction against the issue of these particular warrants. The transcript of that adjudication was offered in evidence, but, if otherwise competent as evidence upon any issue in the case, it was properly excluded, because not authenticated. It is not denied, however, that the injunction was applied for, and that in refusing it the circuit judge expressed the following opinion:

"The right to provide for the payment of contractors erecting a county jail by interest-bearing county orders payable at specified times in the future is recognized by our supreme court in *Jackson Co. v. Rendleman*, 100 Ill. 379. It is contended, however, that the act of May 31, 1879, providing for the issuing of warrants on county treasurer, etc., has rendered nugatory that decision. In my opinion, the act mentioned has no reference to an interest-bearing county order, payable at a specified time in the future, and issued in pursuance of a contract like the one in question. The act is limited to demand orders and those issued to meet and defray ordinary expenses."

That seems to us to be the right view of the question. The distinctions pointed out in the brief for the defendant in error between this and the *Rendleman* Case do not seem to be substantial. The one distinction which is claimed to be vital is that in that case "the order was issued to the contractor in payment for work for which the county had authority to contract, [while] in the case at bar the order was issued to a money lender for money which the county * * * had no authority to borrow." The building of a county jail was a work for which the county had authority to contract, and to issue its warrants in payment, and we cannot think that the warrants issued for such a purpose are to be deemed valid if issued directly to a contractor in payment for work or material, but invalid if issued for money which was paid at once to the contractor or his assignee. At most, only the discount necessary to obtain money on the warrants was involved, and in respect to that the supervisors were under no restrictions, except of good faith. They may have been bound in good conscience to make good to contractors the discounts suffered on the warrants first issued, and to keep the work going it may have been necessary or prudent to make the warrants at par as good as cash to the contractors, and to accomplish that it was doubtless found more economical to sell the warrants in round sums than to deal separately with each con-

tractor. Indeed, there was no other practicable way of distributing the cost of the work for payment in equal or nearly equal annual sums, multiples of \$500, over a number of years, as was contemplated from the beginning. The original warrants issued to the different contractors were in various sums, more often greater or less than equal to \$500 or a multiple thereof, and in no proper sense can it be said that the warrants finally issued were executed for the purpose of funding a prior indebtedness. They were a part of the scheme from the beginning, and if, during the progress of the work, orders or warrants were given to contractors to be held until substituted by or paid with the proceeds of orders issued according to the original plan, the latter are not, on that account, to be condemned as invalid. The doctrine that a municipal body like a city, town, or county cannot issue a funding bond without special authority is conceded, but we believe it has never been applied, and think it ought not to be applied, to such a case. The court erred in refusing to admit the warrants and coupons in evidence, and for that reason the judgment is reversed, with direction to grant a new trial.

COLUMBUS CONST. CO. v. CRANE CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1900.)

No. 548.

1. APPEAL—PRESUMPTIONS—AMENDMENTS TO AVOID VARIANCE.

There should be a liberal practice in allowing amendments of notices of special matter of defense or counterclaim accompanying a plea of the general issue in an action of assumpsit, and on appeal or error any amendment necessary to avoid a variance, and which might have been permitted had objection been taken in the trial court, will be regarded as having been made.

2. SAME—REVIEW OF INSTRUCTIONS—SUFFICIENCY OF EXCEPTIONS AND ASSIGNMENTS OF ERROR.

Rules 10 and 11 of the circuit court of appeals (31 C. C. A. cxlv., 90 Fed. cxlv.), which require that a party excepting to a charge "shall state distinctly the several matters of law to which he excepts," and "shall specify separately and particularly each error asserted and intended to be urged," are for the purpose of preventing the presentation for review of any question which has not been considered by the trial court; and, while the court will not needlessly embarrass the practice by requiring an over-nice observance of them, they must be observed to the extent necessary to accomplish that purpose, and only such objections to a charge will be considered as were sufficiently disclosed by the exceptions taken to bring them to the attention of the trial court.

3. CONTRACTS—CONSTRUCTION.

While parties to a contract are entitled to its literal performance, when practicable, that does not mean that courts and juries shall give to the terms of a contract, however clear and unmistakable the ordinary significance of the words employed, a meaning which, when applied to the subject-matter of the contract, will render performance impossible; and a provision of a contract to furnish pipe, and collars for uniting the same, to be used in the construction of a line for piping gas, that the pipe should prove tight in line, cannot be literally construed, where the evidence shows that the construction of an absolutely tight line for such use is impossible.

4. EVIDENCE—DEFECTS IN ARTICLES SOLD—TESTS DURING TRIAL.

Where collars for joining iron pipe, furnished by defendant under a contract, were produced in court by plaintiff, evidence is admissible to show the result of tests of such collars made by defendant pending the trial, in respect to defects therein alleged by plaintiff.

5. SAME—DEMONSTRATIVE EVIDENCE—COLLATERAL FACTS.

A court may, in its discretion, exclude evidence of tests made of articles similar to those furnished under a contract, and alleged to have been defective; such evidence being collateral, and not directly pertinent to any issue in the case.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This case is here the third time. It was here first on demurrer to the declaration (*Columbus Const. Co. v. Crane Co.*, 9 U. S. App. 46, 3 C. C. A. 216, 52 Fed. 635); and the second time after a trial upon the merits, which resulted in a verdict and judgment for \$48,000 in favor of the plaintiff, the present plaintiff in error. The last judgment was in favor of the defendant, the Crane Company, on its counterclaim, for \$98,085.94, the amount of the unpaid balance at the contract price for pipe delivered, less eight or nine hundred dollars. The entire contract will be found in our first opinion. The substance of it, to quote from our second opinion, is that: "The Columbus Construction Company, a corporation of New Jersey, the defendant in error, on the 5th day of June, 1890, entered into a contract with the Indiana Natural Gas & Oil Company, which was incorporated under the laws of Indiana for the purpose of owning and operating a pipe line for the transportation of natural gas from the gas fields of Indiana to Chicago, whereby the Columbus Construction Company undertook to construct the proposed line; and to that end on June 20, 1890, it made with the Crane Company, the plaintiff in error, the contract in suit, whereby the latter company undertook to purchase, and to cause to be delivered to the former, the various quantities and sizes of pipe necessary for the completion of the line, including two hundred and sixty miles of eight-inch pipe, concerning which this controversy has arisen. The substance of the contract, in so far as it need be stated here, is that the pipe shall be 'eight-inch, wrought-iron, standard line pipe, to weigh not less than 27.48 pounds per lineal foot,' 'made from soft iron, free from blisters and other imperfections, and guaranteed to stand a working line pressure of one thousand pounds to the square inch when proved and tested in lines'; that each spliced joint shall weigh the weight of the collar in addition to its own required weight; that each joint of pipe shall have eight threads to the inch, and at least two inches of thread on each end, with a full, uniform taper to the threads both on the pipe and in the collar; and that the vendor shall pay to the vendee all damages and expenses sustained by reason of defects in the pipe delivered, up to and including the time when the pipe should be tested by the vendee under working pressure not in excess of one thousand pounds to the square inch, and proved tight in line, which working test should be made with reasonable promptness. Deliveries were to be made at such places as should be designated by the Columbus Construction Company, at the earliest practicable dates in July, August, and September, and of the eight-inch pipe not less than thirty-seven miles in July, one hundred and twenty-three miles in August, and the remainder in September, 1890, 'barring strikes and causes beyond their control.' The Columbus Construction Company, upon the delivery of each invoice at the point by it designated, was to pay 'spot cash' therefor, including a commission of two and one-half per cent. over the amount of the manufacturer's invoice. Shipments were to be by car loads not exceeding five spliced joints, the Crane Company paying freight and other charges of transportation from the mills to the point of destination; and it was agreed finally that the pipe should not be construed to be accepted, by reason of any payments made therefor, so as to relieve the Crane Company from liability on account of its defective character until the same had been laid and tested in line and proved."

The declaration contains common and special counts, but all that is alleged of breach of the contract and of damage is believed to be embraced in the

following, quoted from the last special count: "Nevertheless, the said defendant did not perform or regard its promise and undertaking so by it made as aforesaid, in this, to wit, that all of said wrought-iron standard line pipe, when the same was so delivered as aforesaid, was not in conformity with the specifications, and did not fulfill the conditions and stand the tests prescribed in the said contract, and was not made from soft iron, free from blisters and other imperfections, and would not stand a working line pressure of one thousand pounds to the square inch, and would not prove tight in line, when proved and tested in line under said working pressure; and further in this, to wit, that each joint of pipe furnished under said contract did not have eight threads to the inch, and at least two inches of thread on each end, and that full, uniform taper was not given to the threads both on the pipe and in the collar, but, on the contrary thereof, all of said wrought-iron standard line pipe was full of imperfections, and was of a weak, imperfect, poor, and defective quality, and was wholly unable to stand a working line pressure of one thousand pounds to the square inch, or to prove tight in line, when proved or tested in line under said working pressure, and each joint of pipe furnished under said contract as aforesaid had less than two inches of thread on each end, and had more or less than eight threads to the inch, and the taper given to the threads, and each and every of them, both on the pipe and in the collar, was imperfect, partial, and varying,—of all of which the said defendant then and there had notice. And the said defendant, not regarding its said promise or undertaking, did not, nor would it, although often requested so to do, purchase, sell, and deliver to said plaintiff such goods, wares, and merchandise as were required by said contract, but wholly neglected and refused so to do, and therein made default. And said defendant then and there so negligently and improperly conducted and behaved in and about the purchase, sale, and delivery of said goods, wares, and merchandise that the same were by reason thereof not in conformity with the specifications, and did not fulfill the conditions and did not stand the tests prescribed in said contract, but wholly failed therein, and were of no value to the said plaintiff, whereby the said plaintiff not only lost all benefit, profit, and advantage which it might and could have derived and acquired from the purchase, sale, and delivery by the said defendant of the said goods, wares, and merchandise, but was also put to great expense of its moneys, to wit, the sum of \$600,000, which was paid by it to the said defendant as and for the purchase price of said goods, wares, and merchandise, and also was compelled to and did necessarily expend a large sum of money in and about the purchase of other goods, wares, and merchandise to supply the place of the insufficient and defective goods, wares, and merchandise so purchased, sold, and delivered by the said defendant as aforesaid, amounting to, to wit, the sum of two hundred thousand dollars over and above the said contract price of the said defective and insufficient goods, wares, and merchandise so purchased and delivered as aforesaid by the defendant; and also necessarily laid out and expended a large sum of money, to wit, two hundred thousand dollars, in and about the taking up of such defective and insufficient pipe so purchased, sold, and delivered by the said defendant as aforesaid, as had been laid in line in the ground, and in and about unscrewing the same, and taking the defective and insufficient collars therefrom, and replacing such collars with other and sufficient collars, and again laying said pipe, and in and about the rethreading and repairing of such portions of said defective and insufficient pipe as it was necessary to rethread and repair in order to make it in those respects of the description, character, and quality provided for in said contract, and in and about the taking the defective and insufficient collars from the other of said insufficient and defective pipe so purchased, sold, and delivered by the said defendant as aforesaid, which had not been laid in line, and replacing said collars with other and sufficient collars, and in and about the loading and hauling to and from the thread mills of such portions of said defective and insufficient pipe as it was necessary to rethread and repair for the purpose aforesaid,—all of which sums of money the plaintiff says were necessarily and reasonably expended in order that the said wrought-iron standard line pipe might conform with the specifications and fulfill the conditions and stand the tests hereinbefore and in said contract set forth; and also sustained great loss and damage on occasion of its not being

able to use the same at Chicago, in the district aforesaid, whereby the said plaintiff, having employed large numbers of men, and secured teams, wagons, tools, and machinery, to lay said pipe for use, was greatly delayed, damaged, and hindered in the prosecution of said work by the said failure of said defendant to comply with its contract in promptly delivering said pipe, and thereby sustained further damage and loss, to wit, in the sum of two hundred thousand dollars, at Chicago, in said district, and has been and is by reason of the premises otherwise greatly injured and damaged."

The plea was a general denial, with notice of special matters of defense, set-off, and a counterclaim to the effect that there was a balance of \$150,000 due from the plaintiff to the defendant for pipe delivered in accordance with the contract, and for commission on undelivered pipe; that the plaintiff failed and neglected to lay the pipe properly and to make suitable tests thereof with reasonable promptness; and that though the defendant was at all times ready and willing to perform the contract on its part the plaintiff neglected and refused to perform, and on the 12th day of February, 1891, notified the defendant that it would not perform, and unlawfully and wrongfully broke, canceled, and repudiated the contract.

S. S. Gregory and Jacob Custer, for plaintiff in error.

Charles S. Holt, for defendant in error.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Concerning the letter of February 12, 1891, and its effect as a breach of the contract by the plaintiff, we said in our second opinion (46 U. S. App. 59, 65, 20 C. C. A. 233, 73 Fed. 984):

"On the facts as presented in the briefs, beyond which we have not looked, it does not appear that there was an adequate excuse for the refusal to accept further performance of the contract; * * * and, on that basis, whether other modes of relief were available or not, we think it clear that the defendant [now plaintiff] in error can have no remedy in an action upon the contract. It cannot at one and the same time repudiate an executory contract like this, in respect to a part of the subject-matter, and in respect to other parts insist upon enforcement."

In this respect it is asserted, and seems to be conceded, that at the last trial "the facts remained precisely the same," and, that being so, the court might without error have instructed peremptorily against a recovery by the plaintiff in any sum; and it would follow that there was no available error in any instruction touching the obligations, duties, or rights of the parties under their contract in so far as confined to the plaintiff's right of action,—leaving it material to inquire only whether error was committed in respect to the right of the defendant to recover upon its counterclaim. In apparent recognition of this as the true status of the case, the argument in the brief for the plaintiff in error begins by saying that the main question, concretely stated, is "whether defendant can recover full contract price for eight-inch standard line pipe, made according to the specification of the contract, in the best manner known to the art of pipe making, but which for some reason is incapable of meeting another, and, after all, the most important, requirement of the contract,—that it prove tight when tested in line at a pressure of one thousand pounds to the square inch." We have not been able to perceive that this question, as stated, arises upon the record. It does

not seem to be deducible from any exception saved and assigned as error. Touching the test under a pressure of 1,000 pounds, our ruling when the case was here before was that while the plaintiff was entitled to pipe of the character stipulated, and that—

"If at the time of the delivery it remained necessary or desirable, and was practicable, by a reasonable expenditure, to bring the pipe up to the requirements of the contract, it was the privilege of the defendant [now plaintiff] in error to make the expenditure necessary for that purpose, and to exact reimbursement of the Crane Company, instead of resorting to the proof of comparative values; but if * * * the pipe met the requirements of the modified contracts of the Indiana Company, and by reason of the Indiana statute a pipe capable of bearing a pressure of over three hundred pounds was not needed, then manifestly it was not reasonable to expend time or money on an effort to impart to the pipe a degree of strength which could be of no practical utility. Under such circumstances the ordinary rule should prevail, and the recovery should be on the basis of the difference of value between the article delivered and that which ought to have been delivered, to be determined by the market prices, or, if that should be impracticable, then probably by the difference in cost of production at the mills,—certainly not by the cost of repair or reconstruction on or along the trenches in which the pipe was to be laid, where necessarily the work would be more difficult and expensive than at the mills."

There does not seem to have been any attempt at the last trial to show, by market prices or otherwise, the difference in value between the pipe delivered and that contracted for. There has been no reference to evidence on that point, and the inference is fair that there was none. The evidence of the tests made of the pipe in line tended, as stated in our former opinion, "to show the quality and value of the pipe delivered as compared with that contracted for," but that alone was not enough to afford a basis on which to compute or estimate damages on the theory of comparative values. The trial was not conducted on that theory, but, as before stated, the effort was to show that the pipe delivered was defective,—especially that the threading of the pipe and collars was defective, that the collars were too light, and that the substitution of the Hequembourg collars was necessary in order to make the line tight, even under the reduced pressure permitted by the Indiana statute. To the extent necessary to bring the pipe up to that standard, the plaintiff in error, of course, had the right to incur reasonable expense, and to exact reimbursement, but could not at the same time claim damages on the other basis of difference of values; and there could have been no error in the refusal of an instruction which proceeded on the latter basis. The contention that, under the notice of a counterclaim which alleged the delivery of pipe in conformity to the contract, proof of strict conformity was essential to a recovery of the contract price, if in itself sound, seems not to have been insisted upon or suggested in the court below, and therefore should not be available here. If suggested, the objection could have been obviated by an amendment to the notice. No exception was saved and no error assigned which hinted at an assertion of variance between the pleading and the proof, if, indeed, such a notice of special matter of defense, accompanying the general issue, was intended to be governed by the strict rule applicable to a declaration, that the allegation and the proof must correspond. There

should certainly be a liberal practice in allowing amendments of such notices, and on appeal or writ of error any amendment should be regarded as having been made which if allowed could have caused no injustice to the adverse party.

The first specific objection to the charge of the court is that in a number of passages, to which exceptions were saved, the plaintiff was required to sustain the issues of which it had the burden by "satisfactory evidence," and not simply by a preponderance of the evidence; but the meaning of the entire charge was clear, as in some instances it was explicitly stated, that the jury should be satisfied by a preponderance of the evidence. The last expression of the court on the point was too plain to be mistaken, when, after stating that the plaintiff was not entitled to recover "unless it has established a cause of action," the court added, "It must be established by a preponderance of the evidence." In view of the nature of the issue, however, which was whether the pipe was originally defective in the threading or in the weight of the collars, or was injured through the negligence or want of skill of those employed to lay it, —on which latter point the plaintiff, having kept and used the pipe in line, certainly had the burden of proof,—it is not clear that more than a mere preponderance of evidence might not properly have been required to establish a right of recovery on the declaration.

This objection to the charge ought not to prevail for the further reason that it is not pointed out in any exception taken, nor in any specification of error, according to the requirement of our rules 10 and 11 (31 C. C. A. cxlv., 90 Fed. cxlv.), that a party excepting shall "state distinctly the several matters of law in the charge to which he excepts," and that the assignment of error "shall specify separately and particularly each error asserted and intended to be urged." To comply with that requirement, it was explained in the recent case of *Stewart v. Morris* (June Sess., 1899) 37 C. C. A. 562, 96 Fed. 703—

"It may be enough sometimes merely to quote the language of that part of the charge which is supposed to be erroneous. That will do if the language quoted expresses a single proposition of law with unambiguous directness, but if the quotation embraces different propositions, or, like those now before us, is supposed to carry implications beyond or outside of what is expressed, it is intended by the rule that the exception shall state the particular meaning or implication, the exact proposition of law objected to; and then, to enable this court to determine whether the language of the court embodied that proposition, either expressly or by implication, it is necessary that the language be brought up in the bill of exceptions, and set out totidem verbis, as required by rule 11, in the specification of error. * * * These rules, if carefully and intelligently followed, will accomplish the purpose of their adoption, namely, that this court shall not be compelled to consider questions not brought to the attention of the lower court."

These rules, it should be recognized, were prepared with care. Their terms are too clear to have needed exposition, yet, for some reason,—inattention, probably,—their most important requirement has not been generally heeded. While the court would not needlessly embarrass the practice by insisting upon overnice observance of its rules, it is intended, so far as practicable, to accomplish the whole-some purpose that no question shall be reviewed here which was not considered below.

For the same reason the objections urged to other parts of the charge, with perhaps one exception, might be disregarded. They are not directed to the obvious and main purport of the portions of the charge excepted to and specified as erroneous, but to some subordinate idea or implication, which, it may be, was not in the mind of the court, and which, if specifically made the subject of exception, presumably would have been corrected at the time. For instance, in that portion of the charge embraced in the fifth exception, the direct purpose of which evidently was to define a duty of the plaintiff, the jury was told that:

"For the purpose of charging liability upon the defendant for defects in the pipe and collars as laid, [the plaintiff must be held to a degree of care on its part of like character with that imposed upon the defendant,] to the extent that care and skill in the handling, screwing together, and laying equal in importance sufficiency of the pipe to secure a tight line."

The clause in brackets, and a like clause in the portion of the charge covered by the sixth exception, it is insisted, have relation to the construction of the contract, and carry the implication that the defendant might discharge its obligation under the contract, short of performance, by the exercise of some degree of care or diligence. Neither in the exception nor specification of error is that objection suggested. By the rules it should have been stated definitely as the matter of law excepted to, and should have been specified "separately and particularly" as error in the assignment of errors. It is not an obvious, but, rather, a strained, inference, not likely in itself to have been apprehended by the jury; and other parts of the charge, by which the force of the contract and the obligations thereby imposed on the defendant were clearly and correctly explained, make it impossible that the jury should have been misled as supposed.

To another part of the charge, to the effect that the plaintiff seeks to recover damages for "defects in the make and quality of the pipe delivered," and that the plaintiff had the burden of the issue, the objection urged is that "this would indicate to the jury that unless the plaintiff could establish, by a preponderance of proof, the existence of defects in the pipe, it must be regarded as up to contract." And to the part of the charge immediately following, which was to the effect that if, on the other hand, the preponderance of evidence showed that the pipe, as received, "was so generally defective in thread and taper, or in the weight or quality of the collars, or both, that it was incapable of meeting the requirements of the contract, and that the defects * * * were not obvious and clearly discoverable upon reasonable inspection on delivery, but could only be ascertained reasonably and fully by a test in line, and if the plaintiff has met all requirements [to be further explained], the finding should be for the plaintiff," it is objected that "this requires the plaintiff to prove that the pipe was so generally defective in thread and taper, or in the weight or quality of the collars, or both, that it was incapable of meeting the requirements of the contract, and that the defects were such, etc. Now, this imports that the plaintiff must prove that owing to these particular defects the pipe leaked. Obviously, this is not correct." And by way of argument it is added that "if

the pipe leaked at contract pressure because of inherent weakness, with no defects of manufacture, or in fact for any reason except improper, unskillful, or careless handling or laying by the plaintiff, there was a breach of the defendant's contract." The truth of this proposition is not questioned; it is probably undeniable; but it is inapplicable, not only because not made the subject of an exception, and specified as error, but because the defects referred to by the court were not limited to the results of manufacture. They embraced every particular in which there was claimed, or evidence was offered to show, a failure to meet the requirements of the contract, namely, "in thread and taper, or in the weight or quality of the collars, or both." All that is embraced in the words "alleged defects in make and quality"; and there was no error in the use of the word "generally," because particular defects were not alleged. If they existed, they were to be eliminated on discovery by inspection or test, and, if they could have been, were not made a subject of dispute. The actual contest was over the question whether the pipe delivered was generally defective, either in thread or taper, or in the weight and quality of the collars; and, that being so, anything in the charge touching other defects would have been irrelevant and immaterial.

Another portion of the charge is said to be obnoxious to two objections, neither of which, however, was disclosed in the exception taken or in the specification of error. The instruction referred to consists of three distinct sentences, and as many distinct propositions, any one of which might have been the subject of exception; but the two objections urged are directed to the single proposition that by the contract the Crane Company "did assume and agree to furnish pipe and collars of material, strength, weight, and threading which would substantially conform to the specifications of the contract; and it further agreed and promised that the pipe so furnished should be sufficient in those particulars, when laid in line with due care and skill, to stand a pressure of 1,000 pounds gas to the square inch, and to prove tight in line when tested." Objection is now made to the word "substantially," and to the phrase "in those particulars," as placing an unwarranted limitation upon the responsibility of the defendant; but the particulars mentioned embrace all that was in dispute, and substantial conformity to the specifications of the contract was certainly sufficient if the general requirement was met, that when in line the pipe should prove equal to the stipulated test. As the court proceeded at once to say, "It was the quality and competency of the pipe and collars to this end and test that was thus warranted by the defendant, and not a tight pipe line."

A like objection, not disclosed in the exception or specification of error, is made to another part of the charge on account of the expression "so generally defective in thread, taper, and collars, in weight, thread, and taper," and in another part to the expression "that the defects in the pipe were due to faults in the mill, with which defendant is chargeable"; but in view of the immediate context, and other expressions already referred to, there is no reason to believe that the jury was misled in respect to the obligation of the defendant under the contract.

The court instructed the jury that the provision of the contract requiring the pipe to prove tight in line should "receive a reasonable construction, both with reference to the state of the art of pipe making, and of the piping of gas, as known and existing at the date of the contract, and with regard to the conditions which must be met by this line, owing to its length, the high pressure required, and the need of economy and safety in conducting the gas to delivery points"; and proceeding, in words embraced in the exception, to refer to evidence tending to show that no gas line had been made which was absolutely tight at even less pressure than that called for in this contract, the court then repeated that "the term 'tight in line,' as employed in this contract, must be interpreted as reasonably tight in line, considering the objects and conditions of the undertaking, and the possibilities of the art and business as existing and understood, according to the evidence." While it would perhaps have been less objectionable if the instruction had been so framed as to leave it more distinctly to the jury to determine in what sense the words "tight in line" were used and understood by the parties, yet the evidence being clear that an absolutely tight line was impossible, and that the managing agent of the plaintiff considered a line tight which leaked in 24 hours as much or even more than 2 per cent. of its contents, we cannot regard the instruction as materially erroneous. Parties to a contract are entitled to its complete, and, when practicable, even literal, performance; but that does not mean that courts and juries shall give to the terms of an agreement, however clear and unmistakable the ordinary significance of the words employed, a meaning which, when applied to the subject-matter of the contract, will render performance impossible. It is enough on this point to refer to 1 Greenl. Ev. par. 286.

There was at the trial a question whether the collars should have been recessed so as to admit of calking with lead, and in respect thereto the court instructed that the contract provided for screw joints, not lead joints, and that the absence of a recess or other provision did not of itself constitute a breach of the contract, unless, in the state of the art of pipe making as it was when the pipe was made for delivery under this contract, a provision for lead calking was a mere incident or reasonably necessary to the making of a screw joint, but that if such recess was not a mere incident to a screw joint, but "a separate and additional joint, independent of the screw," "it was no part of the duty of the Crane Company, under its contract, to furnish its collars with such dovetail recess for lead calking." The word "duty," as here used, in connection with the words "under its contract," necessarily means "obligation," and is not objectionable. In other respects the charge was favorable to the plaintiff, because the contract neither expressly nor by any possible implication required more than a screw joint. That only the defendant agreed to make, and covenanted that it would stand the test; and so the jury was clearly and sufficiently instructed in another part of the charge. It was, perhaps, the privilege of the defendant to employ the recess, or any other means necessary to make the joints tight; but, excepting the things specified, there was

not, and under no possible conditions of the evidence could there have arisen, an obligation to furnish recessed collars, if without the recess a tight joint was possible. There is no reason to believe that this part of the charge injured the plaintiff. It is not to be inferred that, in our opinion, evidence concerning the use of such recesses was not competent. Evidence that a screw joint could not, in practice, be made securely and permanently tight without the aid of lead calking, would at least tend to show that the pipe and collars delivered were not in a condition to meet the requirements of the contract, and in all probability the jury took that to be the meaning of this charge. If they inferred more, it was to the injury of the defendant, rather than of the plaintiff in error.

Exception is saved to the following portion of the charge,—the only one which may be said to embrace only a single proposition or matter of law, capable of presentation under the rule by a mere quotation of the language:

"You will bear in mind, gentlemen, that defects here and there in the pipe cannot be recovered for in this action. The plaintiff sues upon a total failure of the pipe. He cannot recover (in this action, at any rate) for defects which may have existed here and there in the pipe. It must be a failure which extends, as I have explained to you, through the whole lot of pipe, so as to make it insufficient for the purpose of that line. And you will then consider the testimony of the inspectors in that view and for that purpose."

Whether or not evidence of "defects here and there in the pipe"—a very indefinite expression, surely—was admissible under the declaration, we need not decide. It does not appear, and is not claimed, that such evidence was offered. The actual contest, as already explained, was over the condition and quality of the pipe and collars used in the construction of the line as a whole. The only proper application of this charge would seem to have been to pipe or collars that were rejected, and not used in the line, because found unfit. It is said in the brief of the plaintiff in error that the injurious character of this charge is apparent from the fact that the undisputed evidence shows that between twenty and twenty-five miles of the pipe in controversy was condemned on a joint inspection by representatives of both parties. It is evident that "defects here and there" could not have been understood by the jury to refer to such a quantity of pipe which had been condemned by mutual agreement. The statement of fact, however, is not fully borne out by the evidence. There was a species of inspection of pipe and collars, which had been delivered along the line, conducted by an agent of the plaintiff with the assistance, going little beyond observation, of a representative of the Crane Company; and joints of pipe and collars found defective in the thread or seam were marked, and written reports thereof were made, which were signed by both agents. But the defects found, it is evident, were, in the main, trifling. They did not prevent the use of the pipe in the construction of the line. The plaintiff's inspector testified that the majority of it was used "right along in making the new line, with the Hequembourg collars." There was no attempt in that inspection to determine whether the defects discovered were attributable to faults in manufacture or in the handling.

Portions of the charge touching the force, as evidence, of certain letters written by Mr. Crane, are objected to on two or more grounds; but, besides failure to take a specific exception and to assign the error accordingly, the letters referred to are in no way identified, nor their place in the record pointed out. We cannot undertake to search for them through a bill of exceptions which fills more than four hundred pages of the printed record.

The following instruction, it is said in the brief, was asked "as to the burden of proof":

"Plaintiff was not bound to receive from the defendant any pipe whatever which did not conform to the requirements of the contract, in its capacity, if properly laid in line, to prove tight in line at a pressure of one thousand pounds to the square inch, gas or air; and, unless you find from a fair preponderance of the evidence that the pipe delivered by the defendant under the contract to the plaintiff, was up to the contract requirements in this regard, the defendant is not entitled to recover the contract price thereof, however you may find as to other matters in evidence."

Without the statement in the brief, it could hardly be suspected that this was designed to be an instruction "as to the burden of proof." No ordinary jury could understand its significance in that respect. It is in itself objectionable. There was no question in the case of what character of pipe the plaintiff was bound to receive, and what it was proposed to say on that point, unless more was added, was liable to be misleading in respect to the liability of the plaintiff to pay for pipe which had been received and used. If the pipe was not up to the contract requirements, under a pressure of 1,000 pounds, and yet was of no less value on that account, being equal to all the requirements of the situation, as altered by the statute limiting actual pressure to 300 pounds, a recovery of the contract price was not improper.

By another part of its charge, after referring to evidence touching the manner in which the pipe was laid, and particularly portions which had to be bent, the court directed the jury to "determine from all the testimony whether the neglects in the manner of screwing together and laying were of such a nature that they could fairly and reasonably account for the leaky quality of the portion of the line which was put together and tested, and for a large portion of the defects which were found by the inspectors in the pipe as examined in November—December, I believe it was—of 1890." The criticism on this, now said to be obvious, but which was not suggested below, is that, of the 106 miles delivered, only twenty miles were laid, and they were not covered by the inspection; that the remaining 86 miles were never laid or screwed together, and therefore it was obviously erroneous to tell the jury that they should determine from all the testimony whether the defects of screwing together and laying were of a nature to account for a large portion of the defects found by the inspectors. No reference has been made to the evidence on which this criticism is based, but, while the last clause of the instruction seems to introduce an element of possible confusion and inconsistency of thought, it is not to be supposed that a jury of ordinary intelligence, aiming at an honest conclusion, was led thereby to believe it possible, or to understand that the charge was intended to mean,

that defects in pipe caused by negligence in screwing together and laying could account for defects found on inspection of other pipe which had never been so treated. Besides, it is not true that the 86 miles of pipe was never laid or screwed together. The testimony already referred to shows the contrary, and it is not impossible that the evidence touching its laying should have thrown light upon, and in some degree should have explained, if it did not strictly account for, the defects found and reported by the inspectors in December, 1890. If counsel perceived at the time the danger of this or any other instruction being misunderstood, it was their privilege and duty to ask a correction, and, if they did not perceive the danger, the greater the improbability that it was real, and the stronger the reason for enforcing the rule designed to prevent the subsequent hunting out of objections to be urged on appeal which were not brought to the attention of the trial court.

The court, we deem it clear, did not err in admitting proof of tests made during the progress of the trial, at the shops of the defendant, of collars produced in court by the plaintiff in error as samples of defective collars received of the defendant under the contract. The supposed defect being in the collars, it did not affect the competency of the evidence that the test was made by applying them to pipe which had not been delivered under the contract. The court, on the other hand, excluded evidence of tests made by the National Tube-Works Company of one mile of pipe composed of "regular eight-inch line pipe manufactured by that company"; but, as that line was constructed for the purpose of making the test, and contained neither pipe nor collars which had been delivered under the contract, it was a collateral matter, not directly pertinent to any issue in the case, and even if, in its discretion, the court might have admitted the evidence offered concerning it, the refusal to admit it was not error.

The court refused a special request for an instruction defining the obligation of the defendant under the contract, and declaring it not sufficient to relieve the defendant from the obligation, if, in the opinion of the jury, a pipe made with the best skill and materials, according to the specifications of the contract, would be incapable of standing the stipulated pressure test. The court in its own charge very clearly defined the obligation of the defendant to furnish pipe capable of standing the required pressure, and proving tight in line. There was no suggestion or claim by the defendant that it could be relieved from the obligation of full performance on account of any supposed or proven impossibility or difficulty of making pipe capable of doing what was required. On the contrary, the persistent contention of the defendant was that the pipe delivered had that capacity, the shop tests made before delivery as well as that made during the trial showed that it had, and the verdict shows that the jury was convinced of the fact. But, if the request had been in itself unobjectionable, there would have been no error in refusing it, because, in substance, it was embraced in the charge given.

Considering the length of the court's charge, and that it was not given in writing, it is not remarkable that in some respects it is obnoxious to verbal criticism; but as a whole it was notably clear and

impartial, and, convinced as we are that the trial was a fair one, we do not think that for any reason offered it ought to be annulled. The judgment below is affirmed.

BRIEGAL v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1900.)

No. 842.

MASTER AND SERVANT—FELLOW SERVANTS—RAILROAD ENGINEERS AND FIREMEN.

Plaintiff, who was employed as a fireman on an engine of defendant railroad company, while oiling a turntable by direction of the engineer, which was a matter properly within the duty of the engineer to have attended to, under the circumstances and the rules of the company, was injured through the negligent act of the engineer. Held that, under the common-law rule as declared by the courts of the United States, the engineer was a fellow servant with plaintiff, for whose negligence the master was not liable.¹

In Error to the Circuit Court of the United States for the Western District of Texas.

Millard Patterson and C. N. Buckler, for plaintiff in error.

T. J. Beall, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. A. G. Briegal, plaintiff in error, filed in the district court of El Paso county, Tex., his petition claiming damages against the Southern Pacific Company in the sum of \$10,000 for personal injuries. A petition and bond were filed by the said railway company for removal, and the case was removed to the United States circuit court, Western district of Texas. The plaintiff, Briegal, alleged in his petition that on February 9, 1898, he was in the employ of the defendant as a fireman on a "helper engine," which ran between the stations of Bowie and Dragoon Summit, in the territory of Arizona; that on said date, when said engine arrived at Dragoon Summit, he was ordered by E. J. Bowers, who was the foreman of the roundhouse at Bowie, and in charge of all the machinery and engines at said Bowie station, to oil the turntable at said Dragoon Summit; that plaintiff obeyed said order, and got down in the pit of the turntable, and was engaged in oiling the same, when the said Bowers started said turntable, and caused the same to revolve, without notifying the plaintiff, and his hand was caught and injured; that it was not within the scope of plaintiff's duty and employment as a fireman to oil the turntable, and that oiling the turntable was within the scope of the employment of said Bowers, and that oiling the same subjected him to risks not contemplated by his contract of hiring, and that said turntable was under the care, management, and control of said E. J. Bowers, as roundhouse foreman on that part of defendant's

¹ As to who are fellow servants, see note to Flippin v. Kimball, 31 O. C. A. 286.

road; that it was negligence on the part of the said Bowers to start said turntable without notice to plaintiff of his intention to do so; and that in doing so the place where plaintiff was set to work was rendered unsafe, and that thereby defendant violated its obligation to furnish plaintiff a safe place at which to labor, so that the accident hereinbefore described was caused, and the plaintiff was injured as above mentioned. The defendant filed its original answer, which consisted of a general demurrer, general denial, and a special answer setting up that plaintiff assumed the risk arising from oiling the turntable, contributory negligence, and that the said E. J. Bowers and the plaintiff were fellow servants. The case was tried at the April term, 1899. The defendant company requested the court to instruct the jury, after the evidence was all in, to return a verdict for the defendant, which said instruction was given by the court. The plaintiff excepted to the court's action before the jury retired, and tendered his bill of exceptions, which is found in the transcript.

The most favorable statement of the plaintiff's case in the court below is furnished by giving his own evidence, which is as follows:

"In the month of February, 1898, I was in the employ of the defendant, the Southern Pacific Company, at Bowie, in the territory of Arizona. I was employed as fireman on what is known as a 'helper engine.' At Bowie there is a roundhouse, and three engines stationed there all the time. They are all helper engines, and each engine has a separate crew. The purpose of having the roundhouse, engines, and crews at Bowie was for helping up the road engines each side of Bowie station. Mr. E. J. Bowers was the roundhouse foreman at Bowie at the time I was injured. He had charge of the roundhouse and all three of the engines and crews, and all machinery and all employees connected with the motive department at that place. There were seven or eight different tracks at Bowie, and also a turntable there. I had oiled this turntable at Bowie, on one occasion before I was injured. Mr. Bowers, the roundhouse foreman, ordered me to oil it. I oiled it by myself without the aid of any person. On the occasion when I was hurt, Mr. Bowers and myself had helped a train up the hill from Bowie to Dragoon Summit. When we arrived there, and our helper engine was detached from the through train, we ran the helper engine onto the side track, and, after I cleaned up the engine and wet down the coal, Mr. Bowers ordered me to get the oil can and oil the turntable at Dragoon Summit. I got the oil can, and went down into the pit of the turntable for the purpose of oiling the same. I had been at work for some time, and had oiled, I think, four wheels, and had hold of the fifth wheel for the purpose of turning it so as to get the oil hole perpendicular, so that I could pour in the oil. I had turned the little wheel just so that my hand was on top of the wheel, and just then Mr. Bowers, without giving me any notice or warning, started the turntable to moving, and in doing so it caught my hand between the wheel and the rail. The manner in which I oiled the turntable is as follows: I went to the little wheel, and, if I found that the oil hole was not perpendicular, I took hold of it and turned it around so as to bring the oil hole on top, and then would pour in the oil, and go to another wheel, and oil it in the same way; and as I was attempting to oil the fifth wheel in the same way my arm was caught by reason of Mr. Bowers starting the turntable without notifying me that he was going to do so. When I went down into the pit for the purpose of oiling the turntable it was stationary, and had not been revolving, and I had oiled four wheels before the turntable was moved at all, and, as I said before, I was engaged in oiling the fifth wheel when the turntable was started by Mr. Bowers. This is the first time that it had been moved or started while I had been oiling it. These three engines and their crews are kept at the roundhouse for the purpose of helping loaded cars up the hill to Dragoon Summit, and when we get to the top of the hill the helper engine is detached, placed upon the turntable, and turned around

so that it heads down towards Bowie. These helper engines run from Bowie to Dragoon Summit in helping trains up the hill, two or three times a day, and sometimes more, owing to the amount of traffic over the main line. Mr. Bowers had the exclusive control over these three engines and roundhouse and the employés operating the engines. Q. State what Mr. Bowers did there. A. He was foreman there. He had the say over everything in the line of motive power, just as the master mechanic would in Tucson. And there was nobody in that department over and above Mr. Bowers in authority. When my hand was caught, the little finger and the one next to it on my left hand were so badly mashed that it became necessary to amputate them at the joints where they joined my hand. The other two fingers on my left hand were badly mashed, and are now so stiff and drawn that they are of no value to me whatever. I cannot use them for any purpose. And the knuckle and bone of my hand where the big finger joins my hand was bruised and broken and forced down into the palm of my hand, where it now protrudes. Before I was hurt I was earning from \$75 to \$115 per month. I was then 24 years of age. The reason I got down into the pit was because Mr. Bowers ordered me to do so. At the time I was injured there were three engineers stationed at Bowie in charge of the helper engines,—Mr. Walker, Mr. Bowers, and Mr. Pierce; and each of the engineers ran his engine up to the summit, helping loaded trains. They alternated in that work. Dragoon Summit is about 45 miles from Bowie station. There was nobody present when I was injured except Mr. Bowers and myself. It was my duty as fireman to go with the engine to Dragoon Summit, when ordered by Mr. Bowers, and every time we would go to the summit the turntable would be used in turning the engine. I was employed at Bowie altogether as a fireman about 12 or 13 months before I was hurt. I was employed once at Bowie. Then I went onto the main line. Then Mr. Bowers told me to come and take the position at Bowie the second time. Putting it altogether, I worked at Bowie station about 12 or 13 months, but altogether I worked for the Southern Pacific Company about three years and very near three months; always as a fireman. I never oiled but two turntables in my life, the one at Bowie and the one at Dragoon Summit; and I believe I oiled one a very long time ago. There was nothing difficult or complicated about the work of oiling the turntable. The machinery is simple, and, but for somebody's carelessness, there is no danger about oiling a turntable. Any one can oil a turntable. It does not require skilled labor. I do not know whose business it is to oil the turntable. It was my duty to obey Mr. Bowers when he ordered me to oil the turntable, and I made no objection whatever to oiling it. I had on gloves at the time I was oiling the turntable. My glove did not get caught between the wheel and the rail. It is not true that before I got down into the pit to oil the turntable that Mr. Bowers and I had agreed to oil the same. Mr. Bowers never bothered his head about oiling the turntable. The turntable turned awfully hard, and that is the reason we could not turn the engines with that turntable, and consequently Mr. Bowers said, 'We will oil that turntable so as to make it go around lighter.' There are a number of these little wheels in this turntable, and there is a little oil hole in each of them. This oil hole was upside down, and I took hold of the wheel and turned it so that I could pour the oil into this oil hole. These little wheels are loose, and have some play between the rails, and you can turn them easily with your hand. They are loose because the center of the turntable rests on a pivot or center piece, and the weight of the turntable is on this center, and not on these little wheels. I did not state to Mr. Pratt that my hand was hurt because my glove got caught between the wheel and the rail. I told Mr. Pratt that I was turning the wheel, and my hand was caught between the wheel and the rail. I did not say to Mr. Pratt that it was an accident. Q. Wasn't you, as Mr. Bowers turned the table for you— When you were applying the oil as the wheels came to you, wasn't he turning and didn't he turn the table? A. No, sir; my goodness, no. Why, my goodness, no. If he had been, I would have left the wheel alone. I could never apply the oil if he had done that. I would never had my hands there so as to get the wheels around if he had been turning the turntable. Sometimes in turning the turntable some of the little wheels won't turn. I did not state to Mr. Bowers that, after my hand was hurt, that one of the wheels did not revolve, and that

I took hold of it with my hand, and in so doing ran it through and over the circle rail. When I came out of the pit after my hand was hurt I said to Mr. Bowers: 'You see my hand? My fingers are all hanging in threads.' I said to him: 'Why did you turn the turntable?' He said to me: 'It is all my fault. If I had not turned the table, you would not have a hand like that.' I did not say to Mr. Bowers: 'If you will turn the turntable around for me, I will oil it.' He had not turned the table one full turn before I was hurt. He just gave a little start, and just went a little bit, and my hand was hurt. Mr. Bowers could not see me where I was in the pit. It is not true that before he turned the table I hallooed, and told him that I was ready, and to set the table in motion. I signed a report of this accident after I was hurt. I read it, and know what I signed. Mr. L. S. Pratt employed me, and I was working for the Southern Pacific Company when I was injured. Mr. Pratt also employed Mr. Bowers. The report that I signed contains the following: 'Fireman Briegal was under the turntable, oiling. His hand got caught and rolled over [by] one wheel, mashing three fingers.' I wrote at the end of this report, which was already made out when it was presented to me, the following: 'This answer is correct, and that is all I know about it.' I told Mr. Pratt that while I was under the turntable Mr. Bowers carelessly started the turntable, and hurt my hand. I did not tell him that I had my glove on, and it was a little long, and I got it caught while the turntable was being turned. This accident happened between eleven and twelve o'clock in the morning. It was light. When I oiled the turntable at Bowie no person helped me. I turned the little wheels with my hands, the same as I did at Dragoon Summit."

The plaintiff then offered the following written instrument, after having proved that the signature of L. S. Pratt thereto was genuine, to wit:

"Office of Master Mechanic.

"Tucson, Arizona, December 18th, 1897.

"Bulletin Notice.

"Mr. Fred Clark, of Benson, and Mr. E. J. Bowers, of Bowie, are hereby appointed roundhouse foremen at the respective points mentioned. They will exercise and have the same authority as is vested in other foremen holding the same positions. Engine men and other motive-power employes located at these points, and all other employes who may be temporarily laid over there or held, will also come under their supervision, and are subject to their orders at any time.
[Signed] L. S. Pratt, Master Mechanic."

Recalled:

"I never did tell Mr. Pratt that I was down in the turntable pit and Mr. Bowers was turning the table for me. I told Mr. Pratt that I had four or five wheels oiled, and just then the turntable commenced to go, and by turning that wheel my hand went up over it, and my hand was caught, and mashed."

L. S. Pratt, for the defendant, testified, among other things:

"That in February, 1898, he was master mechanic of the Tucson Division. At the time plaintiff was injured, he and Mr. Bowers were in the motive-power department. The head of that department is H. J. Small. He is superintendent of motive power at Sacramento, California. The plaintiff and Mr. Bowers were in the motive-power department at Bowie. Mr. Bowers was the foreman of the motive-power department at Bowie. The roundhouse foreman's jurisdiction is supposed to end at the turntable at the station where he is located, and the turntable at Bowie is located about 80 or 90 feet in front of the roundhouse. When he was on the road, and at the summit, he was not acting in the capacity of foreman, but as engineer. The turntable at the summit was used for the purpose of reversing the engines after they have helped a train to the top of the grade, in order that they may return to the station. These engines are stationed at Bowie for the purpose of helping trains up grades east and west of Bowie. My recollection is that at that time we had three helper engines and three crews stationed at Bowie. When these helper

engines helped a train to the top of the summit, they usually run on the turntable, and turn around, and get their orders, and return to their stations. I do not know whose duty it is to oil the turntable, but Mr. Bowers had the right to oil it. To oil the turntable is not a duty assigned to anybody especially. I have been in my present position two years and four months at Tucson. If Mr. Bowers thought it needed oil, and he saw fit to have it oiled, he had a right to do so. It was admitted that the turntable was not out of order."

All the other evidence in the case was either unfavorable to the plaintiff, or merely cumulative.

The written order appointing Bowers foreman at Bowie and defining his authority as such foreman being in evidence, the declarations of the plaintiff and others as to the extent of Bowers' authority were mere conclusions, and of no avail. The case made is that Bowers and the plaintiff were employes of the defendant company,—Bowers as an engineer, and the plaintiff as a helper or fireman; and Bowers was also the foreman of the roundhouse at Bowie. While running on the road and at Dragoon Summit (45 miles from Bowie), Bowers as engineer, and the plaintiff as helper, Bowers ordered the plaintiff to oil the turntable, and while the plaintiff was performing that service Bowers negligently turned the turntable, whereby the plaintiff was injured. It is clear that at Dragoon Summit, in the work then being done for the defendant company, the relation between Bowers and the plaintiff was that of engineer and helper. It was within their employment to oil the turntable at that place, which they were required to use if the same needed it. Bowers, as engineer, had a right to do it himself, or to direct his helper to do it; and the helper could do it under such direction, and this without changing the relations between the parties. At this time, and at Dragoon Summit, plaintiff and Bowers were fellow servants, irrespective of any superior authority Bowers might have over the plaintiff at Bowie roundhouse. As there is no fellow-servant statute in the territory of Arizona, where the cause of action originated, it is not disputed that the common-law rule as to fellow servants obtains. As the common law is declared in *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *Railroad Co. v. Peterson*, 162 U. S. 347, 16 Sup. Ct. 843, 40 L. Ed. 944; *Same v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Martin v. Railroad Co.*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; *Mining Co. v. Whelan*, 168 U. S. 88, 18 Sup. Ct. 40, 42 L. Ed. 390; without citing other cases, many of which are at hand,—the plaintiff and Bowers, at the time and place of plaintiff's injury, must be held to have been fellow servants, and on the case made the plaintiff was not entitled to recover.

A careful examination of the precedents cited by the learned counsel for the plaintiff in error will show that the cases themselves are either not controlling in authority, or else that the circumstances under which recovery was allowed were decidedly different from those in the present case. The principal case relied on—*Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787—has been very recently expressly overruled by the supreme court of the United States. In *Railroad Co. v. Conroy*, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. —, the supreme court holds:

"Without attempting to educe from these cases a rule applicable to all possible circumstances, we think that we are warranted by them in holding in the present case that, in the absence of evidence of special and unusual powers having been conferred upon the conductor of the freight train, he (the engineer) and the brakemen must be deemed to have been fellow servants within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another."

The case is exhaustively considered, the authorities fully reviewed, and, dealing with the Ross Case, the court, among other things, says:

"While the opinion in the Ross Case contains a lucid exposition of many of the established rules regulating the relations between masters and servants, and particularly as respects the duties of railroad companies to their various employes, we think it went too far in holding that a conductor of a freight train is ipso facto a vice principal of the company. An inspection of the opinion shows that that conclusion was based upon certain assumptions, not borne out by the evidence in the case, as to the powers and duties of conductors of freight trains. * * * To conclude, and not to subject ourselves to our own previous criticism of proceedings upon assumptions not founded on the evidence in the case, we shall content ourselves by saying that upon the facts stated and certified to us by the judges of the circuit court of appeals we cannot, as a matter of law based upon those facts, and upon such common knowledge as we, as a court, can be supposed to possess, hold a conductor of a freight train to be a vice principal within any safe definition of that relation."

The peremptory instruction given by the trial judge to find a verdict for the defendant was not erroneous for any of the reasons assigned on this writ, and the judgment of the circuit court is affirmed.

TEXAS & P. RY. CO. V. NUNN.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1899.)

No. 837.

CARRIERS—INJURY TO PASSENGERS—NEGLIGENT OPERATION OF TRAIN.

A railroad company is liable for the negligence of its servants in starting a train, after it had stopped at a station, before a passenger had been given sufficient time to get off, and suddenly stopping it again, by which the passenger, who was on her way to the door, was thrown against the end of the car and injured; and where, in an action to recover for the injury, there was evidence tending to establish such facts, the court properly refused to direct a verdict for defendant.

In Error to the Circuit Court of the United States for the Northern District of Texas.

T. J. Freeman, R. L. Stennis, and B. G. Bidwell, for plaintiff in error.

Fred Cockrell and S. P. Hardewick, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. In this case the single error assigned is presented thus:

"First. The court erred in refusing to give the special charge requested by the defendant, which is as follows: 'In this case the defendant requests the court to instruct the jury as follows: The plaintiff has failed by its evidence to make a cause of action against the defendant, and you are instructed to re-

turn a verdict for the defendant.' The ground of this error is that the plaintiff, on the whole case, failed to make out his case against the defendant. He failed to show any actionable negligence on part of the defendant in any way, or that it did anything in the premises but what was its duty to the plaintiff's wife at the time, or that it negligently did or performed such duty. It is shown that the plaintiff's wife was guilty of contributing negligence in not leaving the train when she arrived at her destination. The train waited long enough for her to have done so before it started on its journey."

On the trial more than 20 witnesses were examined. It is not disputed that the plaintiff's wife was a passenger on the defendant's train at the time and place alleged in the declaration. The plaintiff claims that she was seriously injured by the negligence of the defendant's servants in failing to give her timely and proper notice that the train was about to arrive or had arrived at the station at which they knew she was to leave the train; that, upon the train's stopping at that station, she, by looking out of the window, saw that it had arrived at Roscoe, and promptly endeavored to leave the train; that by the time she was able to move a few feet from her seat towards the door of exit the train began to move ahead, and when she had reached the doorway the train was stopped by the servants of the defendant company so suddenly and abruptly that she was brought in contact with some part of the car by the door, and without any fault on her part, from which she received serious injury. The plaintiff and his wife live at Roscoe, Nolan county, Tex., a station in that county west of Sweetwater, the county seat. She is 33 years old; has 8 children, the age of the oldest being 15 years. She testified that the last time she was weighed her weight was 176 pounds. She testified that as the train reached Roscoe that day she did not hear the station called; that, if it was called, she did not hear it. Another witness—Miss Fannie Patterson—testified that: "As the train was approaching Roscoe that day, a station was called, but not Roscoe. Eskota was the station that was called when the train approached Roscoe." Eskota is a station east of Sweetwater.

The plaintiff's wife, Mrs. Fannie Nunn, testified:

"I came to Abilene on the morning train, and went back on the evening train the same day. When the evening train passed Abilene that day, I bought my ticket, and got on the train. I got my ticket at the ticket office, and got on that train by virtue of a first-class ticket. The train was on time. It was four o'clock and some minutes in the afternoon when the train got to Abilene. I went to Roscoe on that train, and was taken off the train at Roscoe. I was hurt in trying to get off the train at Roscoe that day. The best I remember, I was sitting about middleways of the coach, or might have been a seat or two from it. I was sitting on the south side of the coach. I took that seat when I got on at Abilene, and remained in that seat until I got to Roscoe, and went to get off. I went to get off at Roscoe, because that was the end of my destination. I arose from the seat to get off when I noticed that the train had stopped, and when I had got about two or three seats from where I was sitting the train started. I knew I was at Roscoe by the stop of the train. I was reading a book, and when the train stopped it moved me in my seat, and I looked out of the window, and saw I was at home. Then I closed my book, and gathered my bundles to get up and start, and dropped my purse, and stooped down to pick it up hurriedly, and started out. I got to the door of the train. When I arose from my seat, and got the purse, and picked it up, and started out, the train was not moving when I started out. I started towards the west door. The train remained standing until I was two or three

seats from where I was sitting, and then it started again. I just kept on going to the door. I got to the west door of the coach, and there was a man in the next coach that saw I wanted to get off, and he rung the bell, and the train stopped. It just stopped all of a sudden, and jerked me back against the door. I think I struck the door. I struck something. That was the west door of the coach,—the outward door,—and that is the door that I think I struck, and it just jerked me around. That was in the negro part of the coach. When the train stopped, I fell back. I did not fall off my feet. It just jerked me around. It just seemed like it stopped my circulation. And the conductor, Mr. Garrett, was the first one I saw, and I told him to come to me, that I was hurt, and he was coming up behind, and he says, 'Oh, I hope not;' and I began to turn blind then, and I says, 'Oh, take hold of me; I feel like I am going to faint;' and he came up, and, of course, he hesitated to take hold of me; and I told him the second time, I says, 'Take hold of me, and don't let me fall,' and then he took hold of me, and then I saw Byron McBurnett coming to the coach, and I called to him to come to me, that I was hurt; and I fainted, and could not testify positively about anything until they put me in a chair. That chair was on the ground. They say I was carried into the depot, but I don't know. I was afterwards carried home. When I struck something in the car, the bruise that was made was right low in my back. After that I was carried home, and remained there a long time, and confined to my bed in my room. I was not in bed all the time, but I was confined to my room three months, and after the three months I got so I could go about on crutches. The effect of that bruise on my back was that it just seemed like when they moved me it nearly killed me."

Mrs. Jennie Campbell testified that several days after the injury was received she saw a bruised place on Mrs. Nunn's back; that it was about the small of the back somewhere, three or four inches long, and ran up and down the spine; that when the witness went to rub her hand over it Mrs. Nunn jumped, and told her not to do that; that Mrs. Nunn's actions at the time indicated that the place was very sore.

S. M. Garrett, the conductor, testified:

"I saw her [Mrs. Nunn] before she went through the partition. There was a partition in the car,—one part for colored and one for white,—and I saw her before she went into the colored part; just before that. She was passing out just as I came in. I followed her right on through, and was just a few paces behind her, and overtook her before she got to the door. When I overtook her, she turned around and stopped at about the front seat, is my recollection, and she says to me, 'You came near taking me by,' and I says, 'No, we were looking out for you,' and I says, 'You are nearer the depot than you were; you don't have quite so far to walk,' and she says, I believe, 'Let's get off,' and she turned around and she says, 'I believe that I am hurt,' and I says, 'What could have hurt you?' She says, 'The door swung out and struck me in the back,' or something in those words, as near as I can recollect it, and I says, 'I hope you are not seriously hurt,' and told her to let's get off, and we kept on advancing towards the door, and she says, 'Yes, I think I am pretty badly hurt,' and commenced to tremble about that time, and her hands were shaking, and she threw her head back, and I caught her, and supported her, and eased her down on a seat, and told the porter to bring in a chair, and we carried her out in this chair."

Byron McBurnett testified:

"I was at the depot at the time, standing on the platform, near the tracks, at Roscoe. I was there at the time Mrs. Nunn came into Roscoe on the train that evening, and saw the passenger train come in. When the train first came in that evening, it did not run up quite as far as it usually did, but just came to a stop, and then started up. It just stopped about four or five seconds, I suppose, and then run up, I guess, twice as far as across this room, and all at once it just stopped all of a sudden, and I was standing between the office door

of the depot and the car that she was on. The train stopped twice. It stopped for an hour or an hour and a half the second time, something of that kind. When it stopped the first time, it remained standing about four or five seconds."

Mrs. Mattie Wood testified:

"My house was about two or three hundred yards from the depot. * * * That evening, when the train came in, I was sitting at my north window, and saw the train when it came in, and saw it when it stopped at the depot. I don't know exactly, but I don't think the train stopped the first time but a very few seconds. The next time it stopped it stayed at the depot a good while,—when it stopped there, and she got hurt. I am a mighty poor hand to guess at things, but it did not seem to me that the train stopped more than a few seconds the first time. There was nothing special that directed my attention to the train, only that it stopped in an unusual place, and then started on and stopped the second time."

It is not necessary to recite the testimony further. There is much conflicting testimony, but what we have already given tends to support the allegations that the defendant's servants were negligent in the matter of allowing the plaintiff's wife sufficient opportunity and time to safely leave the train at Roscoe, and in stopping the train in the circumstances in which it was stopped in the manner indicated by the testimony we have quoted. It was the duty of the defendant to allow Mrs. Nunn a reasonable time and reasonable opportunity for her egress from the train; and if the defendant's servants put the train in motion without having afforded the plaintiff's wife reasonable time in which to leave it, and she was, while endeavoring to leave it, injured by the sudden stopping of the train, the defendant is liable for damages so incurred. *Railroad Co. v. Harmon's Adm'r*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284. The view that the jury took of the testimony is clearly indicated by the verdict. Whether the evidence, considered all together, is sufficient to support the verdict, is not the question before us; but whether there was such evidence in the case that reasonable men might fairly differ upon the question as to whether there was negligence on the part of the defendant's servants or not, and as to whether the plaintiff's wife received injury or not, if there was such evidence, the determination of the matter was for the jury, and it was clearly the duty of the trial judge to submit those issues to them. *Southern Pac. Co. v. Burke*, 13 U. S. App. 110, 9 C. C. A. 229, 60 Fed. 704; *Id.*, 23 U. S. App. 1, 9 C. C. A. 229, 60 Fed. 704; *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. We think we have shown by the testimony above set out that there was such evidence in this case.

We consider that the defendant's assignment of error is not well taken, and the judgment of the circuit court is therefore affirmed.

In re ELLS.

(District Court, D. Massachusetts. January 19, 1900.)

No. 1,722.

BANKRUPTCY—PROVABLE DEBTS—LOSS OF RENT.

Where a bankrupt was tenant of property under a lease which gave the landlord the right to re-enter and resume possession if the lessee should be "declared bankrupt or insolvent according to law," and the lessee covenanted that in case of such a termination of the lease he would "indemnify the lessor against all loss of rent or other payments which he may incur by reason of such termination during the residue of the term," and the landlord re-entered upon the bankruptcy of the tenant, *held*, that he could not prove a claim against the estate of the tenant in bankruptcy for the difference between the present letting value of the premises for the remainder of the term and the stipulated rent for that period, there being no breach of the covenant of indemnity until after an actual loss of rent, and then only to the extent of such loss.

In Bankruptcy. On review of decision of referee in bankruptcy.

Thomas Weston, for bankrupt.

Walter N. Buffum, for proving creditor.

LOWELL, District Judge. The bankrupt was tenant of premises under a lease, of which one clause read as follows:

"Provided, also, and these presents are upon this condition, that if the lessee, or his executors, administrators, or assigns, do or shall neglect or fail to perform or observe any of the covenants contained in these presents, and on his or their part to be performed or observed, or if the estate hereby created shall be taken on execution or by other process of law, or if the lessee, or his executors, administrators, or assigns, shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of his or their property for the benefit of creditors, then and in any of the said cases (notwithstanding any license of any former breach of covenant, or waiver of the benefit hereof, or consent, in a former instance) the lessors, or their successors, heirs, or assigns, lawfully may, immediately or at any time thereafter, and without demand or notice, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same as of their former estate, and expel the lessee and those claiming through or under him, and remove their effects (forcibly, if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and upon entry as aforesaid this lease shall determine; and the lessee covenants that in case of such termination he will indemnify the lessors, their successors, heirs, and assigns, against all loss of rent and other payments which they may incur by reason of such termination during the residue of the time first above specified for the duration of the said term."

The landlord seeks to prove against the estate for the difference between the present letting value of the premises for the residue of the original term and the rent for the same period fixed by the lease. It is nowhere expressly stated that the landlord entered under the clause above quoted, but it sufficiently appears. To decide this case, it is necessary first to inquire (1) what, after the lessee's bankruptcy, but in the absence of the clause mentioned, would become of the estate created by the lease? and (2) what would be the rights of the landlord if he had entered under the clause mentioned for some cause other than bankruptcy, e. g. for failure to pay rent.

1. The law concerning the effect of bankruptcy upon a leasehold of the bankrupt is stated in *Ex parte Houghton*, 1 Low. 554, Fed. Cas. No. 6,725:

"The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have reasonable time to elect whether they will assume a lease which they find in his possession; and, if they do not take it, the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent. If they do take it, he is released, as in all other cases of valid assignment, from all liability, excepting on his covenants; and from these he is not discharged in any event."

See, also, *Hall, Landl. & T.* 346.

I can find nothing in the act of 1898 to produce a result different from that of the act of 1867. Had there been no clause giving the lessor the right to re-enter, the trustee in bankruptcy would have had a reasonable time to elect whether to assume or to refuse the lease. If he had assumed it, the bankruptcy would have operated like any other assignment, and would have released the bankrupt from all liability, except upon those of his covenants not already broken which would have remained binding upon him after any other assignment. If the trustee had refused to take the lease, the bankrupt would have remained tenant as before. In *Re Jefferson* (D. C.) 93 Fed. 948, 951, the learned judge said:

"And yet the court sees no way to avoid the conclusion that the relation of landlord and tenant in all such cases ceases, and must, of necessity, cease, when the adjudication is made. If the relation does cease, the landlord afterwards has no tenant, and the tenant has no landlord. At the time of the adjudication the bankrupt is clearly absolved from all contractual relations with, and from all personal obligations to, the landlord growing out of the lease, subject to the remote possibility that his discharge may be refused,—a chance not worth considering. After the adjudication there is no obligation on the part of the tenant growing out of the lease. He not only owes no subsequent duty, but any attempt on his part to exercise any of the rights of a tenant would make him a trespasser. His relations to the premises and to the contract are thenceforth the same as those of any other stranger. He cannot use nor occupy the premises. No obligation on his part to pay rent can arise when he can neither use nor occupy the property. The one follows the other, and it seems clear that no provable debt, and, indeed, no debt of any sort against the bankrupt, can arise for future rent. No rent can accrue after the adjudication in such a way as to make it the debt of the bankrupt, and future rent had not, in any just sense, accrued before the adjudication."

With all respect for the learned judge, I must think the above remarks made somewhat hastily, unless they are to be taken as limited to the particular lease in question, or made to depend upon some peculiar provision of the statutes of Kentucky. Let us consider an actual example. A lease recently examined was made for a term of several hundred years, upon a payment of \$16,000 at the beginning of the term, and subject to a future rent of \$1 a year if demanded by the lessor. Clearly, this would be an asset of a bankrupt's estate which the trustee would almost certainly elect to assume, and I can find nothing in the bankrupt act which would terminate the lease and entitle the landlord to possession. Many existing ground leases, also, would certainly be assumed by a trustee in bankruptcy of the lessee, and it would be unjust to hold them terminated by the adjudication. It follows, then, that the lease here in question was not determined by

the bankruptcy of the lessee, but only by the re-entry of the lessor. *Savory v. Stocking*, 4 Cush. 607; *Treadwell v. Marden*, 123 Mass. 390.

2. What, then, would be the remedy of the landlord against the former tenant immediately after re-entry under the clause mentioned, had there been no bankruptcy of the tenant? Could the landlord have recovered at once the difference between the present letting value and the rent for the residue of the original term? I think not. The contract was one of indemnity for loss of rent and other payments, and would be broken only after, and so far as, rent had been lost and payments had been made. Doubtless, the covenant might have been expressed otherwise. If the debtor in this case had made a contract to take a lease at a fixed rent, and had broken the contract by refusing to execute the lease, damages for the entire breach could have been recovered at once, and might perhaps have been estimated at the difference between the rent stipulated in the contract and the rental value of the premises. A covenant in a lease might be worded expressly to require the lessee, in case of re-entry, to pay at once damages calculated upon this basis. But the contract or covenant supposed is not the covenant in this case. The contracts sued upon in the cases cited in argument by counsel for the creditor—contracts to take water for a specified time, to employ the plaintiff, to furnish board or support, etc.—were not contracts of indemnity. Immediately after re-entry the lessor in this case, even if unhampered by bankruptcy, could not have brought suit on this covenant against the lessee to recover the damages for which he seeks to prove against the lessee's estate in bankruptcy.

At the time of adjudication the claim in this case was contingent—First, upon the determination of the lease by the lessor for breach of the covenant; and, second, upon a subsequent loss of rent by the lessor. If the lessor permitted the lease to continue, or if the rent subsequently obtained by him equaled or exceeded that provided in the lease, the claim would not arise. It is argued, however, that contingent claims are provable under the act of 1898. See *Lowell, Bankr.* p. 485. The provisions of the act of 1898 concerning the proof and allowance of contingent claims differ materially from those contained in the acts of 1841 and 1867. Section 63a (1) of the present act provides for the proof of fixed liabilities absolutely owing at the time of filing the petition, but not then payable. Section 57i provides for the proof of the contingent claim of a surety of the bankrupt. General Order 21, par. 4 (32 C. C. A. xxii., 89 Fed. ix.), deals only with the claims of sureties. Apart from those provisions, there is nothing in the act of 1898 or in the general orders which refers expressly to contingent claims, and nothing which corresponds to the sweeping provisions of section 5 of the act of 1841, and section 19 of the act of 1867. To determine this case it is not necessary, however, to decide that the act of 1898 permits proof of no contingent claims except those specified in section 63a (1) and section 57i. Even under the broad provisions of the act of 1867 above referred to, it was held that a provision in a lease that the lessors might re-enter and relet the premises at the risk of the lessees, who should remain liable for the rent, and be credited with the sums actually realized, did not give rise

to a provable contingent claim. *Ex parte Lake*, 2 Low. 544, Fed. Cas. No. 7,991. The provision above quoted of the lease here in question, though not identical with that in *Ex parte Lake*, yet resembles it so closely as to be essentially similar. If the contingent claim arising in *Ex parte Lake* could not be proved under the act of 1867, it is clear that the contingent claim arising in this case cannot be proved under the act of 1898. The judgment of the referee is affirmed.

In re LIPKE et al.

(District Court, S. D. New York. January 20, 1900.)

1. BANKRUPTCY—ARREST OF BANKRUPT—FORM OF WARRANT.

Bankr. Act 1898, § 9b, authorizing the arrest of a bankrupt who is about to leave the district in order to avoid examination, does not require the warrant to state that the bankrupt is to be brought before the court for examination; and the writ will not be vacated for failure to include such a statement, if it was issued upon a sworn petition setting forth the necessary facts, and the bankrupt, being forthwith brought before the judge, did not demand an examination or make any objection, but immediately offered bail, which was accepted.

2. SAME—WRIT OF NE EXEAT.

The power of a court of bankruptcy to order the detention of a bankrupt who is about to abscond from the jurisdiction with his assets is not limited to the particular circumstances and specific purposes covered by section 9b of the bankruptcy act. Under section 2, subd. 15, giving to those courts jurisdiction to "make such orders and issue such process, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the act," the court has authority to issue an order in the nature of a writ of ne exeat when the arrest of the bankrupt is shown to be necessary for the enforcement of the bankruptcy act as applied to his case.

In Bankruptcy.

Goldfogle, Cohn & Lind, for bankrupts.
Oberstein & Pohly, for creditors.

BROWN, District Judge. This is a motion to vacate an order in the nature of a writ of ne exeat issued on the 6th of January, 1900, under which the bankrupts were arrested and held to bail in the sum of \$1,500, conditioned that they should not depart from the jurisdiction of the court and would obey its lawful orders and decrees. The writ is not in the form of the warrant provided for in section 9b of the bankrupt act, requiring the defendants to be brought before the court for examination, but in the usual form of the writ issued in equity under section 717, Rev. St. U. S. Upon the arrest of the defendants, however, they were immediately brought before the judge, and no examination being asked for, bail was immediately given.

It is now objected that the writ was void, because it did not state on its face that the defendants were to be brought before the judge or court for examination. Nothing in subdivision "b" of section 9, however, requires this to be stated in the order or warrant issued under that section; and as no examination was asked for when the defendants were brought before the judge nor any objection made at the

time, but immediate bail was offered and accepted, the right of examination would seem to have been waived. The facts stated in the sworn petition upon which the writ was granted, warranted the belief that the defendants were about to abscond and thereby greatly embarrass the administration of the bankruptcy proceedings. These considerations require the denial of the present motion.

I think the better practice, however, would be to conform to the provisions of section 9b as respects all the matters and objects covered by it. But under the broad powers at law and in equity conferred upon the district courts in bankruptcy proceedings by section 2 and subdivision 15 of that section, it is competent, I think, for the court to issue an order in the nature of a writ of ne exeat as broad as that provided by section 717 of the Revised Statutes, whenever such process is "necessary for the enforcement of the provisions" of the bankrupt act. By section 2 the district courts are expressly invested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, * * * (15) to make such orders and issue such process * * * in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

The writ of ne exeat is one of the orders or writs in familiar use in equity against one who "designing to avoid the justice and equity of the court, is about to go beyond sea, so that the duty will be endangered if he goes." Wyatt, Prac. Reg. 289; 2 Story, Eq. Jur. p. 800, § 1470, note; 3 Daniell, Ch. Prac. (2d Am. Ed.) p. 1925.

The necessity of the occasional exercise of this power for the efficient administration of the bankrupt law is evident. Without it the bankrupt might easily defy, and largely nullify, all adverse proceedings against him, by absconding with his assets.

Under the fortieth section of the act of 1867 (Rev. St. § 5024) it was held by Gray, C. J., in *Usher v. Pease*, 116 Mass. 440, 12 N. B. R. 305, that the warrant of arrest did not extend beyond the hearing and adjudication upon the petition, and was for the purpose of securing the bankrupt's attendance thereon, and to prevent his absconding meanwhile or putting his property out of reach. The scope of section 9b of the present act is somewhat broader; but it seems still to be limited to a detention of the bankrupt for the purpose of examination after adjudication, and for his appearance from time to time for that purpose, not exceeding in all ten days, and for his obedience to all lawful orders made in reference to his examination. The issue of the warrant is further limited to a period of one month after the qualification of the trustee. In the present act there is no express authority to issue a warrant in order to prevent the bankrupt from absconding with assets, except incidentally and under the above limitations of section 9b; and considering the manifest insufficiency of that section to secure an effective administration of the act, I cannot doubt that it was intended by the compact and broad language of section 2, subd. 15, to authorize the court to make all orders and to issue any other process, agreeable to the recognized principles of law, that might be found necessary for that purpose. The act of 1867 contains no such general grant of power as is found in section

2 above quoted. See Rev. St. §§ 4972, 4976, 5024. The limitations of that act, therefore, are not applicable to the present act.

The writ of ne exeat under section 717 is not to be issued "unless a suit in equity is commenced." This was the existing rule of law as to the issuance of writs of ne exeat. Beames, *Ne Exeat*, 26; 3 P. Wms. 312; *Mattocks v. Tremain*, 3 Johns. Ch. 75. Section 2 of the act of 1898 in giving the district courts equitable jurisdiction "in bankruptcy proceedings," would seem to make the commencement of such proceedings the equivalent of a suit in equity for the purposes of the issuance of such a writ. *Mackintosh v. Ogilvie*, 1 Dickens, 119. In view of the broad provisions of section 2, subd. 15, however, it seems quite unnecessary to resort to section 717 for authority to prevent bankrupts from absconding, either with or without their assets, when their detention is necessary for the proper enforcement of the act.

Motion denied.

In re WOOD.

(District Court, S. D. New York. January 11, 1900.)

No. 1,226.

1. BANKRUPTCY—ASSETS—ESTATE IN REMAINDER.

A testator devised all his property to his wife "for and during the term of her natural life." He appointed her executrix, and gave her power to sell the property, or any part thereof, and to "invest and reinvest the proceeds." He devised to his son, "absolutely and forever, all the rest, residue, and remainder" of his property after the death of his wife. After the death of the testator, but before the death of the widow, the son was adjudged bankrupt. *Held*, that at the time of the adjudication he had an absolute vested remainder in his father's estate, which would pass to his trustee in bankruptcy, and should have been listed in his schedule of assets.

2. SAME—RIGHT TO DISCHARGE—CONCEALMENT OF ASSETS.

The bankrupt having admitted that he had seen his father's will, and there being nothing to show that he was under any mistake as to its legal effect, and it appearing that the estate in remainder was of substantial value, *held* that his omission of such estate from his schedule, and his testimony, on his examination in bankruptcy, that he had no interest in his father's estate, constituted a knowing and fraudulent concealment of property from his trustee, such as would forfeit his right to a discharge.

3. SAME—BURDEN OF PROOF.

When creditors file specifications in opposition to a bankrupt's application for discharge on the ground of a fraudulent concealment of assets, the burden of proof is upon them; but when they have made out a prima facie case of the existence of assets it devolves upon the bankrupt to explain any facts which are peculiarly within his knowledge, and, if he fails to do so, he may be presumed to admit them.

In Bankruptcy. On bankrupt's application for discharge and opposition thereto by creditors.

Daniel S. Decker, for bankrupt.

Allen & Bentley, opposed.

BROWN, District Judge. The referee has reported adversely to the bankrupt, upon the specifications opposing his discharge, for the reasons stated in the following opinion:

"The grounds of objection to discharge as filed are in substance that the bankrupt omitted to insert in his schedules as assets his interest in his father's estate, and testified upon his examination that he had no interest in such estate.

"The facts are that Gilbert Wood, the bankrupt's father, died in May, 1894, leaving a will, which in June, 1894, was duly admitted to probate in New York county. The will, after providing for the payment of his debts and funeral expenses, contained the following provisions:

"Second. I give, devise and bequeath unto my said wife Jane H. Wood all my estate real and person whatsoever and wheresoever for and during the term of her natural life.

"Third. All the rest, residue and remainder of my estate after the death of my said wife I give devise and bequeath unto my son Joseph Wood absolutely and forever. * * *

"Fifth. I nominate, constitute and appoint my said wife Jane H. Wood the executrix of this my last will and testament giving and granting unto my said executrix full power and authority to sell and dispose of my real and personal estate or any part thereof at public or private sale at such times and upon such terms and in such manner as she shall deem meet and to invest and reinvest the proceeds of such sale or sales."

"Gilbert Wood owned at the time of his death the premises No. 166 East 116th street, New York. The value of the property was about \$8,000, and it was incumbered with a mortgage for about \$5,000. He also had some other property. Mrs. Jane H. Wood, the widow and executrix of Gilbert Wood, sold the real estate under the power of sale contained in the will. Jane H. Wood died on August 9, 1899, after the adjudication in bankruptcy in this case. The bankrupt's Schedule B4, headed 'Property in Reversion, Remainder and Expectancy,' states after each of the entries, 'Interest in Land,' 'Interest in Personal Property,' 'Rights and Powers, Legacies and Bequests,' the word 'None.' He testified on his examination that he derived no interest under his father's will; that everything was left in it to his second mother, Mrs. Jane H. Wood.

"In my opinion, the bankrupt, at the time of the adjudication, had an absolute vested remainder in the estate of his father, and his trustee in bankruptcy is now entitled to receive the value of such vested remainder at the time of the adjudication, from the legal representatives of Jane H. Wood, and the bankrupt's schedules and testimony upon his examination were incorrect in stating that he had no vested remainder or interest in his father's estate. The bankrupt admits in his examination that at some time he had seen his father's will and he gives no explanation tending to show that he was under any mistake in reference to the legal effect of the will. I think that under such circumstances the objecting creditors have made out a prima facie case and that the bankrupt was called upon to rebut the natural inference that he knowingly and fraudulently endeavored to conceal the existence of this asset in his schedules and testimony.

"The evidence is rather weak as to the value of the bankrupt's interest. No evidence was offered as to what property remained in the hands of Mrs. Jane H. Wood at the time of her death, but I think that the proof that the real estate was worth at some time about \$3,000 over the mortgage and that there was some personal property besides, affords a presumption that the bankrupt's interest in his father's estate is now of some value. If Mrs. Jane H. Wood had wasted it in her lifetime, the bankrupt should have proved it. The will makes it her duty as executrix, if she should sell the real or personal estate under the power of sale, to reinvest the proceeds, and in the absence of any evidence to the contrary the presumption is that she performed her duty. The general rule is undoubtedly that the burden of proof upon objections to discharge is upon the creditors. *In re Hill*, 1 N. B. R. 275, Fed. Cas. No. 6,482; *In re Okell*, 2 N. B. R. 105, Fed. Cas. No. 10,475; *In re Herdic*, 19 N. B. R. 385, 1 Fed. 242; *In re Boasberg*, 1 Nat. Bankr. N. 133. But when the objecting creditors have made out a prima facie case of the existence of assets, a bankrupt is then called on to explain facts peculiarly within his own knowledge, and if he omits to do so may be presumed to admit them. *In re Doyle*, 3 N. B. R. 784, Fed. Cas. No. 4,052.

"The bankrupt's attorney argues that the bankrupt took no interest in his father's estate under this will, claiming that the bequest of the life estate to Jane H. Wood, coupled with the power of sale, vested in law the entire title in her, or at least that the bankrupt had no legal interest in the estate until her death, and cites a number of cases such as *Jackson v. Bull*, 10 Johns. 19, and *Van Horne v. Campbell*, 100 N. Y. 287, 3 N. E. 316, 771, establishing the general doctrine that a valid executory devise cannot co-exist with a devise of a primary fee, accompanied with an absolute disposing power in the first taker, and that an executory limitation by will either of real or personal property after a gift of an absolute estate is void. But in this case the gift to Jane H. Wood was for life only, and her power of sale was not a power of absolute disposition for her own benefit, but simply provided for the reinvestment of the principal fund, and therefore, in my opinion, it cannot be claimed that Jane H. Wood took a fee in the real estate or an absolute ownership in the personality under her husband's will, and the intricate questions as to the effect of executory devises imposing limitations upon prior estates in fee have no application. See 4 Kent, Comm. p. 319.

"In my opinion, the objections to a discharge are sustained by the facts.

"Geo. C. Holt, Referee."

I concur in the above and the discharge is therefore denied.

SABIN v. CAMP.

(Circuit Court, D. Oregon, January 8, 1900.)

No. 2,545.

BANKRUPTCY—PREFERENCES—TRANSFER OF PROPERTY PURSUANT TO PRIOR CONTRACT.

A transfer of property to a creditor by a debtor within four months prior to his adjudication as a bankrupt does not constitute a preference under the bankruptcy law, in the absence of fraud, where the transfer was made pursuant to the terms of a prior contract under which the transferee advanced the money with which the property was acquired, reserving a lien thereon, and the option, in case of default in payment, to purchase the property at a fixed price, deducting therefrom his advances.

This is an action by a trustee in bankruptcy to recover the purchase price of property sold by the bankrupt to a creditor. On demurrer to answer.

Bauer & Green, for plaintiff.

Pipes & Tift, for defendant.

BELLINGER, District Judge. In October, 1897, the Colby Company negotiated with Camp for an advance of not less than \$5,000 or more than \$5,500, to enable such company to secure a lease, and furnish what is known as the "Fredericksburg Café and Music Hall." In January of 1898, and from that time until June following, the defendant loaned money to the Colby Company, in pursuance of this agreement, to the aggregate amount of \$5,400. It was a part of the original agreement made in 1897 that the Colby Company should pay the sums of money advanced on demand, after six months from the first loan, and that in default of a payment the company would give the defendant possession of the premises to secure him for repayment; and it was also provided that, if the money was not paid, the defendant should have the option to buy all the property for a sum not less

than \$7,500, nor to exceed \$8,000, and that part of the purchase price should be the sums of money so loaned and unpaid. It is alleged that, the company not having made the repayments as provided for, the defendant, after demand, went into possession of the property under his contract, and so remained until September, 1898, when he exercised his option to buy it, there being then due him \$5,675.26; that he paid the further sum of \$2,500 in cash to the Colby Company, and took from it a bill of sale for the property, and thereupon the defendant took an assignment from the company of the lease to the premises to be so occupied. On December 28, 1898, a petition in involuntary bankruptcy was filed against the Colby Company, and the plaintiff in this suit was appointed trustee, in which capacity he began this proceeding. The plaintiff adopts the sale made by the Colby Company to the defendant, and seeks to recover from defendant the amount of the purchase price of the property in such sale. To the answer of the defendant setting forth the foregoing facts, the plaintiff demurs. The demurrer is overruled.

The transfer by the Colby Company to Camp was not a preference under the bankruptcy act. It is true, the transaction was consummated within the four months, but it originated in October, 1897. What was done was in pursuance of the pre-existing contract, to which no objection is made. Camp furnished the money out of which the property which is the subject of the sale to him was created. He had good right, in equity and in law, to make provisions for the security of the money so advanced, and the property purchased by his money is a legitimate security and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And so when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exercised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the bankruptcy law. It is not pretended that the sale was for an inadequate price, or that there was any fraud, or that the interests of the creditors have been in any way injuriously affected, any further than it may be to the interests of the creditors to secure to their own benefit the property purchased with Camp's money.

IN RE BOOTH'S ESTATE.

(District Court, D. Oregon. January 8, 1900.)

No. 30.

BANKRUPTCY—LIENS UPON ESTATE—UNRECORDED MORTGAGE.

Under Bankr. Act 1898, § 67a, providing that "claims which, for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate," a trustee in bankruptcy occupies the position of a purchaser for value, without notice; and a creditor cannot enforce against property in

the hands of the trustee a chattel mortgage or other incumbrance which, for want of record and of actual notice, would not have been valid as against such a purchaser.

In Bankruptcy. On review of decision of referee in bankruptcy.

H. Denlinger, for trustee in bankruptcy.

W. E. Yates, for lien claimant.

BELLINGER, District Judge. In this case there is a claim of liens by H. F. Fischer, a creditor of the bankrupt, growing out of the following facts: On January 22, 1898, the bankrupt, being indebted to the claimant in the sum of \$870, gave to him his promissory note of that date for the amount, and, to secure the same, with his wife, executed a bond, by which the obligors bound themselves, in the sum of \$870, to sell and convey certain parcels of real estate belonging to the obligors, and upon which this bond is now sought to be enforced as a lien. On the same date the bankrupt, being indebted to the said Fischer in the further sum of \$600, gave a second promissory note for that amount, and as security therefor executed and delivered to the claimant a chattel mortgage upon a steam launch then under construction by the maker of the note. The chattel mortgage was not filed for record, nor was there any record of the bond, or other notice of either of these instruments. The referee found against the claim of the liens, and such finding is approved. The bankrupt act provides that claims which, for want of record or other reasons, would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate. These liens could not have been maintained against a purchaser of the property for value without notice. In other words, this property is property that the bankrupt might have transferred, free from these claims of liens, to any purchaser not having notice; and it is not claimed in this case that there was any actual notice of the existence of these liens. The trustee of the bankrupt's estate stands in the position of a purchaser for value without notice.

In re MEYER et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 52.

1. BANKRUPTCY—PARTNERSHIP.

Under Bankr. Act 1898, § 5, a partnership is a "person" or entity which may be adjudged bankrupt upon its voluntary petition, or in involuntary proceedings, if it has committed an act of bankruptcy, irrespective of any adjudication of the individual partners as bankrupts; and the adjudication of the firm will subject the separate estates of the partners, as well as the firm property, to administration in bankruptcy.

2. SAME—ADJUDICATION OF INDIVIDUAL PARTNER.

Upon a petition in involuntary bankruptcy against a firm and its members, no adjudication can be made against a partner who has not committed, or participated in committing, any of the acts specified in the statute as acts of bankruptcy.

3. SAME—ADJUDICATION OF FIRM.

Where an act of bankruptcy has been committed by an insolvent firm, as such, it may be adjudged bankrupt on the petition of its creditors, although some of the partners have not committed, nor participated in committing, any act upon which they, as individuals, could be adjudged bankrupt.

4. SAME—ACTS OF BANKRUPTCY—ASSIGNMENT FOR CREDITORS.

Under Bankr. Act 1898, § 3a, cl. 4, providing that it shall be an act of bankruptcy if a person shall have "made a general assignment for the benefit of his creditors," such an assignment is an act of bankruptcy, although made without preferences, without actually intending to defraud creditors, and without insolvency.

5. SAME—"GENERAL" ASSIGNMENT.

An assignment by a partnership for the benefit of its creditors, purporting to transfer all the property of the firm, is a "general assignment," such as to constitute an act of bankruptcy by the firm, and on which the firm may be adjudged bankrupt, although, considered as an assignment by the individual partners, it would be but partial, by reason of not including their separate property.

6. SAME—VALIDITY OF ASSIGNMENT.

Upon a petition in involuntary bankruptcy against a firm, alleging, as an act of bankruptcy, the making of an assignment for the benefit of its creditors, which purports to transfer all the property of the firm, though it was executed by one partner only, the question of the validity of the assignment as to the partners not joining is immaterial; for the language of the bankruptcy act applies to any instrument which is or purports to be a general assignment, without distinguishing between valid and invalid instruments.

7. SAME—ASSIGNMENT BY ONE PARTNER—ADJUDICATION.

Where the liquidating partner of an insolvent firm makes a general assignment of the firm's property for the benefit of its creditors, it is an act of bankruptcy, upon which such partner, as an individual, may be adjudged bankrupt.

8. SAME—APPEAL—INTERVENING CREDITORS.

Creditors who appear in opposition to a petition in involuntary bankruptcy against their debtor, and contest the adjudication thereon, as authorized by the bankruptcy act, have a right to appeal from a decree of the district court making the adjudication.

9. SAME—INTERVENTION AND APPEAL BY ASSIGNEE.

Where the act of bankruptcy charged in an involuntary petition against a partnership is the transfer of its property to an assignee for the benefit of its creditors, such assignee is entitled to appear and contest the petition, and, having been permitted to intervene and be heard, he has a right to appeal from the decree of the district court adjudging the firm bankrupt.

Appeal from the District Court of the United States for the Eastern District of New York.

From an adjudication of bankruptcy against the firm of Meyer & Dickinson, and against Henry L. Meyer, one of the partners, on the petition of the Chemical National Bank and other creditors (92 Fed. 896), this appeal is taken by Marcuard, Krauss & Co., intervening creditors, and Charles W. Sparhawk, assignee for the benefit of creditors.

George W. Wickersham, for appellant assignee.

F. W. Hinrichs, for appellants creditors.

George H. Yeaman and Edward L. Perkins, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. Upon the petition of the creditors of the partnership of Meyer & Dickinson against Henry L. Meyer and Joseph R. Dickinson, as the surviving members, and the answers of the surviving members, the court below adjudicated the partnership and Henry L. Meyer individually bankrupts. The facts alleged and admitted were these: Prior to August 14, 1898, Charles H. Meyer, Henry L. Meyer, and Joseph R. Dickinson were partners in trade at Philadelphia and New York under the firm name of Meyer & Dickinson. Charles H. Meyer died August 14, 1898. August 19, 1898, Henry L. Meyer, as liquidating partner, executed to Charles W. Sparhawk an assignment of all the assets of the partnership, without preferences, for the benefit of its creditors. At the time the partnership was insolvent. Dickinson had not contributed any capital, and did not participate in the management of the partnership, and was not consulted, and did not expect to be consulted, about the assignment. The assignment was duly recorded in Philadelphia and New York; and Sparhawk accepted the assignment, and proceeded to collect the assets transferred.

The appellants insist that no act of bankruptcy was established; that the assignment was not a general assignment by either of the parties, or a valid one by the partnership; that Meyer was improperly adjudged a bankrupt; and that, as neither partner should have been adjudged a bankrupt, the court was without authority to adjudge the partnership bankrupt.

By the provisions of section 5 of the bankruptcy act, "a partnership," during the continuance of the business, or after its dissolution and before the final settlement of its business, may be adjudged a bankrupt, and jurisdiction of all the partners and the administration of the partnership and individual property is conferred upon any court of bankruptcy having jurisdiction of one of the partners. The section provides that the creditors of the partnership shall appoint the trustee; that the trustee shall keep separate accounts of the partnership property and of the individual property; that the expenses shall be paid from the partnership property and the individual property in such proportion as the court may determine; and that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and any surplus added to the assets of the individual partners, and the net proceeds of the individual estate of each partner shall be appropriated to the payment of his individual debts, and any surplus to the payment of the partnership debts. It authorizes the partnership estate to prove against the individual estates, and vice versa, and directs the assets of the partnership estate and the individual estates to be marshaled so as to prevent preferences, and secure the equitable distribution of the property of the several estates. It further provides that the property of a partnership shall not be administered in bankruptcy when less than all the members are adjudged bankrupt; and in that event the partner not adjudged bankrupt is to settle the partnership business expeditiously, and account for the interests of the adjudged bankrupt. The last provision applies to a proceeding by or against one partner, or any number less than all,

and means that the bankruptcy of one partner shall not preclude the other from settling the partnership business, and, like those immediately preceding it, is merely declaratory of a recognized equitable principle of administration in bankruptcy. *Amsinck v. Bean*, 22 Wall. 403, 22 L. Ed. 801; *Murray v. Murray*, 5 Johns. Ch. 60; *Colly. Partn.* 854.

We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity. The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners bankrupt. The language does not require such an adjudication. The section is silent respecting a discharge of the partners individually. It does not, by terms or by implication, preclude an adjudication of the individual partners as bankrupt in the partnership proceeding; and, if there is such an adjudication, there is nothing to prevent the partners from receiving a discharge individually, if they are otherwise entitled to it under the act. But, as the commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding, the individual members cannot be adjudged bankrupts in such a proceeding who have not committed, or been participants in committing, one of the enumerated acts.

Section 5 differs significantly in its phraseology from that of the former acts in regard to the bankruptcy of partners. It takes the place of section 14 of the bankruptcy act of 1841, and of section 36 of the bankruptcy act of 1867. These sections of the earlier acts authorized an adjudication of bankruptcy of "persons who are partners in trade," instead of "a partnership"; and, while providing for the administration of the joint and separate estates substantially like section 5, provided, as section 5 does not, for granting or refusing a discharge to each partner. By the language of these acts, it was a prerequisite that all the persons comprising the partnership should be adjudged bankrupt before the warrant could issue entitling the assignee to administer the joint estate, and the provisions respecting a discharge show that such an adjudication was contemplated.

The differences indicate that congress intended that a partnership should be, for the purpose of the bankrupt act, in all respects "a person," as defined by section 1, entitled to a discharge under section 14, and subject to be adjudged a bankrupt in involuntary proceedings if it has committed any of the acts of bankruptcy specified in section 3. There are many provisions in the act which refer to the personal immunities and duties of bankrupts, and are not applicable to an entity like a partnership, but these are equally inapplicable to a corporation.

Under the former acts, there could not be an adjudication of all the partners unless a joint act of bankruptcy had been committed,

and consequently there could be no administration of the joint effects (see *Redmond v. Martin*, 9 N. B. R. 408, Fed. Cas. No. 11,632); and cases arose in which creditors were without an adequate remedy. It may have been the purpose of congress in the present act to cure the defect. As we interpret it, the present case affords an illustration of the better efficacy of its provisions; for, if it were necessary that Dickinson be adjudged, he could not be, as he did not participate in making the assignment, and consequently the partnership could not be adjudicated.

In the present case the partnership made a general assignment for the benefit of creditors, and by section 3 such an assignment is an act of bankruptcy, although made without preferences, without actually intending to defraud creditors, and without insolvency. In *re Gutwillig*, 34 C. C. A. 377, 92 Fed. 337; *West Co. v. Lea*, 174 U. S. 594, 19 Sup. Ct. 836.

As the assignment purported to transfer all the property of the partnership, it was a general assignment by the partnership, though, as it purported to transfer only their joint, and not their individual, property, it was but a partial assignment by the individual partners. Whether, having been made by one partner only, it was valid, void, or voidable is immaterial. Apparently the partner who did not join has ratified, by acquiescence, the act of the partner who executed it. However this may be, in denominating the making of a general assignment for the benefit of creditors an act of bankruptcy, congress did not make any distinction between valid or invalid instruments, but used terms which would reach the execution of any instrument which is, or purports to be, a general assignment. The majority of the court are of the opinion that the making of the assignment by Meyer, being an act of bankruptcy of which he was the author, entitled the creditors to an adjudication against him individually.

The appellees have insisted that the appellants are not entitled to be heard upon the questions which have been discussed. The appellants *Marcuard, Krauss & Co.* are creditors of the partnership; and, by the terms of section 18, any creditor may appear and plead to the petition in involuntary bankruptcy. The other appellant, *Sparhawk*, the assignee under the general assignment, was certainly entitled to contest the adjudication, as his title may be prejudiced by the proceeding. In *re Mendelshon*, 12 N. B. R. 533, Fed. Cas. No. 9,420; In *re Hatje*, 12 N. B. R. 548, Fed. Cas. No. 6,215; In *re Bergeron*, 12 N. B. R. 385, Fed. Cas. No. 1,342; In *re Jack*, 13 N. B. R. 296, Fed. Cas. No. 7,119; In *re Williams*, 14 N. B. R. 132, Fed. Cas. No. 17,706; In *re Scrafford*, 14 N. B. R. 184, Fed. Cas. No. 12,557. The court below permitted the appellants to intervene and be heard, and they have an undoubted right to review an adverse decision.

The adjudication of the district court is affirmed, with costs.

In re EMPIRE METALLIC BEDSTEAD CO.

(Circuit Court of Appeals, Second Circuit. December 7, 1899.)

No. 88.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—VOLUNTARY APPLICATION BY CORPORATION FOR RECEIVER.

Where a corporation, under the provisions of a state statute, files in a state court its voluntary application for dissolution, and for the appointment of a receiver to wind up its affairs and distribute its assets, on the ground of its insolvency, and procures the appointment of a receiver thereon, such application is not "a general assignment for the benefit of its creditors," within the meaning of Bankr. Act 1898, § 3a, cl. 4, providing that such an assignment shall constitute an act of bankruptcy.

2. SAME.

Such a proceeding cannot be held to be an act of bankruptcy on the ground that it produces results equivalent to those brought about by a general assignment for creditors; for the acts of bankruptcy enumerated and classified by the statute cannot be enlarged by construction so as to include transactions similar or analogous to, but not identical with, those specified.

Appeal from the District Court of the United States for the Northern District of New York.

This is an appeal from a decree dismissing a petition in involuntary bankruptcy brought against the appellee by the appellant and other creditors. 95 Fed. 957.

Tracy C. Becker and George L. Lewis, for appellants.

William L. Marcy, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The Empire Metallic Bedstead Company, a manufacturing corporation, organized under the laws of the state of New York, and established in Buffalo, in that state, brought its petition before the supreme court of New York, under the provisions of the Code of Civil Procedure, for the dissolution of the corporation and the appointment of a receiver of its property, upon the ground of its insolvency, which petition was granted and a temporary receiver was appointed on or about April 27, 1899. Within four months after the date of this petition, the Bourne-Fuller Company and sundry other creditors of the bedstead company brought their petition before the United States district court for the Northern district of New York, averring its insolvency, and that within four months next preceding it had committed an act of bankruptcy, in causing, upon its petition to the state court, the appointment of a receiver because of insolvency, which proceeding, under the laws of the state of New York, was averred to operate as, and to be equivalent to, a general assignment of the property of the said bedstead company for the benefit of its creditors. The answer denied that any act of the corporation was an act of bankruptcy. After a reference to the referee, who reported that in his opinion the act of the insolvent was equivalent to an assignment for the benefit of creditors, the question came before the district court for decision, which dismissed the petition. This appeal is from the decree of dismissal.

The petition did not allege that the corporation's application was with intent to hinder, delay, or defraud its creditors, but placed the averment of an act of bankruptcy solely upon the ground that the petition and the appointment of a receiver at its instance because of insolvency were equivalent to a general assignment of its property for the benefit of creditors; and whether such a procedure is an act of bankruptcy, because equivalent to a general assignment, is the only question to be determined upon this appeal.

The argument for the appellant is, in substance, that the appointment of a receiver takes the assets of a corporation beyond the reach of creditors, and places them in the hands of a trustee whom they did not appoint; that for this reason a general assignment for the benefit of creditors is a fraud upon the bankrupt act, and would be held an act of bankruptcy, if it had not been expressly declared to be such; and that the act of the corporation in promoting the appointment of a receiver has, in its substantial results, the same effect as an assignment, in this: that the trustee is not designated by the creditors. It is true that the application was for the purpose of an equal distribution of the avails of the assets by a trustee appointed by the court, and in whose appointment the creditors were not represented by themselves or by a person of their own selection; and, if it had been averred that the act of the corporation was an act to hinder or delay creditors in their rights and remedies under the bankrupt law, a different question might have arisen. When the statute declares that a general assignment for the benefit of creditors is an act of bankruptcy, can it be construed to include an act which is not a general assignment? We think that it cannot, because the term has a universally understood and recognized meaning throughout the different states, and means a transfer and conveyance by a person of all his property to a named person upon a trust which is to be worked out in some states by a court of probate and insolvency, in some states by a court of common law, and in some states by a trustee, subject only to the supervision to which any trustee is subjected. It is a deed or conveyance which the grantor makes voluntarily, or sometimes by compulsion, at the instance of a court of insolvency. A petition for the appointment of a receiver is not that proceeding which is universally recognized as an assignment, and its "equivalency" of result, if equivalency exists, is not important. The bankruptcy statute has said that the one is an act of bankruptcy, and has said nothing about the other, in direct terms; and when acts of bankruptcy are classified, as they are in the statute of 1898, it is not the province of a court to enlarge the classification because the omitted class seems to partake of the sin of the named class. Why the legislature did not specifically mention acts of corporations which would have the effect of a general assignment, but which are of a different character, it is unnecessary to surmise; for it is, in our opinion, sufficient to say that these other acts are not assignments, and were not particularly specified, and that, if they are acts of bankruptcy, it is because they are included in the general language of one of the other subdivisions of section 3 of the act. The order of the district court is affirmed, with costs.

THE LAURADA.

UNITED STATES v. THE LAURADA.

(Circuit Court of Appeals, Third Circuit. January 2, 1900.)

No. 2.

NEUTRALITY LAWS—VIOLATION—FORFEITURE OF VESSEL.

To bring an American vessel within the provisions of Rev. St. § 5283, which subjects to forfeiture any vessel fitted out and armed within the limits of the United States, or commissioned within the territory or jurisdiction of the United States, with intent that such vessel shall be employed in violation of the neutrality laws, it must be shown that the employment of the vessel in the prohibited service was pursuant to an intention formed within the limits of the United States; and the formation of such intention after she has left the jurisdiction of the United States, and while she is on the high seas, cannot be construed, because of her nationality, to be within such limits.

Appeal from the District Court of the United States for the District of Delaware.

Lewis C. Vandegrift, for appellant.

Andrew C. Gray and H. H. Ward, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. The court below was asked to condemn and forfeit the American steamship Laurada under section 5283 of the Revised Statutes, which is as follows:

"Sec. 5283. Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out or arming, of any vessel with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition and stores, which may have been prepared for the building and equipping thereof, shall be forfeited; one-half to the use of the informer and the other half to the use of the United States."

The case was very thoroughly considered by the district judge. 85 Fed. 760. His opinion contains a statement of the facts, the accuracy of which is conceded, and it deals with the questions of law involved to our entire satisfaction. We adopt his reasoning, and concur in his conclusion.

To render the acts enumerated in this section unlawful, it is requisite that they should be done with intent that the vessel should be employed to cruise, or to commit hostilities, and that intention must be formed within the limits of the United States. There is no evidence whatever from which it could be inferred that at the time the Laurada left this country an intent to employ her for either of these purposes existed, and it is not necessary to decide whether

the landing by her of the expedition on the shore of Cuba was or was not a hostile act, for this was done in pursuance of an intent which was not formed until after the original purpose had been executed; and the theory under which a vessel afloat is, for some purposes, identified with the country to which it belongs, cannot be so applied as to expand the plain and ordinary meaning of the phrase, "within the limits of the United States," as it is used in this statute. The decree of the district court is affirmed.

In re REESE.

(Circuit Court, D. Kansas, First Division. January 15, 1900.)

1. INJUNCTION—SCOPE—PERSONS NOT PARTIES.

A person cannot be committed for contempt for the violation of a restraining order made by a federal court in a suit between private persons, to which he was not made a party, either by words of specific or general description, and where he is, moreover, a citizen and resident of another state, who could not be sued by the complainant in such court without his consent.

2. HABEAS CORPUS—GROUNDS FOR GRANTING OF WRIT.

A person imprisoned for the violation of an order which did not extend to him, or, if it in terms extended to him, was in excess of the jurisdiction of the court, is entitled to a discharge by the writ of habeas corpus.

This was a proceeding on the petition of John P. Reese for a writ of habeas corpus.

W. H. Rossington, David Overmyer, and Oliver T. Boaz, for petitioner.

J. H. Richards, William C. Perry, C. E. Benton, and Morris Cliggitt, for respondent.

THAYER, Circuit Judge. This is a proceeding by habeas corpus to secure the release of John P. Reese, who was committed for an alleged contempt in disobeying an order of injunction that was issued by the circuit court of the United States for the district of Kansas, Third division. By virtue of an oral agreement of counsel, the case has been submitted for decision upon a written stipulation as to one issue of fact; also upon the petition for the writ, the return thereto, and the annexed exhibits. By these pleadings and exhibits, the following facts are disclosed, which are undisputed:

On June 13, 1899, the Western Coal & Mining Company, a corporation of Missouri, filed a complaint in the circuit court of the United States for the district of Kansas, Third division, which may be characterized, in general phrase, as a bill to enjoin the defendants therein named from resorting to threats, intimidation, or scurrilous epithets for the purpose of preventing miners who so desired from taking service with the coal company, and from resorting to the same means for the purpose of inducing persons already in the coal company's employ to abandon such service. Forty-six persons were made defendants to the bill by name, all of whom were alleged to be citizens and residents of the state of Kansas; and in addition thereto other persons, as it is claimed, were made parties defendant to the bill by the following words of general description in the caption of the complaint, to wit: "And all members of the United Mine Workers' lodges or unions in Crawford and Cherokee counties, in the state of Kansas, and all members of District No. 14 of the United

Mine Workers of America, and all other persons co-operating with them, being citizens of Kansas." The opening paragraph of the complaint alleged that the complainant brought its bill against the persons who were specifically named in the caption thereof, their names being again repeated as in the caption; that "each and all of them are residents and citizens of the state of Kansas, and all members of the United Mine Workers' lodges or unions in Crawford and Cherokee counties, in the state of Kansas, each and all of whom are residents and citizens of the state of Kansas," and that it brought its bill against "all members of District No. 14 of the United Mine Workers of America, citizens of the state of Kansas, co-operating with them, whose names are not known to your orator"; and it prayed leave that it might be permitted "to add thereto the names of such other persons, citizens of Kansas, as may become known, and charge them in apt words as in the premises." The bill, after setting out in detail the wrongs complained of and threatened, prayed the aid of the court, as a court of equity, "to the end that said defendants, and each of them, and all other persons co-operating with them, whose names are not known to your orators, and all members of the lodges or unions of the United Mine Workers of America in Crawford and Cherokee counties and state of Kansas, and all other persons conspiring and combining with them," might be enjoined from committing the various wrongful acts charged in the bill. But it only asked for process of subpoena against those defendants whose names were set forth in the caption of the complaint, as above stated. On July 18, 1899, a temporary injunction was granted, which injunction, as issued and entered of record, was thus entitled, after setting out the name of the court in the usual manner: "Western Coal & Mining Company, Complainant, vs. W. T. Wright, Robert Gilmore, Hugh Bone, et al., and All Members of the United Mine Workers' Lodges or Unions in Crawford and Cherokee Counties, in the State of Kansas, and All Members of District Number Fourteen of the United Mine Workers of America, and All Other Persons Co-operating with Them, Being Citizens of Kansas, Defendants." In the body of the order which was made under the aforesaid caption, the prohibition of the court forbidding the doing of certain acts complained of in the bill was addressed to "the defendants above named, and each of them, and all other persons who have or may combine, confederate, or conspire with said defendants, or either of them." This order was never served on the petitioner, nor was any attempt made to do so, so far as the case discloses; but on October 20, 1899, the petitioner was cited into court to answer the charge of having disobeyed its provisions, and after due service of such citation, and a hearing before the court, was adjudged guilty of contempt for a violation of the injunction, and was thereupon sentenced to imprisonment for three months. The affidavit upon which the aforesaid citation was obtained stated, among other things, that Reese was a member of the national executive board and one of the organizers of the United Mine Workers of America, and that he was a citizen of the state of Iowa, but was in Crawford county, Kan., when the restraining order was issued, and had been in that state repeatedly since that date, and had aided and abetted striking miners in the unlawful acts complained of in the bill. By a stipulation of counsel made on the hearing of the case at bar, it was agreed, in substance, that the petitioner's attorney, in his argument during the hearing of the contempt proceeding, claimed that the order of injunction ran against citizens of the state of Kansas only, and that the petitioner, being a citizen of the state of Iowa, was not within the terms of the order, and that he could not violate it.

From the foregoing summary of the facts disclosed by the pleadings and exhibits, the conclusion is inevitable that the complainant company intended, when it filed its bill, to exclude as parties to the cause all persons except such as were citizens and residents of the state of Kansas, and that it did not make the petitioner a party defendant to the injunction suit, either by name or by words of general description, he being at the time a citizen and resident of the state of Iowa. In framing the complaint, and in framing the caption to the order of injunction, counsel industriously used language which ex-

cludes the idea that any one was intended to be made a party defendant who was not at the time a citizen and resident of Kansas, and they were doubtless influenced to such action by the thought that, if a nonresident of the latter state was named as a party defendant, it might impair the jurisdiction of the court over the other defendants, who were specifically named, within the rule announced in *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, and *Id.* (C. C.) 38 Fed. 53, inasmuch as federal jurisdiction was invoked solely on the ground of diverse citizenship. Counsel for the respondent concede, apparently, that the petitioner was not a party to the bill for an injunction; but they point to the general language heretofore quoted, which is found in the prayer for injunctive relief and in the body of the injunction, and insist, in substance, that to render the petitioner amenable to the restraining order, and punishable for its violation, it was not necessary that he should have been made a party to the suit in which it was granted, nor that it should appear that he was a citizen of the state of Kansas.

These propositions will be noticed briefly. It will be readily conceded that, in many contempt proceedings instituted in the federal courts, neither the citizenship of the accused, nor the fact that he is not a party to any case pending in the court whose authority has been set at naught, is of any importance. This is true when a federal court undertakes to punish one who either interferes with its proceedings, obstructs the due execution of its process, or intermeddles with property in its custody. A different rule, however, applies to cases like the one in hand, where the aid of a court of equity is invoked by a private suitor to restrain another from doing a threatened act which is alleged to be wrongful, on the ground that the legal remedy to redress the wrong is inadequate, and complaint is made that a restraining order entered in the case has been disobeyed. In such cases, the order of the chancellor, when made, prohibiting a given act or series of acts, becomes a special law for the governance of the parties to the cause, and such other persons, if there be any, who may assume to do the forbidden act or acts, not in the exercise of an independent right, but merely as the servants or attorneys of those who are named as parties and are expressly enjoined. Chancellor Kent said in *Fellows v. Fellows*, 4 Johns. Ch. 25: "I have no conception that it is competent to this court to hold a man bound by an injunction who is not a party in the cause, for the purpose of the cause." And the same doctrine has been enunciated in other cases. *Iveson v. Harris*, 7 Ves. 256; *Schalk v. Schmidt*, 14 N. J. Eq. 268; *Boyd v. State*, 19 Neb. 128, 26 N. W. 925; *Robertson v. Tapscott's Adm'r*, 81 Va. 533, 549; *Watson v. Fuller*, 9 How. Prac. R. 425. See, also, *State v. Anderson*, 5 Kan. 90; *Land Co. v. Elkins*, 22 Blatchf. 203, 20 Fed. 545; *Vanzandt v. Mining Co.*, 2 McCrary, 642, 48 Fed. 770; 2 Joyce, Inj. p. 1327.

In accordance with this doctrine, it is the usual practice, when an injunction issues against a corporation or an individual to restrain the commission of an alleged tort, to prohibit, not only the defendant, but also his servants, employés, and attorneys, from doing the threatened act, and to hold the latter bound by the order, if, with knowledge of its existence, they do that which is forbidden, not in the

exercise of an independent right, but in behalf of their principal. *People v. Sturtevant*, 9 N. Y. 264; *People v. Compton*, 1 Duer, 512, 554; *State v. Cutler*, 13 Kan. 131; *Atlantic & P. Tel. Co. v. Baltimore & O. R. Co.*, 46 N. Y. Super. Ct. 377, 416, 417; *Phillips v. Detroit*, 19 Fed. Cas. 512. Expressions are found in some cases, notably in *Lennon v. Railway Co.*, 22 U. S. App. 561, 568, 12 C. C. A. 134, 64 Fed. 320 (although in that case the court was dealing with one who was merely a servant of the party who was enjoined), which give some color to the view that an order enjoining a defendant from doing an act alleged to be tortious binds all other persons not parties to the suit who have knowledge of the order, if they are acting in concert with him, although each claims an individual right to do the thing prohibited, and does not act as the servant or attorney of him who is specifically enjoined. The court is aware of no case, however, and none has been called to its attention, where the proposition last stated, that an injunction of the kind last mentioned binds every one who has notice of it, has passed into judgment on a state of facts involving its determination, and, in the absence of controlling authority, the principle does not seem to be one which should receive judicial sanction. It is obvious that, if a person may be restrained from doing an act which he claims an individual right to do that is not derivative, without his being made a party to the cause, either by words of specific or general description, then he may be condemned unheard, and deprived of an asserted right without due process of law. The power of a chancellor does not extend to such limits, nor is there any necessity that it should do so. Torts, when committed by numerous persons, may be treated either as joint or several (*Hopkins v. Stave Co.*, 49 U. S. App. 709, 28 C. C. A. 99, 83 Fed. 912); and, if for any reason the requisite power to enjoin a wrongdoer is not vested in one court, it may always be found lodged in another, and resort should be had to a forum where he may be prosecuted without violating, or seeming to violate, any of those fundamental rules under and subject to which judicial proceedings must always be conducted.

The case, then, presents the following features: The petitioner stands committed for violating a restraining order made in a suit between private persons, to which he was not made a party, either by words of specific or general description. Moreover, as the court in which the suit was brought was one of limited jurisdiction as respects the persons who might be sued therein and subjected to its jurisdiction without their consent, and as the petitioner was a citizen and resident of the state of Iowa, he was not subject to be sued by the complainant in the court by which the order was made, unless he elected to submit himself to its jurisdiction, and such election had not been made when the order of injunction was entered, nor when it is alleged to have been violated, nor subsequently.

We are thus confronted with the question whether a person who is imprisoned under the circumstances aforesaid may obtain his release by a writ of habeas corpus. The determination of this point does not involve a consideration of the nature of the acts constituting the alleged contempt, nor the findings which may have been made with respect thereto, since these matters are not jurisdictional, and

the findings in question are not subject to review in the present proceeding. It is within the province of the court, however, to consider the scope of the injunction, and the power of the court by which it was granted to punish the accused by summary process of contempt for a violation of the same. The restraining order does not profess to enjoin persons who are the "servants, agents, and attorneys" of the defendants. These usual words are omitted. Persons of that class are not embraced by the terms of the order. The only language found therein which can include the petitioner are the words, "and all * * * persons who * * * combine, confederate, or conspire with said defendants"; which language must be held to mean persons acting along the same general lines as the defendants, but in the exercise of an asserted individual right to do the various acts charged in the complaint. If the court looked merely to the allegations of the bill, and to other parts of the record to which special reference has been made, it would experience no difficulty in holding that the descriptive language last above quoted was only intended to embrace persons who were citizens of Kansas, and that the restraining order does not in terms extend to the petitioner. It would not feel at liberty to impute to counsel an intention to include a person within the terms of the order, and to subject him to possible penalties for its violation, whom they had taken special pains to exclude as a party defendant to their bill, and by so doing had deprived of the ordinary rights which belong to a party to a cause. Inasmuch, however, as the learned district judge by whom the order was granted has evidently construed and enforced it as reaching beyond the parties to the record, and as embracing the petitioner, who was not a citizen of Kansas, nor subject to be sued by the complainant in that state without his consent, the validity of the order may be determined on the assumption that such was its true scope and purpose.

Viewed from the latter standpoint, the court is of opinion that the restraining order was void, in so far as it concerned the petitioner, and that it afforded no legal basis for the contempt proceedings which were subsequently inaugurated against him, and against him alone, although there were, as it seems, many other persons concerned in the acts constituting the alleged contempt. It is somewhat remarkable that no attempt was made, prior to the contempt proceedings, to make the petitioner a party to the suit in which the injunction was granted. If he had been made a party, it may be that he would have waived his privilege of being sued elsewhere, and consented to litigate with the complainant company the various issues tendered by its bill of complaint. If he had refused to do so, the case might nevertheless have proceeded against the other defendants by a simple dismissal as to the petitioner. *Hopkins v. Stave Co.*, 49 U. S. App. 709, 714, 28 C. C. A. 99, 83 Fed. 912. But, be this as it may, it cannot be adjudged that, upon the state of facts heretofore recited, the restraining order extended to and bound the petitioner. If it be assumed that such was its true scope and purpose, then it was void, in the sense that it was beyond the power of the court to make it. And where one is imprisoned for the violation of an order which did not

extend to him, or for the violation of an order which was in excess of the jurisdiction of the court, if it in terms extends to him, he is entitled to a discharge by the writ of habeas corpus. *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872. The result is, in the language of the habeas corpus act (section 761, Rev. St.), that "law and justice," as applied to the facts of the case, require the petitioner's discharge; and it is so ordered.

FALK v. CURTIS PUB. CO.

(Circuit Court, E. D. Pennsylvania. January 4, 1900.)

No. 8.

1. COPYRIGHTS—PENALTIES FOR INFRINGEMENT—LIABILITY OF CORPORATION.

The provisions of Rev. St. § 4965, which subjects "any person" to the forfeitures therein prescribed for having in his possession, etc., unauthorized copies of a copyrighted publication, apply as well to corporations as to natural persons; and the possession of such copies by agents of the corporation, acting in its behalf, is the possession of the corporation.

2. SAME—SUIT TO RECOVER FORFEITURES—SUFFICIENCY OF DECLARATION.

The amount of the forfeiture recoverable for the infringement of a copyright under Rev. St. § 4965, is limited to one dollar for each copy of the infringing publication found in the possession of the defendant before suit brought; and a declaration in an action to enforce such forfeiture which fails to allege that any copies were so found is fatally defective, the omission being of a fact which is essential to any right of recovery.

On Demurrer to Plaintiff's Statement of Claim.

Samuel M. Hyneman, for plaintiff.

J. Martin Rommel and Hector T. Fenton, for defendant.

DALLAS, Circuit Judge. The defendant has assigned 10 reasons in support of its demurrer to the plaintiff's statement of claim:

1. The objection that "the writ and statement are defective and insufficient, in not alleging that the suit is brought as well for himself as for the United States," need not be considered; for the plaintiff's counsel, though denying that such a suit must be so brought, concede that it may be, and have expressed their willingness to amend by adding after the name of the plaintiff these words, "who sues as well for himself as for the United States"; and this amendment will, of course, be allowed. *Megargell v. Coal Co.*, 8 Watts & S. 342.

2 and 3. The brief for the defendant states that paragraphs 2 and 3 of the demurrer set up the proposition "that this penalty can only be incurred by a natural person in whose actual possession infringing copies can be, and have been, found prior to suit brought, and cannot be enforced against a corporation." This proposition has been earnestly and ably enforced by argument, but it cannot be sustained. It is unquestionably true that section 4965 of the Revised Statutes, upon which this action is founded, is a rigorously penal one, and therefore should be strictly construed. But the construction which

the defendant invokes is not merely restrictive,—it is discriminative; and the real question is whether the congress intended, in using the words “any person,” to discriminate between two sorts of persons (natural and artificial) equally well known, and both recognized by law. No reason has been suggested which could have induced such an intent, and to me it seems that to ascribe to congress a purpose to exempt corporations from, while subjecting natural persons to, the penalties imposed by this section, would be to assume that it purposed a manifestly unreasonable consequence; and of this the court should not be persuaded, except by clear and unequivocal expression. 1 Shars. Bl. Comm. p. 90, and note by Christian. But congress has distinctly declared its intent to the contrary; for the first section of the Revised Statutes prescribes that:

“In determining the meaning of the Revised Statutes; * * * the word ‘person’ may extend and be applied to partnerships and corporations, * * * unless the context shows that such words were intended to be used in a more limited sense.”

Although this defining provision is, in my opinion, conclusive of the question, yet I have examined the cases referred to in supposed support of the defendant's position, but without finding that they tend to sustain it. The case of *Androscoggin Water-Power Co. v. Bethel Steam-Mill Co.*, 64 Me. 441, arose under a state statute which created a criminal offense and also imposed a civil liability; and it was held that “the intent with which the act prohibited is done” was, under that statute, the essential subject of inquiry either in the criminal or in the civil proceeding which it contemplated, and that the intent meant “is individual, not corporate, intent.” But it was there said:

“While, undoubtedly, the word ‘person’ may include a body corporate, we do not think that it was the legislative intention that in the act under consideration it should do so. The fair and natural construction to be given to the language used negatives any such idea.”

That case is plainly distinguishable from this one.

In *State v. Cincinnati Fertilizer Co.*, 24 Ohio St. 611, a corporation was indicted under an act of the legislature for erecting and keeping up a nuisance. Nothing was decided which is applicable here, but only that, in view of the state of legislation and practice in the state of Ohio, the whole theory and machinery of whose administration of criminal law seems adapted only to the prosecution and punishment of natural persons, the legislature could not have intended in the use of the word “person,” which is found in almost every criminal law of the state, to authorize an indictment against a corporation for this particular offense, without any special or further provision as to the liability of corporations or the mode of proceeding against them.

Benson v. Manufacturing Co., 9 Metc. (Mass.) 562, was decided under a statute which by its express terms made the agents or superintendents of manufacturing establishments liable to the penalties which it imposed; and it was in view of this provision that the court held that, inasmuch as every case may be reached without applying the penalties to corporate bodies, and sustaining actions against them in their corporate name for breach of this statute, an action against such

corporate bodies in their corporate name could not be sustained. The court, however, said:

"They [corporations] may be said to be embraced in the word 'owner' of any manufacturing establishment; and if the provision had been thus limited, and no penalty imposed on other persons than the owners of establishments, it would perhaps have been a reasonable construction, and necessary to give force and effect to the statute, to the extent designed, to have held the corporation liable under the description of 'owner.'"

The authorities which show that under certain circumstances there can be no recovery against the master of a penalty or of damages which the law visits upon the actual wrongdoer, the servant, by way of punishment only, and not for the purpose of compensating the injured party, need not be particularly considered. The charge in this case is against the corporation itself, and a corporation aggregate is but a bundle of agents. As an abstract entity it is incapable of action, but, whatever may at one time have been supposed to be the law, it is now well settled that a corporate body is liable to substantially the same extent as a natural person for the wrongful acts of its officers and agents committed on its behalf, and for its benefit, in the course of their office or employment. "The true rule is that corporations are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly embodied in the statute." *Stewart v. Turn Verein*, 71 Iowa, 226, 32 N. W. 275. Nothing need be added to show that copies can be found in the actual possession of an artificial person as well as of a natural person. It results from what has already been said that the possession of agents of a corporation, who in that behalf are its representatives, is the possession of the corporation itself. The second and third paragraphs of the demurrer cannot be sustained.

4. The objection that "the specific copyrighted photograph, as it is cited and described in the statement, is not a copyrightable subject-matter," is not well taken. *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349.

5. The fifth paragraph of the demurrer avers that the statement is bad "because the amount of the penalty recoverable is limited to the number of copies actually found in the possession of the defendant before suit brought, and the statement does not aver that they were so found." This proposition is, in my opinion, well founded in law. "While the forfeiture is not limited as to the number of the copies, it is limited to such as are found in, and not simply traced to, the possession of the defendant." The plaintiff, in his statement of his cause of action, demands "judgment against the corporation for the sum of \$5,000,—one-half thereof to the use of the United States,—besides the costs of this action." Hence it appears that the recovery which he seeks is limited to the penalty of one dollar for every sheet of the alleged infringement found in the defendant's possession, and yet he nowhere alleges that any number of said sheets were so found prior to the bringing of the suit. Therefore he has failed to allege a fact the existence of which is necessary to disclose a cause of action. *Bolles v. Outing Co.* (decided by the supreme court of the United States Dec. 4, 1899; not yet officially reported), 20 Sup. Ct. 94, Adv.

S. U. S. 94, 44 L. Ed. —. In that case the question arose upon the exclusion of evidence offered upon the trial, and no point was presented respecting the pleading; but, as the court distinctly held that section 4965 did not impose a forfeiture of one dollar for any copy or copies which had not been found in the defendant's possession before suit brought, it necessarily follows that a declaration which omits to allege that any copies were so found is fatally defective. The omission is to allege a fact upon the existence of which the asserted right of recovery is absolutely dependent. *Aechternacht v. Watmough*, 8 Watts & S. 162; *Ferrett v. Atwill*, 1 Blatchf. 151, Fed. Cas. No. 4,747. In a proceeding of this sort there can be no intendment in favor of the plaintiff. "In a criminal or quasi criminal action, the pleading should be clear and consistent. The court is not called upon to strain any language to remove doubt or secure consistency." If any copies were found in the possession of the defendant before the action was commenced, nothing could be easier than to say so plainly. But this has not been done, and "there should be no labored effort at reconciliation of apparently contradictory averments, at least when the pleading is challenged before trial." This fifth ground of demurrer must therefore be sustained, but, with reference to the views just expressed, plaintiff will be afforded an opportunity to amend. *Taft v. Engraving Co.* (C. C.) 38 Fed. 28; Rev. St. § 954.

6 and 7. The sixth and seventh grounds of demurrer have not been insisted upon.

8, 9, and 10. The eighth, ninth, and tenth grounds of demurrer are not substantial. The fifth paragraph of the plaintiff's statement alleges a precise compliance with the requirement of section 4962 of the Revised Statutes; and whether or not the two complete printed copies of the photograph filed with the librarian of congress contained the identifying title, and were or were not the same photograph which is alleged to have been copyrighted and to have been unlawfully appropriated, is a matter which I think may be determined from the evidence, upon the pleading as it stands. If, however, the plaintiff shall, from abundance of caution, be advised to meet this objection by amending his statement, such amendment will be allowed. Rev. St. § 954.

The demurrer of the defendant to the plaintiff's statement of claim, but only as to the fifth ground assigned in support thereof, is sustained; and the plaintiff is granted 20 days in which to file an amendment of his said statement, and the defendant is allowed 20 days thereafter to plead thereto.

AMERICAN WELL WORKS v. F. C. AUSTIN MFG. CO.

(Circuit Court, N. D. Illinois, N. D. January 6, 1900.)

No. 25,292.

PATENTS—INFRINGEMENT—APPARATUS FOR SINKING WELLS.

The Chapman patent, No. 382,689, for an apparatus for sinking wells, which consists of a combination of devices by which an iron pipe, the lower edge of which does the boring, is held by means of a rolling clamp having sharp cutting edges, and rotated at the same time that it sinks

endwise by the force of gravity, was not anticipated by prior devices by which a rotary movement and a longitudinal movement were imparted to an article at the same time, but independently, as in machines for making double-pointed screws and whipstocks, but the adaptation of the principles of such devices to use upon a pipe for drilling wells, often of great length and weight, involved invention. Claims 12 and 13 of such patent also *held* infringed.

This is a suit in equity for infringement of a patent. On motion for preliminary injunction.

Bond, Adams, Pickard & Jackson, for complainant.
Chas. G. Page, for defendant.

KOHLSAAT, District Judge. This cause comes before the court upon an application for a temporary injunction restraining the defendant from making, using, or vending any apparatus for sinking wells containing the improvements or invention secured to complainant under claims 12 and 13 of patent No. 382,689, dated May 15, 1888; said patent being for an "apparatus for sinking wells." It appears from the record that Matthew T. Chapman, being the inventor of said improvements, secured the patent therefor in due form, and afterwards, and by proper assignment, dated March 17, 1893, conveyed the same to complainant; that complainant has made and sold a large number of said well-digging machines, at a great profit; that the same have been upon the market, and generally accepted by the public, for 11 years; that said patent has been litigated, and such litigation has resulted in the upholding of complainant's title thereto, and the validity of said patent, although the contest in said litigation does not appear to have been very thorough; that defendant has applied for a patent upon the device sought herein to be enjoined, and has since May, 1899, been manufacturing and placing the same upon the market. It further appears that complainant's apparatus is made up of several old devices, whereby a round article, as an iron pipe, is made to rotate with the endwise movement of the article, which latter may also be independent of a rotary movement thereof. This result is effectively secured by the use of sharp or cutting edges at the point where the clamp impinges upon the round article grasped thereby. So far as the record discloses, complainant was the first to patent and apply this latter device. It further appears that in the several devices used in the manufacture of double-pointed screws and whipstocks, covered by letters patent numbered, respectively, 145,136 and 313,348, and in other patents introduced, the principle of the endwise movement of the article clamped, independent of the rotary movement which carries said article around, is clearly set out. In complainant's apparatus the said principle is applied to vertical movement effected by force of gravity, and to ponderous articles. It seems to be well settled that it is not invention to so enlarge and strengthen a machine that it will operate on larger materials than before. Walk. Pat. § 30, and cases cited. Nor is it an invention to apply to vertical uses a device which has previously been used in other connections to accomplish horizontal movement. *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. 58, 33 L. Ed. 322. So that if com-

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plainant's device had been anticipated in an apparatus which operated horizontally upon some smaller article, the mere change involved in applying same to a larger article in another position would not constitute an invention. It is not invention to use an old thing or process for a new purpose. Walk. Pat. § 38, and cases cited. In the whipstock and double-pointed screw patents, the endwise movement is secured by force. In complainant's device it is secured by gravity. I can see no patentable improvement in this distinction. Complainant has in some manner applied the combined rotary movement to ponderous articles,—pipe weighing many tons,—in sinking deep wells. The rotation of the pipe while it sinks seems to be an essential factor in digging to a great depth, whereby the well can be cased and walled while the adjacent material is kept from binding and thereby retarding the descent of the pipe. But such rotation was not new to the art, although it was formerly secured by crude and unsatisfactory means. It is undisputed that complainant's device is a great success, and has worked a revolution in well digging. While it does not appear from the claims in question that the patent was intended particularly to cover a well-boring machine, yet, from the title of the patent and the specifications, it is evident that that idea was the prominent one in the designer's mind. Is there, then, in complainant's apparatus, that which distinguishes it from the alleged anticipatory patents, other than the manner of its application? As above considered, could the whipstock and screw devices cited be made to apply to a massive well-boring apparatus with no other change than enlargement and change of position? Complainant says, "No," and insists that its rotating clamp, with its sharp angles, supplies a needed improvement to the aforesaid appliances, without which sharp angles or cutting edges the work as practically carried on could not be accomplished. Could a large, round article, weighing many tons, be held firmly or grasped so as to rotate, and at the same time permit an endwise movement thereof, independent of the rotary motion which carries the article around, by mere gripping or hugging? The advantages claimed for the cutting edges are that they hold the article upon which they impinge, firmly, against sidewise movement, while at the same time it is permitted to move endwise, or sink, of its own weight. Could this be accomplished by friction alone? Would not the pressure necessary to hold in position an article many tons in weight (especially considering the strain placed upon the clamping edges by reason of the fact that the lower end of the pipe is engaged in digging and cutting, oftentimes at a very great distance from the clamping edges) crush such article, or prevent necessary endwise or downward progress? I am impressed in this case by the wide divergence between the uses to which the so-called anticipatory devices are put, and the ends to which complainant's patent is applied. It is almost inconceivable that the principles should be identical. In my judgment, the divergence is found in the cutting rollers. It was a bold undertaking to attempt the manipulation of such large and weighty articles as are required in well digging, to the depth of hundreds of feet, and in some cases thousands of feet, by the simple process of a rolling clamp with sharp cutting edges of adjustable

grasp; thus adding to the grasp of the impinging roller edge the resistance of the shoulder or material above the cutting edge of the roller. Chapman did this, and in so doing made a valuable and patentable discovery.

It then remains to determine whether defendant's device infringes claims 12 and 13 of complainant's patent. While complainant uses what it calls "clamping cones," with serrated edges, the defendant uses concaved pulley wheels hung upon swinging arms; the periphery of each side of each wheel being sharpened into a cutting edge. Both are adjustable. Both sustain the article grasped by pressing the sharp angles or cutting edges into and upon the article grasped. Both use substantially the same means to secure the combined rotary action. While defendant secures the endwise movement of the article, independent of its sidewise rotation, in a different manner from that accomplished by complainant's device, it is the same action, and the change is unimportant. It sustains the article grasped by the impingement of the cutting edges, and is, in my judgment, a substantial infringement of complainant's patent. The preliminary injunction is granted.

THE KATIE M. HAGAN.¹

THE LIZZIE CRAWFORD.

(District Court, E. D. Pennsylvania. December 26, 1899.)

No. 71.

COMPROMISE OF CLAIMS—SETTLEMENT IN WRITING—FRAUD—PROOF REQUIRED.

Where parties have compromised all claims in controversy by agreeing upon an amount to be paid in settlement, and have reduced their agreement to writing, neither party will be heard to complain, unless upon clear proof of fraud in procuring said settlement.

In Admiralty. The libellant in this case had settled with an insurance company all claims arising out of the sinking of his barge by the alleged negligence of a steam tug, and afterwards filed his libel to recover for the expense incurred in raising her, averring that this item was not included in the settlement. Proof of fraud was almost wholly wanting. Libel dismissed.

John A. Toomey, for libellant.

James J. Macklin, for respondent.

McPHERSON, District Judge. The libellant is managing owner of the barge Katie M. Hagan, which ran aground and sank on December 28, 1896, owing to the alleged negligence of the tug Lizzie Crawford. The barge was afterwards raised by a wrecking company at the cost of \$1,200, and, this sum having been paid by the libellant under threat of a proceeding in rem, the present action is brought to compel repayment.

Whether the tug was or was not negligent is not a matter of importance now, for the reason that the libellant settled his whole claim,

¹ Reported by Arthur G. Dickson, Esq., of the Philadelphia bar.

including the item in controversy, several months after the accident, and was paid the amount that had been agreed upon in order to compromise the dispute. The settlement is in writing, and was made between the libellant and the agents of the Home Insurance Company, which had insured the tug against tower's liability. The paper reads as follows:

"Pavonia, N. J., Aug. 4, 1897.

"It is hereby agreed, by and between Peter Hagan, owner of barge Katie Hagan, and Louis F. Burke, representing the underwriters on tug Lizzie Crawford, to settle any and all claims of the barge Katie Hagan and her owners against the said tug Lizzie Crawford, arising from the disaster of December 28, 1896, for the sum of eighteen hundred dollars.

Peter Hagan.

"Louis F. Burke."

This is a settlement of the claim in suit, and it was followed by payment and acceptance of the sum of money therein named. It is true the libellant attempted to qualify his acceptance by stating in the receipt that the money did not cover "bill of raising"; but this was a week after the agreement was made, and his mere statement could not change the terms of that contract. The libellant now attacks the settlement on the ground of fraud and misrepresentation, but these charges have not been proved. At the best, the testimony may be said to raise some doubt about the scope of the compromise, but a doubt is not enough. The libellant is bound to prove the allegations upon which he relies to relieve him from the agreement, and this he has failed to do. The evidence is insufficient to justify a court in setting aside a written instrument.

This libel must be dismissed, with costs.

THE MORINGEN.¹

(District Court, E. D. Pennsylvania. December 15, 1899.)

CHARTER PARTY—STIPULATIONS INCONSISTENT WITH LIEN.

Where a charter party provides for the payment of a fixed sum, to be made in advance, and at a particular place, such stipulation will be held to be an implied waiver of the charterer's lien for unpaid arrears of hire, and payment thereof cannot be demanded elsewhere and at other times.

In Admiralty. This was a libel for the injury suffered by the consignee of a cargo carried on a chartered vessel, the master of which, acting under instructions from the owners, refused to dock her upon arrival, the delay resulting in another cargo, belonging to a rival of the libellant, being first discharged, and thereby securing the market. The facts are very fully recounted in the opinion of the court. Decree for libellant.

Horace L. Cheyney and John F. Lewis, for libellant.

Henry R. Edmunds, for respondent.

McPHERSON, District Judge. In December, 1895, Dumois & Co., who are importers and wholesale dealers in foreign fruits, chartered the steamship Moringen for a period of five months from March 15,

¹ Reported by Arthur G. Dickson, Esq., of the Philadelphia bar.

1896, at the hire of £405 British sterling per calendar month, "payment of said hire to be in cash at New York at the rate of \$4.85 per pound sterling, half-monthly in advance, from the date of delivery of steamer." The vessel was delivered on March 23d at Gibara, Cuba, to Guarch & Co., who are shippers of fruit at that port, and received the boat for the charterers. She made two voyages to New York, carrying fruit consigned by Guarch & Co. to Dumois & Co., and afterwards made three or four voyages to Philadelphia, carrying fruit consigned by the same shippers to Fox, the libellant, who was a commission agent in this city, and received the fruit for sale on account of Guarch & Co. These voyages to Philadelphia were made under a verbal contract between the charterers and Guarch & Co., by which the ship was to carry cargo for Guarch & Co., and they were to pay to Dumois & Co. the hire named in the charter party, in the same manner (half-monthly in advance) and at the same place (the city of New York). As Mr. Dumois testified, the amount of freight to be paid was not measured by the quantity of cargo actually shipped, but Guarch & Co. were to ship what they pleased to Fox, and Fox was to pay the charter hire to Dumois & Co. In his own words: "Every fifteen days the charter money was to be paid. * * * The one to whom [the cargo] was consigned would take my place,—to pay the money to me, and for me to remit it to the owner."

On May 27th, Guarch & Co. consigned to Fox a cargo of bananas, the bill of lading stating that freight was to be paid "as per charter party"; and on the evening of June 8th the ship arrived at Philadelphia, and cast anchor in the Delaware river, opposite the dock at which the fruit was to be unloaded. Fox sent out a tugboat to bring the vessel in, but the captain of the steamship refused to allow his boat to be docked, declaring that on his way up the river he had been notified by Dumois & Co. not to dock the ship until further order. At this time two installments of hire were unpaid. Not long before the vessel arrived, there had been some controversy about these arrears between Fox and Dumois, the result of which had left the charterers in some doubt whether payment would be made. In consequence of this doubt, they gave the captain the order above referred to, intending to enforce payment thereby, but they did not inform the captain why the order had been given, nor what its object was. He carried out the order without giving any reason, and without making any demand for money; but Fox correctly supposed that the difficulty was caused by his failure to pay the last two installments of hire, and accordingly, between 8 and 9 o'clock of the same evening, he offered the captain two certified checks, each for \$957.58,—this being the exact amount of a semimonthly installment. The checks were properly drawn and indorsed, and would have been paid upon presentation at the Camden National Bank in this city. The captain made no objection on the ground that checks, and not cash, were offered, but refused to accept payment for the express reason that his orders were positive, and that he had no authority to receive the money. Fox thereupon gave notice that another ship, carrying bananas consigned to Dumois & Co., had just arrived, and would supply the local market, to his own injury, if he were not allowed a fair chance to compete;

declaring that he would hold the ship liable if she were not at the dock early the next morning. The captain continued to refuse, and the situation remained unchanged until about noon the next day, when Mr. Dumois came to Philadelphia from New York,—where his firm has its principal office,—and the difficulty was settled. Dumois presented a bill for \$1,149.11, being “for half-month’s hire of S. S. Moringen, May 21st to June 6th,” less commission, \$957.58, and “3 days’ hire June 6-9,” \$191.53; these two sums making the amount demanded. The money was paid, and the ship was docked. The cargo could not be fully discharged before noon of the following day, and the libelant avers that this delay enabled the other vessel to supply the local market, and made it necessary to ship the bananas of Guarch & Co. to other points, thus compelling them to dispose of the fruit at a pecuniary disadvantage.

Upon this state of facts I think the libelant is entitled to recover for such injury as may have been done. The terms of the contract between Dumois & Co. and Guarch & Co. are sufficiently clear. The latter firm did not have control of the ship under a subcharter, but they were freighters, having a right to load the ship upon the payment of a specified sum. But the amount of this sum was not to be determined by the quantity of cargo carried; neither was payment to be made only after the arrival of the cargo, and at the port of destination, but the hire was a fixed sum, whether much or little was carried; and payment was to be made semimonthly in advance, and the place of payment was the city of New York. I think it is well settled that under such a contract Dumois & Co. waived the right to hold the cargo for arrears of hire. Having agreed that the hire should be paid semimonthly in advance, and at a particular place, they gave up the inconsistent right to demand payment elsewhere and at other times. The point has been expressly decided, both in England and in the United States, and need not be further discussed. An examination of the subject, both upon principle and authority, will be found in *Raymond v. Tyson*, 17 How. 53, 15 L. Ed. 47; *How v. Kirchner*, 11 Moore, P. C. 21; and *Kirchner v. Venus*, 12 Moore, P. C. 361.

The case will be referred to a commissioner, to determine what damage, if any, has been suffered by the libelant, and to report an appropriate decree.

THE STRABO.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 75.

ADMIRALTY—MARITIME TORT.

Admiralty has jurisdiction of an action for injury to one descending from a ship to a wharf by means of the ladder provided therefor, caused by the ladder being negligently left unfastened to the rail of the vessel, it having slipped along the rail while he was descending, and he being thrown upon the wharf, and injured there.

Appeal from the District Court of the United States for the Eastern District of New York.

For opinion in district court, see 90 Fed. 110.

Edw. L. Owen, for appellant.
Wm. C. Bucher, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The libelant was, at the time of the injury which was complained of, a longshoreman at work in loading the steamship Strabo, as she was lying at one of the docks in the city of Brooklyn. The libel averred:

"That the master of the Strabo furnished for the libelant and his fellow workmen a ladder as the sole means of access to and egress from the steamship, which was by the master placed with one end resting upon the rail of the Strabo, and one end upon the dock; that said ladder was negligently and carelessly left unfastened in any manner to the rail of the Strabo, and left wholly unsecured; that on or about the 12th day of March, 1897, while the libelant was about to leave the Strabo by means of this ladder, and while the same was resting upon said rail of the steamship, the libelant was by reason of the falling of the ladder, and wholly because of the careless and negligent manner in which it had been left, thrown violently to the ground, and severely and permanently injured."

These allegations were true, and, as a result of the insecurity of the ladder upon the ship, it slid along the rail after the libelant had descended two or three steps; he was thrown off; he struck upon the dock; was picked up as he was lying, with one leg over the string-piece, and the other leg upon the dock; and was subsequently taken to the hospital, where it was found that the urethra had been ruptured by the external violence to which he had been subjected, and a painful operation was performed. The district court for the Eastern district of New York entered a decree in favor of the libelant for the sum of \$2,500, and costs. He testified that his shoulder struck against the side of the ship before he fell upon the dock, but this was not averred in the libel, and the record does not give reliable information upon the subject. The important question in the case is that of the jurisdiction of a court of admiralty over a tort caused by the negligence of the master upon navigable water, in regard to the security of the ladder upon the ship, the accident commencing upon the ship, and the known injurious consequences having been suffered by the fall upon the land.

The decisions in this country are all founded upon *The Plymouth*, 3 Wall. 20, 18 L. Ed. 125, which was a case of fire originating in the negligence of the persons in charge of a steam propeller anchored at a wharf in the Chicago river, whereby the vessel took fire, and the flames communicated to valuable buildings and property upon the wharf. The owners of the burned property brought a libel in admiralty against the owners of the steamer. The supreme court was of opinion that the case was outside the jurisdiction of admiralty over marine torts, because, to give a court of admiralty jurisdiction, "the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters." This case, and those of similar character, are where the negligence happens on navigable water, and the injurious consequences are communicated to, or extend to, property on shore, which always had been

severed from the ship; but the language, if taken literally, declares that admiralty jurisdiction does not exist unless the substantial consummation of the injury or the substantial damage occurs on navigable water, and therefore if a passenger on board a steamship should, through the negligence of the owners, stumble on the ship upon a defective gangplank, and be precipitated upon the wharf, the injury would not be a maritime tort. The language employed in the Plymouth decision, and which was applicable to the circumstances of that case, does not justify such a conclusion. In this case it is highly probable that the libelant sustained some damage from nervous shock while precipitated through the air, and before he fell upon the wharf. A person of sensitive nervous organization would, without doubt, receive such an injury. The injury commenced when, by the slipping of the ladder, the libelant was thrown into the air. Whether or not this throw was *damnum absque injuria* cannot be told, but it is true, as the district judge said, "that the whole wrongful agency was put in motion and took effect on the ship, and thereby the libelant was hurled from his position on the ship, and before he reached the dock was subjected to conditions inevitably resulting in physical injury, wherever he finally struck." The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water.

In *The H. S. Pickands*, 42 Fed. (D. C.) 239, a case much relied upon by the appellant, the negligence was the removal by the master of the vessel of a cleat on the wharf which protected against slipping the ladder which connected the wharf with the vessel. A workman on the vessel attempted to go on shore by the aid of the ladder, which slipped at the bottom, in consequence of the icy condition of the wharf, whereby he was thrown upon the wharf and severely injured. The district and the circuit courts held that an admiralty court had no jurisdiction. The negligence was the removal of the cleat on the wharf. The ladder slipped, and the serious part of the damage occurred on the wharf. The only thing which is known to have happened on navigable water was that the master, while on the ship, shifted the ladder away from the cleat. These facts distinguish the case from the one at bar, and make it more plainly a tort by the master upon the land. The decree is affirmed, with interest and with costs.

THE MARY MANNING.

THE JENNIE C. MAY.

(Circuit Court of Appeals, First Circuit. January 10, 1900.)

Nos. 275, 276.

COLLISION—DETERMINATION OF FAULT—EVIDENCE CONSIDERED.

Evidence considered, and *held* to establish that a collision between two schooners meeting in the evening was caused by the vessel having the right of way changing her course after the vessels were within sight of each other.

Appeal from the District Court of the United States for the District of Massachusetts.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellants.
Arthur H. Russell and Charles T. Russell, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

COLT, Circuit Judge. These appeals relate to a collision between the schooner Jennie C. May and the schooner Mary Manning, which took place off Nauset Light, Cape Cod, on January 1, 1896. The May was a three-masted schooner of 745 tons net register, loaded with a cargo of coal, and bound on a voyage from Baltimore to St. John. The Manning was a four-masted schooner, 1,130 tons net register, bound on a voyage from Salem to Philadelphia, without cargo. The time of the collision was between 5:15 and 5:30 p. m. The weather was fair. The wind, by the preponderance of evidence, was W. N. W.

According to the account of the May, at the time the Manning was sighted, she was sailing closehauled on the port tack, steering N. by W., and making about five knots an hour. There was a competent man at the wheel, and a vigilant lookout. The proper side lights were set and burning, and all hands were on deck. While so proceeding, the lookout reported a vessel, which proved to be the Manning, right ahead. Soon afterwards the sails and side lights of the Manning were seen about half a point on the lee or starboard bow, indicating a vessel approaching sailing free. The May held her course, but the Manning, instead of changing her course and keeping out of the way of the May, held her course, and continued to approach until the two vessels were in imminent danger of collision. The May thereupon, just before the collision, for the purpose of avoiding it or easing the blow, put her wheel down two or three spokes, and immediately, before any change in her course, seeing that the Manning had suddenly luffed, put up her wheel. The vessels almost immediately came together, the Manning striking the May on the port bow, almost a head-on bow. According to the account of the Manning, she was heading south on the starboard tack, going six or seven knots an hour, with her side lights properly set and burning brightly, a competent man at the wheel, and a vigilant lookout forward, and both her master and mate on deck. While so proceeding, the red light of a sailing vessel, which proved to be the May, was seen about a point off the port bow. The red light was duly reported, and continued to bear on the port bow, when suddenly the May changed her course, swinging to the westward and showing both lights, and then showing only her green light; whereupon the mate ordered the helm of the Manning hard a-port. The May then swung to starboard, and struck the Manning forward of the forerigging on the port side.

Upon the question which vessel was at fault, the contention of the May is that, after she saw the Manning, she made no change of course, except a slight luff in extremis, when the collision was in-

evitable, and that, having the right of way, the cause of the collision was the failure of the Manning to keep clear of her. The contention of the Manning is that the collision was caused by the May suddenly changing her course to the westward, and coming up into the wind, whereby she exposed her green light.

It is admitted by the May that she did make such a change of course for the purpose of hauling in her sheets, and the important question to be determined is whether, upon the evidence, this maneuver took place before she saw the Manning or the Manning saw her. If the contention of the Manning on this point is correct, the cause of the collision is made clear.

The libel of the May alleges that the collision took place "at about 30 minutes after 5 o'clock in the afternoon." The answer of the Manning alleges that it was "after 5 p. m." Capt. St. John, of the May, in his testimony, makes the time "20 or 21 minutes past 5." The vessels were approaching each other at the rate of some 12 miles an hour. Consequently, the time that would be taken to sail the distance of 2 miles, at which the side lights of a sailing vessel could be seen, would be about 10 minutes. This would make the time when the May first saw the Manning about 5:10.

Capt. St. John's statement of the May's change of course to haul in her sheets may be summarized as follows: A little before sundown the May went off two points to N. E. by N. $\frac{1}{2}$ N., so as to increase his distance from the shore about a quarter of a mile. (This would mean, on the course given, that she sailed about a mile, which, at the rate she was going, would take 10 or 12 minutes.) The May then came up into the eye of the wind for the purpose of hauling in her sheets, which took about 5 minutes, and she then proceeded N. by W., closehauled on the port tack. His side lights were set 15 minutes after sundown, or about 5 o'clock, and he put his wheel down, and hauled in his sheets after sundown, and before the lights were set. He did not see the Manning until 10 minutes after the lights were set. Capt. St. John's statement, that this change of course and hauling in the sheets took place before the lights were set, or before 5 o'clock, and that the Manning was not seen until after the lights were set, is corroborated by the boatswain, Smith, who was acting as mate, and by Buckley, the lookout.

But this account does not agree with the testimony of other persons on board the May. It is not confirmed by the evidence of Capt. Parker, of the schooner Du Vignon, whose vessel was in the vicinity, and who was called as a witness by the May. It is also in direct conflict with the account of the witnesses on the Manning. According to Capt. St. John, the May hauled in her sheets (or made the change of course seen by the Manning, which immediately preceded) at least 10 minutes before the Manning was sighted. On the other hand, two of the sailors on the May, who were engaged in hauling in the sheets, testify that the Manning was seen during the time the sheets were being hauled in. Johansen, who was called on deck to haul in the sheets, says:

"Q. When did you come on deck that afternoon,—what time? A. Well, I could not tell you what time, but, by my judgment, I think it was a little be-

fore half past five. Q. What did you do after coming on deck? A. I came on deck. I went up to the mizzen topsail clew line. I hear the captain sing out to haul the sheets flat. Q. Then what did you do after that? A. After we was finished with the topsail clew line, some other fellows hauled the sheets tight. I went up into the mizzen rigging to make the topsail fast. Q. Now, at that time, did you see the approaching schooner? A. Yes, sir. Q. At that time did you hear any report? A. I heard somebody sing out, 'Vessel ahead!' She was on the starboard side of us. Q. Where were you then? A. I was up in the mizzen topsail crosstree, sir. Q. What were you doing? A. I was furling the sail fast. Q. When you heard the vessel reported, did you see her? A. Yes, sir. Q. Where were you when you heard the lookout report the schooner? A. I was up in the rigging the first time I heard it. Q. Was that before or after they had finished hauling the sheets in? A. That was before they was finished hauling the sheets in."

Knutsen, another sailor, who came on deck to help haul in the sheets, says:

"Q. What were you doing when she was reported? A. I was after clewing up the mizzen topsail then. Q. Where were you on deck? A. I was aft then, and then we went forward when we were clewing up the fore-topsail. Q. Where did you see this vessel approaching? A. On the starboard bow. Q. What did you see of her? A. I see her two lights. Q. After that did you go forward? A. Yes, sir; after that we went forward, all of us. Q. And you were then clewing up the fore-topsail? A. Fore-topsail? Yes, sir; and me and the mate went on fore-castle deck. The man on lookout was going to make the fore-topsail fast, because it was his watch on deck. Q. Did you hear the man on lookout report a vessel? A. I did, sir. Q. Where were you? A. I was 'midships then. I heard him twice report it. He sung out, 'I see a vessel, but I cannot see the lights.' That was at the time I was hauling in the sheets. Q. That was at the time you were hauling in the main sheets? A. Yes, sir. Q. That was the time you were hauling in the main sheet you heard the man on lookout say— A. 'I see a vessel, but cannot see any lights on her.' Q. That was the first time you heard her reported? A. Yes, sir. Q. Then you heard her reported a second time, didn't you? A. Yes, sir. Q. What were you doing when you heard her reported the second time? A. Clewing up the mizzen topsail."

Oelsen, the man at the wheel, testifies that it was only about a quarter of an hour before the collision that the sheets were hauled in:

"Q. At the time of the collision, where was the captain? A. He was aft, sir. Q. How long had he been on deck? A. On deck about twenty minutes before the collision. Q. How many other men on deck? A. All hands, sir. Q. What were they doing? A. About a quarter of an hour before the collision we hauled in the sheets, hauling them in fore and aft. Q. How many men clewing up the sails or hauling in the sheets? A. Four of us. Q. Was any change made in the course of the vessel to haul in the sheets? A. We had to keep her off the shore about north by east half east, to get more room to haul in the sheets. Q. After you went off, what did you do with the wheel? Did you come up into the wind? A. The captain took the wheel then. Q. What did he do with it? A. He came up into the wind. Q. That was how long before the collision? A. Fifteen minutes."

Capt. St. John, in his testimony, admits he gave an order to the mate in regard to clewing up the sails after the Manning was sighted:

"Q. Did you give him [the mate] any orders in regard to the sails then [after the Manning was seen]? A. Well, about the time that he got on the bridge, going from the poop deck to the house,—the forward house,—I ordered him to clew up the fore-topsail. Q. What did that require to do? A. Well, cast off the halyards and sheets, and haul in on the clew lines. Q. That would be forward, of course? A. Yes, forward. Q. Do you know whether he obeyed that order? A. I heard the topsail halyards rattling immediately afterwards."

The material's testimony, to the same effect, is as follows:

"Q. In going forward, did you get any order from him [the captain]? A. Yes, sir. Q. What was that? A. He told me to clew up the fore-topsail. Q. What did you do then? A. I ordered a man to let go the halyards."

The clewing up of the fore-topsail, which Capt. St. John and the mate say took place after they saw the Manning, seems to have been a part of the operation of hauling in the sheets. On this point the testimony of Knutsen is instructive:

"Q. In the first place, you hauled in the main sheets? A. Yes, sir. Q. Then you went forward to haul in the jib and staysail sheets, and then went aft to clew up the mizzen topsail? A. Yes, sir; the mizzen topsail was partly clewed up. We had to clew it up better. Q. As soon as you got through pulling in the jib and staysail sheets, you went to help clew the mizzen topsail up? A. Yes, sir. Q. Finished it? A. Yes, sir. Q. Then you and the mate went forward to clew up the fore-topsail; is that right? A. Yes, sir."

Again, on the important point whether the sheets were hauled in before the lights were set, Capt. St. John is directly contradicted by his own witnesses. He testifies that the sheets were hauled in before the lights were set, and that the Manning was not seen until 10 minutes after the lights were set. On the other hand, Knutsen testifies as follows:

"Q. Were you on deck when the side lights were put up? A. No, sir; I was below then. We were called out to clew up the sheets and haul in the topsail. Q. When you came on deck to haul in the sheets, the side lights were all set? A. Yes, sir. Q. And they were set when you came up on deck, and before you hauled in the sheets? A. Yes, sir. Q. Positive of that? A. Yes, sir; I am sure of that."

Johansen also testifies as follows:

"Q. You and Knutsen were in the same watch? A. Yes, sir. Q. You came on deck at the same time? A. I came a little before him. Q. And you at once went to clew up the mizzen topsail? A. Yes, sir. Q. Did you have your side lights up at that time? A. Yes, sir; I was not on deck when they put them up, but I know they was up."

The testimony of Capt. Parker, master of the Du Vignon, cannot be said to confirm Capt. St. John, but tends to corroborate the account of the Manning that the May must have changed her course to haul in her sheets after she was seen by the Manning.

Capt. Parker was in company with the May that day from 11 o'clock until half past 5. He saw the May change her course, and come up into the wind, but did not see the collision:

"Q. 8. On that afternoon, did you see anything of the Jennie C. May? A. Yes; I was in company with her. Q. 9. For what time? A. From eleven o'clock until half past five. * * * Q. 22. Could you see the vessel? A. Yes, sir. Q. 23. Did you see the collision? A. No, sir. Q. 24. Did you hear the sound of any collision? A. I did not. Q. 25. How far off were you from the May at this time? A. I was somewheres about half a mile. * * * Q. 32. When you last saw the May, how did she bear from your vessel? A. About two points on our port bow. Q. 33. Could you see her sails? A. Yes, sir. Q. 34. What was she doing? A. The last time I saw her, she kept off, and then luffed up into the wind to take her sheets off. Q. 35. You say that you saw him keep off? A. Yes. Q. 36. And then luff up into the wind? A. To take her sheets in. Q. 37. And that was about half past five? A. No, sir; before that time. Q. 38. That was the last you saw of her? A. Yes, sir. Q. 39. How much did he keep off? A. I should say swung his vessel off three or four points. Q. 40. And then he came back on his course? A. No, sir; he came dead up into the wind. Q. 41.

Can you tell what time that was? A. No, sir; I could not within a few minutes. I should think it was somewhere in the neighborhood of five o'clock. Of course, when I saw these things I did not think I should be called upon to testify in this case, and so, consequently, could not swear to the time. Q. 42. But you could see the change of course distinctly, could you not? A. Yes, sir. Q. 43. Did you see him take any sails in at that time? A. I did not. Q. 44. In stating about five o'clock, you would not state within half an hour, one way or another? A. I can state within half an hour, but not within ten or fifteen minutes. Q. 45. It might have been a quarter past five? A. I should hardly think it was as late as quarter past five; somewhere between ten minutes of five and quarter past five. I do not know; that is only from memory. Q. 46. And at that time she came right up into the wind? A. Yes, sir. Q. 47. How close to the wind, should you say? A. Right up, so that her sails were shaking. Q. 48. Well, how many points should you think? A. When you take your vessel up into the wind to take your sheets in, you let her come right up head to the wind. Q. 49. Well, she probably came within two or three points of the wind? A. Within a point or two, I should say, of the wind. Q. 50. At that time you had your side lights up? A. Oh, yes, sir."

An examination of the whole evidence on the part of the May does not support the statement of Capt. St. John that the May changed her course to the westward to haul in her sheets before the approaching vessels were in sight of each other. On the contrary, some of the witnesses on the May confirm the uniform and consistent account of the witnesses on the Manning that the May made such a maneuver after she was seen by the Manning.

To find in favor of the May on this issue, it may be said that we must accept Capt. St. John's account to be correct, although he is contradicted by his own witnesses and by the witnesses for the Manning. We do not feel warranted, upon the evidence, in reaching such a conclusion. This change of course on the part of the May accounts for the collision. That she made this maneuver some little time before the collision is admitted. Assuming that it was made after the Manning sighted her, the evidence from both vessels, as a whole, becomes fairly reconcilable, and the cause of the collision is clear. If, however, we eliminate this factor from the case, it becomes very difficult, upon the evidence, to reach any satisfactory conclusion. If it appears that the May had the right of way, it is also abundantly shown by the record that there was more or less confusion on board of her before the collision, and that she did not have an efficient lookout. On the other hand, the Manning maintained a particularly vigilant lookout and good discipline, so that, on well-settled rules, the presumptions are in favor of the proofs coming from her master and crew. Upon full consideration of the evidence, we think that this change of course on the part of the May took place after she was seen by the Manning, and that this maneuver on her part was the cause of the collision.

In No. 275 (The Mary Manning) the decree of the district court is reversed, and the case is remanded to that court, with instructions to dismiss the libel, with costs, and the appellant recovers the costs of appeal.

In No. 276 (The Jennie C. May) the decree of the district court is reversed, and the case is remanded to that court, with instructions to enter a decree for the libelants, with costs, and the costs of appeal are awarded to the appellants.

MEMORANDUM DECISIONS.

CITY OF ANNISTON v. UNITED STATES ex rel. **SAFE-DEPOSIT & TRUST CO. OF BALTIMORE**. (Circuit Court of Appeals, Fifth Circuit. January 17, 1900.) No. 829. In Error to the Circuit Court of the United States for the Northern District of Alabama. T. W. Coleman, Jr., for plaintiff in error. J. J. Willett, for defendant in error. Dismissed, pursuant to the twentieth rule.

CUMBERLAND COAL CO. v. DUN et al. (Circuit Court of Appeals, Sixth Circuit. November 13, 1899.) No. 722. In Error to the Circuit Court of the United States for the Middle District of Tennessee. Dismissed for failure to print the record, pursuant to the twenty-third rule.

GREEN v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. January 22, 1900.) No. 845. In Error to the Circuit Court of the United States for the Northern District of Alabama. Lee Cowart, for plaintiff in error. J. Ward Gurley, for the United States. Dismissed for want of prosecution.

KENAN v. TEXAS & P. RY. CO. (Circuit Court of Appeals, Fifth Circuit. December 20, 1899.) No. 875. In Error to the Circuit Court of the United States for the Northern District of Texas. T. J. Freeman, for defendant in error. Dismissed for want of prosecution.

MICHIGAN TEL. CO. v. CITY OF CHARLOTTE et al. (Circuit Court of Appeals, Sixth Circuit. November 13, 1899.) No. 721. Appeal from the Circuit Court of the United States for the Western District of Michigan. A. C. Angell, for appellant. Garry C. Fox and James M. Powers, for appellees. Dismissed upon stipulation. See (C. C.) 93 Fed. 11.

NEW ENGLAND R. CO. v. CONROY. (Circuit Court of Appeals, First Circuit. January 19, 1900.) No. 207. In Error to the Circuit Court of the United States for the District of Massachusetts. Frank A. Farnham, for plaintiff in error. James E. Cotter, for defendant in error. Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. Having considered the questions involved in this case, and having certified to the supreme court the following questions of law arising on the facts stated in the record: First, whether the negligence of the conductor was the negligence of a fellow servant of the deceased brakeman; second, whether the negligence of the conductor was the negligence of its vice or substituted principal or representative, for which the corporation is responsible,—and the supreme court having answered the first question in the affirmative and the second question in the negative (20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. —), it follows that the judgment of the circuit court must be reversed, the verdict set aside, and the case remanded to that court for further proceedings. The judgment of the circuit court is reversed, the verdict set aside, and the case remanded to that court for further proceedings.

In re PLIMPTON et al. (Circuit Court of Appeals, Second Circuit. December 14, 1899.) No. 48. Appeal from the District Court of the United States for the Northern District of New York. E. F. Jellinek, for appellant. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Affirmed, without costs.

RECTOR v. SOUTHERN BUILDING & LOAN ASS'N et al. (Circuit Court of Appeals, Eighth Circuit. November 20, 1899.) No. 1,274. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. S. R. Cockrill, for appellant. J. W. House and Lawrence Cooper, for appellees. No opinion. Reversed and remanded, with directions to enter a decree for such sum as may be found to be due on the contract in suit, treating it as valid and not usurious, and directing that the decree of this court be entered nunc pro tunc as of May 29, 1899. See (C. C. A.) 98 Fed. 171.

SMITH v. CLEVELAND, C., C. & ST. L. RY. CO. (Circuit Court of Appeals, Sixth Circuit. October 5, 1899.) No. 698. In Error to the Circuit Court of the United States for the Southern District of Ohio. Thomas L. Michie and Joel C. Clore, for plaintiff in error. Aaron W. Goldsmith, for defendant in error. No opinion. Affirmed.

UNITED STATES ex rel. SAFE-DEPOSIT & TRUST CO. OF BALTIMORE v. CITY OF ANNISTON. (Circuit Court of Appeals, Fifth Circuit. January 17, 1900.) No. 830. In Error to the Circuit Court of the United States for the Northern District of Alabama. J. J. Willett, for plaintiff in error. T. W. Coleman, Jr., for defendant in error. Dismissed, pursuant to the twentieth rule.

WRIGHT v. PHIPPS et al. FISHER v. WRIGHT. DEGRAUW v. ATTRILL et al. ATTRILL et al. v. DEGRAUW. GATES v. SAME. (Circuit Court of Appeals, Second Circuit. December 19, 1899.) Nos. 14-18. Appeals from the Circuit Court of the United States for the Eastern District of New York. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Affirmed on motion of counsel for appellee. See (C. C.) 90 Fed. 556.

BENHAM v. WELLS, FARGO & CO. (Circuit Court, N. D. California. November 17, 1899.) No. 12,740. Action at law to recover damages in the sum of \$50 for the alleged neglect of the defendant, as a common carrier, to receive and transport a certain package of merchandise offered and tendered by plaintiff for conveyance and transportation. McGowan & Squires, for plaintiff. E. S. Pillsbury, for defendant.

MORROW, Circuit Judge. For the reasons stated in the opinion rendered to-day in the case of Johnson v. Wells, Fargo & Co. (C. C.) 98 Fed. 3, this cause will be remanded to the justice's court of the city and county of San Francisco, state of California.